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# The Myth of Paradise

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**A reappraisal of Commonwealth Caribbean States' sovereignty and development sustainability within the transnational anti-money laundering and counter-terrorist financing legal order**

This thesis is submitted for the degree of Doctor of Philosophy

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## **Declaration**

This thesis is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared and specified in the text. It is not substantially the same as any that I have submitted or is being concurrently submitted for a degree or diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared and specified in the text. I further state that no substantial part of my thesis has already been submitted, or is being concurrently submitted for any such degree, diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared and specified in the text. It does not exceed the prescribed word limit for the relevant Degree Committee.

*Cambridge, November 2020*

## **Abstract**

### **The Myth of Paradise: A Reappraisal of Commonwealth Caribbean States' Sovereignty and Development Sustainability within the Transnational Anti-Money Laundering and Counter-Terrorist Financing Legal Order**

From the global wars on drugs and terror to the 'Paradise Papers' scandal, the Commonwealth Caribbean has been discursively stigmatised as a mythical island paradise of 'rogue' States. Not infrequently, their exercise of regulatory self-determination has been reduced to the selling of their economic sovereignty to facilitate shady business deals and financial crimes. Resultantly, these small jurisdictions have been subjected to coercive and intrusive extraterritorial regulation and surveillance within the transnational legal order for combating money laundering and the financing of terrorism and proliferation (TAMLO). Adopting a Constructivist epistemological lens, the study historicises and deconstructs these hegemonic discursive practices since the 1980s. It critiques how powerful policy elites such as the Group of Seven (G7), the Organisation for Economic Cooperation and Development (OECD) and the Financial Action Task Force (FATF) have deployed highly politicised labelling practices along the 'Onshore/Offshore' axis. It empirically traces how these discursive practices have constituted, normalised and reproduced narratives of Commonwealth Caribbean States as among the 'weakest links' within the TAMLO, while simultaneously foreclosing critical engagement with the latent geopolitical interests and legitimacy claims of powerful onshore regulatory elites.

It is compellingly argued that these discursive practices have been both constitutive and causative of the precarious diminution of Commonwealth Caribbean States' sovereignty, exclusive AML/CFTP regulatory autonomy, and right to legitimately determine their sustainable development trajectories. Using the Bahamas, Jamaica and Trinidad and Tobago as primary sites of analysis, the thesis substantively explores the region's legal and regulatory policy experiences within the TAMLO with respect to corrupt politically exposed persons (PEPs) and their professional facilitators, offshore Internet gambling services, and the coherence of the FATF's risk-based approach to combating money laundering (RBA) in developing country contexts. The study's primary contribution to existing scholarship lies in its advocacy for the reconstitution of the transnational AML/CFTP regulatory discourse as development discourse. This anti-hegemonic stance is proffered as a potentially pragmatic

solution for reaffirming the sovereignty and sustainable development of Commonwealth Caribbean States within the TAMLO. In this regard, the United Nations 2030 Agenda for Sustainable Development and Sustainable Development Goals (SDGs) have been posited as a principled basis on which to reconstitute the TAMLO as a more just, democratic, and anti-hegemonic project.

Keywords: money laundering; terrorist financing; proliferation financing; corruption; sovereignty; politically exposed persons; offshore, remote gambling; virtual assets; de-risking; correspondent banking relationships; risk-based approach; common but differentiated responsibilities; organized crime; regulatory capture; transnational legal orders, foreign terrorist fighters.

***Rohan Clarke***

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## List of Abbreviations

AECs	Anonymity-Enhanced Cryptocurrencies
AML/CFTP	Anti-Money Laundering and Combating the Financing of Terrorism and Proliferation of Weapons of Mass Destruction
AMLD (4th)	Fourth European Union Anti-Money Laundering Directive
ARIN-CARIB	Asset Recovery Inter-Agency Network for the Caribbean
CARICOM	The Caribbean Community
CBDR	Common but Differentiated Responsibility
CBR	Correspondent Banking Relationship
CDD	Customer Due Diligence
CFATF	Caribbean Financial Action Task Force
CFT	Combating the Financing of Terrorism
CPA	Cotonou Partnership Agreement
DNFBPs	Designated Non-Financial Businesses and Professions
EPA	Economic Partnership Agreement
EDD	Enhanced Due Diligence
EU	European Union
FATF	Financial Action Task Force
FCPA	Foreign Corrupt Practices Act 1977
FSRBs	FATF-Style Regional Bodies
FIs	Financial Institutions
FIU	Financial Intelligence Unit
FinTech	Financial Technology
FTFs	Foreign Terrorist Fighters
G7	Group of Seven
HIMICs	Highly Indebted Middle-Income Countries
IACAC	Inter-American Convention against Corruption (1996)
IACC	International Anticorruption Coordination Centre
ICAR	International Centre for Asset Recovery
IFFs	Illicit Financial Flows

IMF	International Monetary Fund
INCSR	International Narcotics Control Strategy Report
ISIL	Islamic State of Iraq And Levant
KYC	Know Your Customer
LASCs	Lone Actor and Small Cells
LEA	Law Enforcement Authorities
MER	Mutual Evaluation Report
MLATs	Mutual Legal Assistance Treaties
ML/TF	Money Laundering and Terrorist Financing
ML/FTP	Money Laundering and the Financing of Terrorism and Proliferation
MSBs	Money Service Businesses
MVTS	Money or Value Transfer Services
NRA	National Risk Assessment
NPOs	Non-Profit Organisations
NPPSs	New Payment Products and Services
NCCTs	Non-Cooperative Countries and Territories for the Purpose of Anti-Money Laundering Regulation
OECD	Organisation of Economic Cooperation and Development
OFC	Offshore Financial Centre
PEPs	Politically Exposed Persons
RBA	Risk-Based Approach to Combating Money Laundering and the Financing of Terrorism and Proliferation
SAPs	Structural Adjustment Programmes
SAR	Suspicious Activity Report
SDGs	Sustainable Development Goals
SIDS	Small Island Developing States
SDD	Simplified Due Diligence
StAR	Stolen Asset Recovery Initiative (World Bank/UNODC)
STR	Suspicious Transaction Report
TAMLO	Transnational Anti-Money Laundering and Counter-Terrorist Financing Legal Order
TI	Transparency International

TIEA	Tax Information Exchange Agreement
TOC	Transnational Organised Crime
TCSPs	Trust and Company Service Providers
UN	United Nations
UNCAC	United Nations Convention against Corruption (2003)
UNODC	United Nations Office on Drugs and Crime
UNTOC	United Nations Convention against Transnational Organised Crime (2000)
USA PATRIOT ACT	Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism Act of 2001
VAs	Virtual Assets
VASPs	Virtual Asset Service Providers
Vienna Convention	The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)
WTO	World Trade Organisation

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‘In an age of expertise, where knowledge ostensibly reigns, global governance not infrequently settles for ignorance’.<sup>1</sup>

- Terence C. Halliday, (2018)

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<sup>1</sup> Terence C. Halliday, ‘Plausible Folk Theories: Throwing Veils of Plausibility over Zones of Ignorance in Global Governance: Plausible Folk Theories’, *The British Journal of Sociology* 69, no. 4 (December 2018): 1, <https://doi.org/10.1111/1468-4446.12605>.

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## 1. Introduction

Transnational criminal justice responses to money laundering and the financing of terrorism and proliferation of weapons of mass destruction (ML/FTP) are as much a question of hegemonic power politics as they are transnational law. By transnational law, reference is hereby being made to a hybrid source of regulatory authority directed at actions and activities that transcend national frontiers, and includes both domestic and international law, as well as private norms not formally enacted by States.<sup>2</sup> From a normative standpoint, the discursive politics within the transnational anti-money laundering legal order (TAMLO) has been especially problematic for Commonwealth Caribbean States. These jurisdictions have been discursively ascribed identities of ‘high-risk’ and ‘non-cooperative’ for the purposes of AML/CFTP regulation, which have been used as a pretext for their disciplining as well as to construct and sustain accounts of their sovereignty as derogable. The onslaught on Commonwealth Caribbean States’ sovereignty has been most pronounced among those with offshore financials centres (OFCs) and liberal tax regimes. On occasions, powerful world leaders have advocated for the complete annihilation of OFCs.<sup>3</sup> Mythologised narratives of the Commonwealth Caribbean as an idyllic destination for “sun, sand, ... sea and hedonistic”

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<sup>2</sup> Seyla Benhabib, ‘The New Sovereignism and Transnational Law: Legal Utopianism, Democratic Scepticism and Statist Realism’, *Global Constitutionalism* 5, no. 1 (2016): [i]-144; Roger Cotterrell, ‘What Is Transnational Law?’, *Law & Social Inquiry* 37, no. 2 (ed 2012): 500–524, <https://doi.org/10.1111/j.1747-4469.2012.01306.x>; Lawrence M. Friedman, ‘Borders: On the Emerging Sociology of Transnational Law Essay’, *Stanford Journal of International Law* 32, no. 1 (1996): 65–90; Harold Hongju Koh, ‘Why Transnational Law Matters Internationalizing the First Year Law School Curriculum - A Symposium from the Association of American Law Schools Annual Meeting January 3-7, 2006: Integrating Transnational Legal Perspectives into the First Year Curriculum’, *Penn State International Law Review* 24, no. 4 (2006 2005): 745–54; Carrie Menkel-Meadow, ‘Why and How to Study Transnational Law Training for the Practice of Law at the Highest Levels: Reflections from UC Irvine: Essay’, *UC Irvine Law Review* 1, no. 1 (2011): 97–129; Peer Zumbansen, ‘Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism’, in *Beyond Territoriality: Transnational Legal Authority in an Age of Globalisation*, vol. II, Queen Mary Studies in International Law (London (UK): Brill, 2012), 53–86, <https://brill.com/view/book/edcoll/9789004227095/B9789004227095-s005.xml>.

<sup>3</sup> Peter D. Maynard, ‘The New Emerging Caribbean Anti-Money Laundering Regime, with Special Reference to the Bahamas’, in *Eight Annual Oceania Conference on Caribbean Measures against Money Laundering, Cybercrime and International Financial Crimes* (Eight Annual Oceania Conference on Caribbean Measures against Money laundering, Cybercrime and International Financial Crimes, Curacao, 1997).

adventures,<sup>4</sup> including for criminal masterminds, are pervasive. Despite its historical antecedence in memoirs of conquest and colonialism,<sup>5</sup> in contemporary AML/CFTP discourses Commonwealth Caribbean States are still portrayed as “geographies to be conquered,”<sup>6</sup> especially by powerful onshore regulatory elites. Still, negative narratives of the Commonwealth Caribbean continue to be uncritically reproduced in mainstream media.<sup>7</sup> Documentaries, such as ‘The Spider’s Web’, have presented sensationalized accounts of the region’s offshore financial services sector. Legitimate wealth planning activities have been inaccurately criticised as “reverse piracy”, and offshore trusts vehicles as “hidden treasures,”<sup>8</sup> including of the criminal underworld. Ironically, the Commonwealth Caribbean has, perhaps too successfully, marketed itself as ‘paradise’ for tourism and investment purposes.<sup>9</sup> Commonwealth Caribbean States have failed to demythologise their ascribed rogue identities as money laundering facilitators. Their precarious development realities are often securitised using discursively constructed accounts of them as threatening to the integrity of the global financial system. This practice has been used to justify paternalistic extraterritorial surveillance and disciplining of these small States, often at the cost of their sovereignty and regulatory autonomy.

The Financial Action Task Force’s (FATF) recent decisive refusal to comment on the “unauthorised disclosure of confidential FinCEN documents” from the US Department of Treasury,<sup>10</sup> has highlighted the power dynamics and unfairness of accountability practices within the TAMLO. In contrast, the ‘Paradise Papers’ scandal, in November 2017, sparked a highly politicised discourse on the need for stronger transnational regulatory and law

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<sup>4</sup> Marcella Daye, ‘Re-Visioning Caribbean Tourism’, in *New Perspectives in Caribbean Tourism*, ed. Marcella Daye, Donna Chambers, and Sherma Roberts, Reprint, 1. pbk. ed, Routledge Advances in Tourism 12 (New York, NY: Routledge, 2011), 19.

<sup>5</sup> Lorna Burns, ‘Landscape and Genre in the Caribbean Canon: Creolizing the Poetics of Place and Paradise’, *Journal of West Indian Literature* 17, no. 1 (2008): 20–41; Ian G. Strachan, ‘Paradise and Plantation: The Economy of Caribbean Discourse’ (United States, University of Pennsylvania, 1996), 1.

<sup>6</sup> Don D. Marshall, ‘The New International Financial Architecture and Caribbean OFCs: Confronting Financial Stability Discourse’, *Third World Quarterly* 28, no. 5 (2007): 930.

<sup>7</sup> Camille Hernandez-Ramdwar, ‘Challenging Negative Stereotyping and Monolithic Constructions Through Caribbean Studies’, *Caribbean Quarterly* 51, no. 3–4 (September 2005): 77–85, <https://doi.org/10.1080/00086495.2005.11672277>.

<sup>8</sup> Denise C. Brown, ‘Caribbean Asset Protection Trust: Here Comes the Sun - Dispelling the Dark Clouds of Controversy’, *University of Miami Business Law Review* 7, no. 1 (1999 1998): 133.

<sup>9</sup> Daye, ‘Re-Visioning Caribbean Tourism’; Hernandez-Ramdwar, ‘Challenging Negative Stereotyping and Monolithic Constructions Through Caribbean Studies’.

<sup>10</sup> Financial Action Task Force, ‘FATF Statement Following Unauthorised Disclosure of Confidential FinCEN Documents’, 23 September 2020, <https://www.fatf-gafi.org/publications/fatfgeneral/documents/fatf-unauthorised-disclosure-statement.html>.

enforcement responses to ML/FT, especially to secure Caribbean States' compliance with international AML/CFTP standards.<sup>11</sup> The scandal involved the leak of approximately 13.4 million confidential files from offshore firm Appleby, as well as company registries of nineteen OFCs. It linked several heads of state and government, including Queen Elizabeth's private estate, to supposedly "hidden wealth" in the Commonwealth Caribbean.<sup>12</sup> The centrality of the region in the ensuing transnational AML/CFTP regulatory discourse was again amplified in May 2018, when the UK Parliament unilaterally adopted the Sanctions and Anti-Money Laundering Act, to compel British Overseas Territories to establish public registries of beneficial ownership of companies. The Act has also permitted the UK to use sanctions as a foreign policy tool to promote compliance with the FATF International Standards. This legislative move was criticised by the Premier of the British Virgin Islands as not only "unfair and discriminatory" but objectionable, as Caribbean States have "striven to be at the forefront of international standard-setting in the areas of due diligence, anti-money laundering and financial crimes... regulation."<sup>13</sup> In the Premier's estimation, and which has resonated among Member States of the Caribbean Community (CARICOM), some small jurisdictions have "worked harder than many bigger countries to meet international standards" and to establish stringent regulatory oversight regimes.<sup>14</sup> Indeed, as early as the 1970s, Commonwealth Caribbean States had actively sought to spearhead transnational cooperative responses to economic crimes within the context of the Commonwealth of Nations.<sup>15</sup> Their demonstrated commitment to curbing money laundering had, therefore, been evident long before the establishment of the FATF by the Group of Seven (G7) in 1989, and before the Organisation for Economic Cooperation and Development (OECD) assumed its hegemonic leadership within transnational AML/CFTP regulatory governance. Furthermore, recognising the inability of their criminal justice systems to effectively deal with serious cases of drug trafficking and

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<sup>11</sup> David Boyle, 'The Scandal of the Tax Havens', *New Statesman*; London, 13 November 1998; William R. Schroeder, 'Money Laundering: A Global Threat and the International Community's Response', *FBI Law Enforcement Bulletin* 70, no. 5 (2001): 1–9.

<sup>12</sup> Juliette Garside, 'Paradise Papers Leak Reveals Secrets of the World Elite's Hidden Wealth', *The Guardian*, 5 November 2017, <http://www.theguardian.com/news/2017/nov/05/paradise-papers-leak-reveals-secrets-of-world-elites-hidden-wealth>.

<sup>13</sup> Orlando Smith, 'Statement By Premier Smith on United Kingdom Sanctions and Anti-Money Laundering Bill | Government of the Virgin Islands', 30 April 2018, <http://www.bvi.gov.vg/media-centre/statement-premier-smith-united-kingdom-sanctions-and-anti-money-laundering-bill>.

<sup>14</sup> Smith.

<sup>15</sup> Barry A. K. Rider, 'Report to the Commonwealth Law Ministers' Meeting in Barbados on Combating Economically Motivated Crimes' (London (UK): Commonwealth Secretariat, 1979).

related money laundering, Caribbean countries adopted the 1996 *Barbados Plan of Action for Drug Control Coordination and Cooperation in the Caribbean*.<sup>16</sup> On occasions, they had exerted peer-pressure on delinquent countries within the region to take legislative steps and adopt international best practices to effectively suppress money laundering.<sup>17</sup> Yet, these historically pertinent facts have invariably been ignored in contemporary discourses on the region's commitment to responsibly engage within the TAMLO.

Undoubtedly, the objectification of Commonwealth Caribbean countries as 'high-risk' ML/TF targets of extraterritorial regulation, rather than as sovereign States with agency for domestic fiscal and AML/CFTP regulation, has become inimical to their sustainable development.<sup>18</sup> Such practices have been reproduced by polarised offshore/onshore rhetoric within transnational AML/CFTP discourses. For present purposes, 'offshore' is used as discursive construct to denote a spatialised zone of exclusion to which Commonwealth Caribbean States have been peripherally relegated within the TAMLO. This aligns with the securitised imagery of the region as high-risk within transnational AML/CFTP regulatory discourses. Its usage is distinguishable from the technical meaning of an OFC. As a juridical construct, an OFC refers to a jurisdiction or municipal centre, whose financial and corporate service providers specialise in the export or provision of the financial services to non-residents, on a scale where external assets and liabilities usually exceed the size and financing of its domestic economy.<sup>19</sup> As a corollary term of art, 'onshore' would spatially encapsulate powerful advanced Western States that hegemonically dominate the TAMLO. The othering of offshore States is normatively problematic for several reasons.

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<sup>16</sup> Fitz-Roy Drayton, 'Dirty Money, Tax and Banking: Recent Developments Concerning Mutual Legal Assistance and Money Laundering in the Caribbean Region and the Region's Responses', *Journal of Money Laundering Control* 5, no. 4 (1 January 2002): 338–44, <https://doi.org/10.1108/eb027316>.

<sup>17</sup> Commonwealth Secretariat, *Combating Money Laundering and Terrorist Financing: A Model of Best Practice for the Financial Sector, the Professions and Other Designated Businesses* (London (UK): Commonwealth Secretariat, 2006).

<sup>18</sup> Caribbean Policy Research Institute (CAPRI), 'The Correspondent Banking Problem: Impact of de-Banking Practices on Caribbean Economies' (Kingston, Jamaica: The Caribbean Policy Research Institute, February 2016), <https://capricaribbean.org/documents/correspondent-banking-problem>.

<sup>19</sup> Mark P. Hampton, 'Creating Spaces. The Political Economy of Island Offshore Finance Centres: The Case of Jersey', *Geographische Zeitschrift* 84, no. 2 (1996): 103–13; Alan C. Hudson, 'Reshaping the Regulatory Landscape: Border Skirmishes around the Bahamas and Cayman Offshore Financial Centres', *Review of International Political Economy* 5, no. 3 (1 January 1998): 534–64, <https://doi.org/10.1080/096922998347516>; International Monetary Fund, 'Concept of Offshore Financial Centres: In Search of an Operational Definition', IMF Working Papers (Washington, DC, USA: IMF Secretariat, 2007), <https://www.imf.org/external/pubs/ft/wp/2007/wp0787.pdf>.

Firstly, North America, Europe, and Asia host over seventy OFCs.<sup>20</sup> Whereas Caribbean States, such as the Bahamas, are seen to “sell and surrender their sovereignty,”<sup>21</sup> or use OFCs as “parasitical” State strategies,<sup>22</sup> such claims by the epistemic community have infrequently been made of onshore jurisdictions. Thus, OFCs hosted onshore have seemingly been subjected to less scrutiny and reputational sanctions. Secondly, ascribing Commonwealth Caribbean States rogue identities of ‘non-cooperative’,<sup>23</sup> arguably amounts to reductive labelling. Indeed, such compliance-inducing practices have tended to distance justifications for their disciplining and intrusive extraterritorial surveillance and monitoring from Commonwealth Caribbean States’ genuine resource and adaptive capability challenges. Such capacity constraints have materially undermined their technical compliance with FATF standards and the effectiveness ratings of their domestic AML/CFTP regimes, which are expected to be on par with wealthier onshore States. Thirdly, the onshore epistemic community has complicitly reproduced harmful, non-empirical narratives that have influenced transnational regulatory posturing towards the region. Some Commonwealth Caribbean States have been pejoratively labelled as “tax havens” and “bogus locations” that commercialise their sovereignty to attract dirty money, using banking secrecy and confidentiality laws.<sup>24</sup> Their regulatory and legal frameworks have been berated as “shaky institutions” that promote “rogue banking.”<sup>25</sup> These uncritical representations have crystallised into ‘alternative facts’ or ‘geographical knowledge’ about the Commonwealth Caribbean. Consequently, the sovereignty of the region’s small States and their right to legitimately leverage it to determine their sustainable development trajectories, have become contested within the TAMLO. Fourthly, the sustainable development and economic sovereignty of Commonwealth Caribbean States have been discursively pitted against the fiscal, regulatory, and national security policy interests of powerful onshore States.<sup>26</sup> Especially in the contexts of the OECD’s campaign against ‘harmful tax competition’

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<sup>20</sup> John Christensen, ‘The Hidden Trillions: Secrecy, Corruption, and the Offshore Interface’, *Crime, Law and Social Change* 57, no. 3 (1 April 2012): 325–43, <https://doi.org/10.1007/s10611-011-9347-9>.

<sup>21</sup> Hudson, ‘Reshaping the Regulatory Landscape’, 558.

<sup>22</sup> Jason Abbott and Ronen Palan, ‘Tax Havens: Parasitical Behaviour in the International System’, *Newcastle Discussion Papers in Politics*, 1995, 21.

<sup>23</sup> Mark P. Hampton and John Christensen, ‘Offshore Pariahs? Small Island Economies, Tax Havens, and the Re-Configuration of Global Finance’, *World Development* 30, no. 9 (1 September 2002): 1657–73, [https://doi.org/10.1016/S0305-750X\(02\)00054-2](https://doi.org/10.1016/S0305-750X(02)00054-2).

<sup>24</sup> Ronen Palan, ‘Tax Havens and the Commercialization of State Sovereignty’, *International Organization* 56, no. 1 (ed 2002): 151, <https://doi.org/10.1162/002081802753485160>.

<sup>25</sup> William F. Wechsler, ‘Follow the Money Essay’, *Foreign Affairs* 80, no. 4 (2001): 43.

<sup>26</sup> Jason C. Sharman, *Havens in a Storm: The Struggle for Global Tax Regulation*, Cornell Studies in Political Economy (Ithaca: Cornell University Press, 2006); William Vlcek, ‘Why Worry? The Impact of the OECD

and the post-9/11 ‘war on terror’ and terrorist financing,<sup>27</sup> the ability to access the global financial and payment systems has been tied to offshore States’ compliance with the FATF International Standards. Furthermore, these States continue to struggle to meet escalating onshore AML/CFTP regulatory expectations, demands for tighter financial surveillance and the timely exchange of financial intelligence for the identification, tracing and seizure of illicit proceeds.<sup>28</sup> FATF-determined ‘strategic deficiencies’ in their domestic AML/CFTP regimes have been over-securitised as threatening to the integrity of the global financial system. Alas, there is emerging evidence that Caribbean financial services sectors are overregulated,<sup>29</sup> and that offshore assets are being repatriated to less regulated onshore financial centres.<sup>30</sup> It is in this problematic policy and normative context that the study has been situated.

Critical engagement with contentious normative issues within the TAMLO are often foreclosed by hegemonic discursive practices. As a case in point, the “weakest link” analogy<sup>31</sup> is commonly used to justify the attribution of transnational AML/CFTP responsibilities to States of the Global South. Uninfluenced by considerations of inequalities in material resources and adaptive capabilities, this practice in delineating transnational AML/CFTP regulatory responsibilities along the Onshore/Offshore axis has raised proportionality concerns. Moreover, the extent to which the risk-based approach to combating money laundering (RBA) is conceptually sound, when applied in developing contexts, is disputed. Additionally, the normative role that sustainable development and international justice principles ought to play within the TAMLO has not been subjected to sober scholarly assessment. As a result of these unresolved normative and policy issues, significant strides made by Commonwealth Caribbean States in strengthening their respective AML/CFTP regimes have not attenuated de-risking and financial inclusion issues. Thus, due to disciplining practices and adverse labelling, the

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Harmful Tax Competition Initiative on Caribbean Offshore Financial Centres’, *The Round Table* 96, no. 390 (1 June 2007): 331–46, <https://doi.org/10.1080/00358530701463998>.

<sup>27</sup> Michael Levi, ‘Combating the Financing of Terrorism: A History and Assessment of the Control of “Threat Finance”’, *The British Journal of Criminology* 50, no. 4 (1 July 2010): 650–69, <https://doi.org/10.1093/bjc/azq025>.

<sup>28</sup> Drayton, ‘Dirty Money, Tax and Banking’.

<sup>29</sup> Sheldon McLean et al., ‘Economic Impact of De-Risking on the Caribbean: Case Studies of Antigua and Barbuda, Belize and Saint Kitts and Nevis’, Studies and Perspectives (Barbados: ECLAC Sub-regional Headquarters for the Caribbean, January 2018).

<sup>30</sup> Iyandra Bryan, ‘Responsible Offshore Financial Services Post the Panama and Paradise Papers’, in *Thirty-Sixth International Symposium on Economic Crime* (Unexplained Wealth- Whose Business?, Jesus College, University of Cambridge, UK, 2018).

<sup>31</sup> Stefan Haigner, Friedrich Schneider, and Florian Wakolbinger, ‘Combating Money Laundering and the Financing of Terrorism: A Survey’ (Deutsches Institut für Wirtschaftsforschung (DIW), Berlin, Economics of Security Working Paper, 2012), <https://www.econstor.eu/handle/10419/119391>.

perceived risks of doing business with financial institutions operating in the Commonwealth Caribbean is high. Onshore intermediaries have, therefore, pursued the wholesale termination of correspondent banking relationships (CBRs) with those financial institutions to avoid exposure to escalating fines, regulatory sanctions, and reputational injury. This has restricted access to the Society for Worldwide Interbank Financial Telecommunications (SWIFT),<sup>32</sup> through which most transactions from the region are routed. Furthermore, de-risking has exacerbated financial exclusion among already largely unbanked Commonwealth Caribbean societies.<sup>33</sup> De-risking has also disrupted remittance flows, credit card payments in the tourism sector, foreign direct investments, and international trade payments.<sup>34</sup>

The study, therefore, seeks to explore how a balance could be struck between safeguarding the sovereignty and sustainable development interests of Commonwealth Caribbean States and ensuring their effective participation within the TAMLO. By sovereignty, reference is being made to its positive, rather than negative or juridical, dimension. That is, the empirical capability of a State to exercise its exclusive internal problem-solving competence and to make discretionary choices as to domestic governance,<sup>35</sup> including in relation to AML/CFTP law-making, regulation and enforcement. In particular, the project seeks to emphasise how the region's development complexities have become negligible within the transnational AML/CFTP regulatory discourse. Instead, AML/CFTP compliance failures by governments within the region have often been uncritically reduced to a lack of political will. The study, therefore, seeks to bridge discourses on Commonwealth Caribbean States' sovereignty,

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<sup>32</sup> Caribbean Policy Research Institute (CAPRI), 'The Correspondent Banking Problem: Impact of de-Banking Practices on Caribbean Economies'.

<sup>33</sup> Tracey Durner and Liat Shetret, *Understanding Bank De-Risking and Its Effects on Financial Inclusion: An Exploratory Study* (Global Center on Cooperative Security, 2015), <https://oxfamlibrary.openrepository.com/handle/10546/582310>; Rebecca L. Stanley and Ross P. Buckley, 'Protecting the West, Excluding the Rest: The Impact of the AML/CTF Regime on Financial Inclusion in the Pacific and Potential Responses', *Melbourne Journal of International Law* 17, no. 1 (2016): 83–106; Michael Pisa, 'Does the Financial Action Task Force (FATF) Help or Hinder Financial Inclusion? A Study of FATF Mutual Evaluation Reports', *Centre for Global Development Policy Paper*, no. 143 (2019): 43.

<sup>34</sup> Carlos Acosta et al., 'De-Risking in the Caribbean Region- A CFATF Perspective' (Port-of-Spain, Trinidad & Tobago: Secretariat, Caribbean Financial Action Task Force, 2019), <https://www.cfatf-gafic.org/documents/resources/13667-de-risking-in-the-caribbean-region-a-cfatf-perspective>; Toussant Boyce, 'Discussion Paper: Strategic Solutions to "de-Risking" and the Decline of Correspondent Banking Relationships in the Caribbean' (Barbados: Caribbean Development Bank, 2016), [https://issuu.com/caribank/docs/discussionpaper\\_solutions\\_de-riskin](https://issuu.com/caribank/docs/discussionpaper_solutions_de-riskin); Caribbean Policy Research Institute (CAPRI), 'The Correspondent Banking Problem: Impact of de-Banking Practices on Caribbean Economies'.

<sup>35</sup> Miriam Ronzoni, 'Two Conceptions of State Sovereignty and Their Implications for Global Institutional Design', *Critical Review of International Social and Political Philosophy* 15, no. 5 (December 2012): 573, <https://doi.org/10.1080/13698230.2012.727306>.

sustainable development, and compliance with the FATF International Standards. This is intended to fill a significant gap within existing AML/CFTP scholarship, on several accounts. Firstly, asymmetrical power relations along the Onshore/Offshore axis have been theorised as the primary explanation for the diffusion and entrenchment of transnational AML/CFTP standards among Commonwealth Caribbean countries.<sup>36</sup> Undoubtedly, pressure from the US and UK drove up financial integrity offshore, and the pace of Caribbean States' compliance with the FATF International Standards. Especially due to 'blacklisting' under the FATF's Non-Cooperative Countries and Territories (NCCT) initiative, there seems to be a foregone conclusion that coercion<sup>37</sup> has accounted for the sustained implementation of AML/CFTP standards by governments in the region. In the author's view, not only do such explanations deprive Commonwealth Caribbean States of their agency but they cast doubt on their demonstrated commitment to suppressing ML/FTP. It is submitted that compliance could also be attributed to economic pragmatism. For example, minimising the development costs of reputational injury from stigmatisation could be an alternative or at least complementary causal explanation. Secondly, despite widespread compliance with FATF International Standards that have deeply penetrated domestic laws, institutional frameworks, regulatory and banking practices, the effectiveness of the TAMLO is questionable.<sup>38</sup> Excessively 'risk-policing' the financial services sector and off-loading crime control and financial intelligence gathering on the private sector have not materially disrupted criminal and terrorist finance.<sup>39</sup> There is also the marginalisation of States from Global South from substantive participation in transnational AML/CFTP governance, decision-making and legal processes.<sup>40</sup> This could account for Commonwealth Caribbean States' apparent disillusionment with the TAMLO and perceptions

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<sup>36</sup> Jason C. Sharman, 'Power and Discourse in Policy Diffusion: Anti-Money Laundering in Developing States', *International Studies Quarterly* 52, no. 3 (1 September 2008): 635–56, <https://doi.org/10.1111/j.1468-2478.2008.00518.x>; Jason C. Sharman, *The Money Laundry: Regulating Criminal Finance in the Global Economy*, Cornell Studies in Political Economy (Ithaca: Cornell University Press, 2011).

<sup>37</sup> Levi, 'Combating the Financing of Terrorism: A History and Assessment of the Control of "Threat Finance"'.  
<sup>38</sup> Terence Halliday, Michael Levi, and Peter Reuter, 'Global Surveillance of Dirty Money: Assessing Assessments of Regimes to Control Money-Laundering and Combat the Financing of Terrorism' (Centre on Law & Globalisation, 30 January 2014),

[http://orca.cf.ac.uk/88168/1/Report\\_Global%20Surveillance%20of%20Dirty%20Money%201.30.2014.pdf](http://orca.cf.ac.uk/88168/1/Report_Global%20Surveillance%20of%20Dirty%20Money%201.30.2014.pdf);  
 Terence C. Halliday and Gregory Shaffer, 'Researching Transnational Legal Orders', in *Transnational Legal Orders*, ed. Terence C. Halliday and Gregory Shaffer (Cambridge: Cambridge University Press, 2015), 475–528, <https://doi.org/10.1017/CBO9781107707092>.

<sup>39</sup> Levi, 'Combating the Financing of Terrorism: A History and Assessment of the Control of "Threat Finance"'.  
<sup>40</sup> Eleni Tsingou, 'Global Financial Governance and the Developing Anti-Money Laundering Regime: What Lessons for International Political Economy?', *International Politics* 47, no. 6 (1 November 2010): 617–37,

<https://doi.org/10.1057/ip.2010.32>.

of whether it is fit-for-purpose given the resulting development deficit. This challenges explanations that are based on a presumed lack of political will. In order to fill these gaps within AML/CFTP scholarship on the Commonwealth Caribbean, the author has compellingly argued for the reconstitution of the transnational AML/CFTP discourse as development discourse. The United Nations Sustainable Development Agenda and Sustainable Development Goals are advanced as a principled framework within which to cast such an anti-hegemonic normative project.

The study has been structured into six substantive chapters. Chapter Two frames the investigation through a Constructivist lens, and transnational AML/CFTP regulatory governance within the overarching theory of transnational legal orders (TLOs). A TLO is taken to be “a collection of formalised legal norms and associated organisations and actors that authoritatively order the understanding and practice of law across national jurisdictions.”<sup>41</sup> The emphasis is, decidedly, on transnationalism as opposed to laying claim to a global AML/CFTP legal order. Undoubtedly, the FATF International Standards have been globally diffused. However, the intention is to underscore the waning primacy of broad multilateral legalism or consent-based treaty rules.<sup>42</sup> More restricted forms of politically contestable intergovernmentalism, unilateralism, fragmented private and public normative ordering and enforcement by a plurality of actors, have become normalised within the TAMLO. Using the Bahamas, Jamaica and Trinidad and Tobago as case studies, it is concerned to highlight that problematising discourses within TLOs can unmask whose interests are served and whose are harmed by their institutionalization; problematic policy assumptions and ideological underpinnings of transnational norms and institutions.<sup>43</sup> It further unmask the propensity of powerful policy elites to constitute identities of themselves as legitimate and safe by representing others as different and threatening.<sup>44</sup> Using Onshore/Offshore dialectics, the geopolitical ‘Othering’ of sovereign Commonwealth Caribbean States’ as targets of transnational AML/CFTP regulation, surveillance and disciplining is amplified.

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<sup>41</sup> Halliday and Shaffer, ‘Researching Transnational Legal Orders’, 475.

<sup>42</sup> {Citation}

<sup>43</sup> Halliday and Shaffer, ‘Researching Transnational Legal Orders’.

<sup>44</sup> Senem Aydın-Düzgit and Bahar Rumelili, ‘Discourse Analysis: Strengths and Shortcomings’, *All Azimuth: A Journal of Foreign Policy and Peace*, 2 December 2018, <https://doi.org/10.20991/allazimuth.477300>; Lene Hansen, ‘A Case for Seduction?: Evaluating the Poststructuralist Conceptualization of Security’, *Cooperation and Conflict* 32, no. 4 (1 December 1997): 369–97, <https://doi.org/10.1177/0010836797032004002>.

Chapter Three provides a critique of the notion of territorial sovereignty as historically contingent, formulated within the Westphalian legal order and linked to the modern nation-state system. It evaluates its contemporary utility in analysing the empirical experiences of small States within the TAMLO. It is argued that, for the most part, small States' regulatory sovereignty and territorial integrity are negotiated and discursively constituted through hierarchical power relationships within the TAMLO. Against this background, it historicises the proclivity of powerful OECD States and transnational actors to use paternalistic discursive strategies to 'discipline' Commonwealth Caribbean States. Finally, in attempt to bridge the AML/CFTP, sovereignty and development discourses, the author problematises the securitisation of the structural risks of Caribbean States, their development precarity, and quest for economic self-determination, as high-risk for ML/FTP.

Chapter Four unpacks the transnational legal and institutional framework and discursive practices within the TAMLO. It contextualises the transnational securitisation of money laundering in connection with the United States' internationalised 'war on drugs'. This was subsequently reinforced by the 'war on terror' and proliferation financing post-9/11. It establishes these spatialised security concerns as the backdrop against which collective responsibility for suppressing ML/FTP became framed in terms of Western geopolitical interests. Consequently, Western political expediency in responding to the 'Islamic threat' led to a shift in the locus of transnational AML/CFTP rules from universally applicable and consent-based international treaty law to risk-based international 'soft law' standards. This will be partly attributed to the regulatory capture of the deliberative processes and institutional arrangements within the TAMLO by powerful OECD States. It will be demonstrated that onshore hegemonic leadership within the TAMLO, reinforced by forcible extraterritorial regulation, and labelling and shaming practices, targeted at peripheral offshore developing States, have had dire consequences for transnational AML/CFTP policy ownership, coherence, and effectiveness within offshore spaces.

Chapter Five explores the AML/anticorruption nexus, with respect to efforts to regulated politically exposed persons (PEPs). It traces the historical antecedence of the OECD's efforts to curb the bribery of foreign public officials and the recovery and return of looted assets from States in the Global South. It highlights that this normative development was contextually contingent on once tolerated corrupt and repressive autocratic regimes losing favour with their Western allies post-Cold War. In this regard, it theoretically frames polarised legitimacy and accountability claims along the Onshore/Offshore axis, in terms of the normative, systematic,

democratic, and functional challenges experienced in polycentric TLOs. A deep-dive analysis is then undertaken of the contextually specific challenges for regulating domestic PEPs and their professional facilitators in the Bahamas, Jamaica and Trinidad and Tobago. Given that grand corruption does not generally typify Commonwealth Caribbean States' experiences, as opposed to less serious mismanagement of public funds, procurement improprieties and nepotism and cronyism, the author then engages with the question of whether the transnational AML/anticorruption sub-regime is contextually 'fit for purpose'.

Chapter Six problematises the resort to unilateralism outside of institutionally embedded regulatory processes and mechanisms within the transnational AML/CFTP legal order. Specifically, it examines the United States use of federal 'long-arm' AML/CFTP statutes to criminalise the cross-border supply of remote betting and gambling services by virtual casinos and Internet gambling operators in Commonwealth Caribbean jurisdictions. Using the *Antigua-United States Remoting Gambling case* settled by the World Trade Organisation (WTO) Dispute Settlement Mechanism, it examines how powerful States may disregard international legal rules and evade attempts to make them render account by less powerful States within TLOs. The chapter ends by considering the broader implications of this dispute for the current operations and future prospects of remote betting and gambling sectors in the Bahamas, Jamaica and Trinidad and Tobago, as well as for their sovereignty and sustainable development.

Chapter Seven critiques the policy coherence of the FATF's risk-based approach to combating money laundering and the financing of terrorism and proliferation (RBA), in developing country contexts. It is argued that insofar as the RBA prescribes rationalising resources rather than responsibilities despite contextually specific ML/FTP risk assessments and capacity constraints in the Bahamas, Jamaica and Trinidad and Tobago, it leaves unresolved the normative question of proportionality. This discussion is framed within calls, elsewhere, for the repoliticization of the normative assumptions underpinning the identification, assessment, and management of financial risks.<sup>45</sup> It is argued that the discursive ascription of labels of ML/FTP high-risk to Commonwealth Caribbean States has served to mutually constitute onshore States as lower risk. Finally, the chapter delves into the increasingly apparent unintended sustainable development consequences of transnational

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<sup>45</sup> Marieke de Goede, 'Repoliticizing Financial Risk', *Economy and Society* 33, no. 2 (May 2004): 197–217, <https://doi.org/10.1080/03085140410001677120>.

AML/CFTP regulation for poor countries, such as de-risking and financial exclusion in the correspondent banking sector in the Commonwealth Caribbean. It advocates for a fairer transnational ‘division of regulatory labour’,<sup>46</sup> in line with the international equitable principle of common but differentiated responsibilities (CBDRs), as a possible normative solution.

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<sup>46</sup> Chris Brummer, ‘How International Financial Law Works (And How It Doesn’t)’, *Georgetown Law Journal* 99, no. 2 (2011 2010): 273.

## 2. Methodology: Unpacking the Discursive Signification and Regulatory Treatment of Commonwealth Caribbean States in the Transnational Anti-Money Laundering Legal Order

This chapter outlines the rationale for the methodological and conceptual choices that I have made. AML/CFTP scholarship on Commonwealth Caribbean jurisdictions has conventionally focused on OFCs, ‘tax havens’, and especially the British Overseas Territories.<sup>47</sup> Furthermore, it has been preoccupied with theorising their compliance with transnational AML/CFTP standards in terms of compliance-inducing stigmatisation practices.<sup>48</sup> Since the 1980s, the derogation of Commonwealth Caribbean States’ sovereignty and right to determine their sustainable development pathways have been legitimised and normalised. This study has sought to advance the literature through a systematic qualitative inquiry into how a balance could be struck between safeguarding the sovereignty and sustainable development interests of Commonwealth Caribbean States and ensuring their effective participation within the TAMLO.

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<sup>47</sup> Michael J. Burns and James McConvill, ‘An Unstoppable Force: The Offshore World in a Modern Global Economy Comment’, *Hastings Business Law Journal* 7, no. 2 (2011): 205–22; Sharon C. Cobb, ‘Why Offshore? Exploring the Geographies of Offshore Financial Centers’, in *WorldMinds: Geographical Perspectives on 100 Problems: Commemorating the 100th Anniversary of the Association of American Geographers 1904–2004*, ed. Donald G. Janelle, Barney Warf, and Kathy Hansen (Dordrecht: Springer Netherlands, 2004), 237–41, [https://doi.org/10.1007/978-1-4020-2352-1\\_38](https://doi.org/10.1007/978-1-4020-2352-1_38); Sharon C. Cobb, ‘Re-Defining “Offshore” in Latin America’, *Growth and Change* 40, no. 2 (2009): 332–56; Richard K. Gordon, ‘On the Use and Abuse of Standards for Law: Global Governance and Offshore Financial Centers’, *North Carolina Law Review* 88, no. 2 (2010 2009): 501–94; Grant Stein, ‘Offshore: Driving Growth’, *The Lawyer; London*, 26 July 2010, 19; William Vlcek, ‘Behind an Offshore Mask: Sovereignty Games in the Global Political Economy’, *Third World Quarterly* 30, no. 8 (1 December 2009): 1465–81, <https://doi.org/10.1080/01436590903279224>; Ronen Palan, *The Offshore World: Sovereign Markets, Virtual Places, and Nomad Millionaires*, Cornell Paperbacks (Ithaca [N.Y.]: Cornell University Press, 2006); Palan, ‘Tax Havens and the Commercialization of State Sovereignty’.

<sup>48</sup> Michael G. Findley, Daniel L. Nielson, and Jason C. Sharman, ‘Causes of Noncompliance with International Law: A Field Experiment on Anonymous Incorporation’, *American Journal of Political Science* 59, no. 1 (2015): 146–61, <https://doi.org/10.1111/ajps.12141>; Sharman, *Havens in a Storm*; Sharman, ‘Power and Discourse in Policy Diffusion’; Jason C. Sharman, ‘The Bark Is the Bite: International Organizations and Blacklisting’, *Review of International Political Economy* 16, no. 4 (22 October 2009): 573–96, <https://doi.org/10.1080/09692290802403502>; Jason C. Sharman, ‘Canaries in the Coal Mine: Tax Havens, the Decline of the West and the Rise of the Rest’, *New Political Economy* 17, no. 4 (1 September 2012): 493–513, <https://doi.org/10.1080/13563467.2011.616583>; William Vlcek, ‘Competitive or Coercive? The Experience of Caribbean Offshore Financial Centres with Global Governance’, *The Round Table* 97, no. 396 (1 June 2008): 439–52, <https://doi.org/10.1080/00358530802057418>.

## 2.1. Epistemological and Conceptual Framework: A Constructivist Critique

It is debatable whether one's epistemological choice fundamentally affects their empirical findings.<sup>49</sup> The study is concerned to critically engage with the complex subjective meanings of labels and security imageries ascribed to Commonwealth Caribbean States, as discursively constructed objects of regulation and disciplining, along the Onshore/Offshore axis, within the TAMLO. As such, it drew on Constructivism insofar as it has striven to "lay bare the values and biases" underpinning knowledge claims.<sup>50</sup> Thus, empirical reality is held to be socially constructed and, therefore, subjective.<sup>51</sup> Furthermore, it provides an epistemological framework for problematising the intrinsic nexus between discourse and power,<sup>52</sup> and specifically how power struggles within transnational relations constitute international normative orders and are recursively reconstituted by them.<sup>53</sup> Constructivism's anti-hegemonic ethos are also well-suited for problematising how dominant framings of 'knowledge claims' produce and reproduce hierarchical power relations by legitimizing particular forms of action while marginalizing others.<sup>54</sup> Such normative issues have characterized the spatialised knowledge of ML/FTP risks posed by sovereign Commonwealth Caribbean States and their regulatory treatment.

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<sup>49</sup> Karen Devine, 'Epistemology Matters: A Reply to David Patrick Houghton and a Call for Epistemological Pluralism', *International Politics* 49, no. 6 (November 2012): 710–45, <https://doi.org/10.1057/ip.2012.21>; David Patrick Houghton, 'Positivism "vs" Postmodernism: Does Epistemology Make a Difference?', *International Politics* 45, no. 2 (March 2008): 115–28, <https://doi.org/10.1057/palgrave.ip.8800222>.

<sup>50</sup> Houghton, 'Positivism "vs" Postmodernism', 119.

<sup>51</sup> John W. Creswell and Cheryl N. Poth, *Qualitative Inquiry & Research Design: Choosing among Five Approaches*, Fourth edition (Los Angeles: SAGE, 2018); Houghton, 'Positivism "vs" Postmodernism'; Christopher Lamont, *Research Methods in International Relations* (SAGE, 2015); Michael Quinn Patton, *Qualitative Research & Evaluation Methods: Integrating Theory and Practice*, Fourth edition (Thousand Oaks, California: SAGE Publications, Inc, 2015); Sarina Theys, 'Introducing Constructivism in International Relations Theory', in *International Relations Theory*, ed. Stephen McGlinchey, Rosie Walters, and Christian Scheinplugg (Bristol, England: E-International Relations Publishing, 2018), 36–41, <https://www.e-ir.info/2018/02/23/introducing-constructivism-in-international-relations-theory/>.

<sup>52</sup> Aydın-Düzgüt and Rumelili, 'Discourse Analysis'; Michael Barnett and Raymond Duvall, 'Power in International Politics', *International Organization* 59, no. 1 (2005): 39–75; Houghton, 'Positivism "vs" Postmodernism'.

<sup>53</sup> Martin Weber, 'Between "Is" and "Oughts": IR Constructivism, Critical Theory, and the Challenge of Political Philosophy', *European Journal of International Relations* 20, no. 2 (1 June 2014): 516–43, <https://doi.org/10.1177/1354066112466573>.

<sup>54</sup> Jennifer Milliken, 'The Study of Discourse in International Relations: A Critique of Research and Methods', *European Journal of International Relations* 5, no. 2 (1999): 225–54, <https://doi.org/10.1177/1354066199005002003>.

The use of theory strengthens the scientific robustness of qualitative research,<sup>55</sup> especially if applied at the various stages of the research process.<sup>56</sup> Methodologically, Constructivism influenced framing the research question, justifying the research design, data collection, analysis, and interpretation as well as the reporting of findings. Substantively, theoretical visibility has been ensured using the overarching theory of TLOs to historicise, contextualise and deconstruct the hierarchical power-relations, institutional arrangements, normative processes and competing interests within the TAMLO. At the substantive chapter level, insights were drawn from a number of regulatory, development and criminological theories to render the study interdisciplinary. For instance, the theories of labelling and reintegrative shaming were extended to analyse the ‘blacklisting’ and ‘ratings’ of sovereign Commonwealth Caribbean States. Using the regulatory theory of polycentrism in transnational regulatory regimes, the nexus among AML, corruption and sovereignty were explored. This enabled the formulation of alternative ‘knowledge claims’ about ML/TFP ‘threat’ construction in offshore spaces. Additionally, by cross-fertilizing the AML/CFTP discourse with the equitable principle of common but differentiated responsibilities used in multilateral climate change governance, the policy coherence of the FATF RBA was critiqued whilst amplifying the need for greater scholarly attention to the AML/CFTP regulatory/sustainable development nexus.

## 2.2. Research Design: Comparative Case Study

Case study research designs are considered well-suited for the in-depth study of complex and amorphous transnational phenomena.<sup>57</sup> The study traces the discursive construction and

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<sup>55</sup> Vincent A. Anfara and Norma T. Mertz, eds., *Theoretical Frameworks in Qualitative Research*, Second edition (Los Angeles: SAGE, 2015); Caroline Bradbury-Jones, Julie Taylor, and Oliver Herber, ‘How Theory Is Used and Articulated in Qualitative Research: Development of a New Typology’, *Social Science & Medicine* 120 (1 November 2014): 135–41, <https://doi.org/10.1016/j.socscimed.2014.09.014>; Creswell and Poth, *Qualitative Inquiry & Research Design*; Margarete Sandelowski, ‘Theory Unmasked: The Uses and Guises of Theory in Qualitative Research’, *Research in Nursing & Health* 16, no. 3 (1993): 213–18, <https://doi.org/10.1002/nur.4770160308>; Mehdi Tavallaei and Mansor A. Talib, ‘A General Perspective on Role of Theory in Qualitative Research’, *Journal of International Social Research* 3, no. 11 (2010): 570–77.

<sup>56</sup> Amanda Coffey and Paul Atkinson, *Making Sense of Qualitative Data: Complementary Research Strategies* (Thousand Oaks: Sage Publications, 1996); Lyn Richards and Janice M. Morse, *Readme First for a User’s Guide to Qualitative Methods*, 3rd ed (Los Angeles: Sage, 2013); Sandelowski, ‘Theory Unmasked’.

<sup>57</sup> Andrew Bennett and Colin Elman, ‘Case Study Methods in the International Relations Subfield’, *Comparative Political Studies*, 30 June 2016, <https://doi.org/10.1177/0010414006296346>; Gary Goertz and James Mahoney, *A Tale of Two Cultures: Qualitative and Quantitative Research in the Social Sciences*

normalisation of Commonwealth Caribbean States' sovereignty as derogable since the 1980s in tandem with the progressive development of the TAMLO. In terms of geopolitical importance to the Commonwealth Caribbean, the trajectory of this process has been the transnational criminalisation of the laundering of the illicit proceeds of narco-trafficking, the use of transnational AML/CFTP laws and standards to regulate corrupt politically exposed persons (PEPs), disrupting the cross-border supply of Internet gambling services from offshore operators; and the policy incoherence of the FATF's RBA in the regional context. The FATF's International Standards have undergone a series of revision and consolidation since they were first issued in 1989. Thus, a comparative analysis of the compliance assessments of the Bahamas, Jamaica and Trinidad and Tobago with core FATF recommendations applicable to aforementioned substantive issue-areas was conducted on the basis of data from the Third and Fourth Mutual Evaluation rounds. Their peer-review assessments were administered by the Caribbean Financial Action Task Force (CFATF), one of the nine FATF-Style Regional Bodies (FSRBs) within the TAMLO. This spanned 2005- 2018 and captured the pre-and post- 2012 major revisions to the Recommendations. The rationale for using the Bahamas, Jamaica and the Trinidad and Tobago as the primary units of analysis, are outlined below.

### **2.2.1. Purposive Sampling**

The Bahamas, Jamaica and Trinidad and Tobago were purposively sampled. That is, cases were selected that offer the greatest prospects for illuminating or resolving the research question under investigation.<sup>58</sup> The intention is to challenge the singular narrative of the Commonwealth Caribbean as a securitised space, constituted of "rogue tax havens," whose liberal tax regimes, financial and corporate services sectors threaten the global financial system. The Bahamas is a significant OFC, Trinidad and Tobago has accounted for the most Foreign Terrorist Fighters (FTFs) per capita joining ISIS/ISIL and has been considered uncooperative for tax purposes although not a traditional 'tax haven'. Jamaica is a notorious transshipment point for drug trafficking from South America to North America and Europe.

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(Princeton, N.J: Princeton University Press, 2012); John S. Odell, 'Case Study Methods in International Political Economy', *International Studies Perspectives* 2, no. 2 (2001): 161–76.

<sup>58</sup> Michael Quinn Patton and Michael Quinn Patton, *Qualitative Research and Evaluation Methods*, 3 ed (Thousand Oaks, Calif: Sage Publications, 2002).

Becoming an international financial centre (IFC) has long been on Jamaica's legislative and political agenda. By reflecting the heterogeneity of the Commonwealth Caribbean ML/FTP risk contexts, the selection of these three jurisdictions illuminate the geopolitical considerations that have influenced them being discursively constructed as "major money laundering countries."<sup>59</sup> Their selection further illuminates how, until the adoption of the FATF RBA, largely unreflective the FATF's transnational AML/CFTP regulatory approach has been in taking account of country-specific ML/CFTP threats, as opposed to levelling the playing field for all States' compliance with its Forty Recommendations. This has provided a pretext for the US and other powerful onshore States to unilaterally discipline Commonwealth Caribbean jurisdictions. Using the Bahamas, Jamaica and Trinidad and Tobago as the primary sites of analysis, it is intended to expose how transnational AML/CFTP policy has failed to accommodate country-specific ML/TF threats contexts in the allocation of regulatory responsibilities to States. Structural features of Caribbean countries such as small size; highly specialised financial, recreational, and corporate services sectors; ethnic and religious profiles; and corruption levels; have significantly influenced the occurrence of ML/FTP predicate offences and have brought the policy coherence of transnational AML/CFTP governance into question. Detailed profiles of all three cases are provided below.

### **2.2.1.1. Country Profile of The Commonwealth of the Bahamas**

The Bahamas is an archipelago of an estimated 700 islands, only 30 of which are inhabited. Prior to gaining political independence from the United Kingdom in 1973, the Bahamas had acquired the reputation of "the top secrecy jurisdiction for North and South American dirty money."<sup>60</sup> Hey Majesty's Government, it has been recalled, was complicit in emboldening then colonial finance minister Stafford Sands, who insisted on criminalising the breaking of banking secrecy, irrespective of the United States Federal Government's protestations.<sup>61</sup> The corrupt oligarchic family 'the Bay Street Boys' that had known US mob connections, had an influential

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<sup>59</sup> United States Department of States, 'International Narcotics Control Strategy Report (Vol.2)- Money Laundering' (Washington, DC, USA: Bureau of International Narcotics and Law Enforcement Affairs, March 2019).

<sup>60</sup> Nicholas Shaxson, *Treasure Islands: Tax Havens and the Men Who Stole the World* (London: Vintage Books, 2016), 110.

<sup>61</sup> Shaxson, *Treasure Islands*.

presence within the colony.<sup>62</sup> The Bahamas was the first OFC to be established in the Commonwealth Caribbean and remains arguably one of the largest in the world. Post-independence, the Bahamas has been described as “the Switzerland of the West,”<sup>63</sup> and, disputably, as “on par with Panama in terms of its thirst for and tolerance of dirty money.”<sup>64</sup> It hosts an estimated 413 offshore banks and over 100,000 International Business Corporations (IBCs) or shell companies.<sup>65</sup> In the 1980s, Carlos Lehder of the Colombian Medellín cartel, Pablo Escobar’s crime partner, reportedly established Norman’s Cay as a transit base for drug-laden aircrafts smuggling cocaine into the United States, with the tacit approval of corrupt local officials.<sup>66</sup>

Nonetheless, on 30<sup>th</sup> January 1989, the Bahamas became the first State to ratify the 1988 Vienna Convention against the Illicit Trafficking in Narcotics Drugs and Psychotropic Substances,<sup>67</sup> which criminalised drug-related money laundering. Moreover, it had independently adopted the Tracing and Forfeiture of Proceeds of Drug Trafficking Act (1986).<sup>68</sup> However, the Bahamas was also among the first Caribbean jurisdictions to be blacklisted in 2000 under the FATF’s Non-Cooperative Countries and Territories (NCCT) initiative for the purposes of AML/CFTP regulation.<sup>69</sup> By 2003, the Bahamas was delisted after improving its domestic AML/CFTP regime.<sup>70</sup> In 2017, the CFATF found that the Bahamas was yet to develop and adequately document its national AML/CFTP policies but had a well-structured financial intelligence unit (FIU) and low risk-assessment for terrorism financing

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<sup>62</sup> Shaxson.

<sup>63</sup> Will Fitzgibbon and Emilia Díaz-Struck, ‘Secrecy for Sale: Former EU Official Among Politicians Named in New Leak of Offshore Files from The Bahamas’, *International Consortium of Investigative Journalists (ICIJ)* (blog), 20 September 2016, <https://www.icij.org/investigations/offshore/former-eu-official-among-politicians-named-new-leak-offshore-files-bahamas/>.

<sup>64</sup> Fitzgibbon and Díaz-Struck.

<sup>65</sup> Drayton, ‘Dirty Money, Tax and Banking’.

<sup>66</sup> British Broadcasting Corporation (BBC), ‘Drug Lord Escobar’s Crime Partner Leaves US Jail’, BBC News, 17 June 2020, <https://www.bbc.com/news/world-latin-america-53070547>.

<sup>67</sup> Shazeeda Ali, *Money Laundering Control in the Caribbean*, Studies in Comparative Corporate and Financial Law 16 (London: Kluwer Law International, 2003).

<sup>68</sup> Anthony Smellie, ‘The Work of the Caribbean Regional Division of the Financial Action Task Force’, *Commonwealth Law Bulletin* 19, no. 4 (1993): 1830–51.

<sup>69</sup> Financial Action Task Force, ‘Review to Identify Non-Cooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures’, 2000, [http://www1.oecd.org/fatf/pdf/NCCT2000\\_en.pdf](http://www1.oecd.org/fatf/pdf/NCCT2000_en.pdf).

<sup>70</sup> United Nations Office on Drugs and Crime and World Bank Group, ‘Crime, Violence, and Development: Trends, Costs and Policy Options in the Caribbean’ (Vienna, Austria: UNODC Secretariat, 2007), <http://siteresources.worldbank.org/INTHAITI/Resources/Crimeandviolenceinthecaribbeanfullreport.pdf>.

(TF).<sup>71</sup> Financial institutions (FIs) and non-financial businesses and professions (DNFBPs) were found to be applying strong customer due diligence (CDD) procedures, and the Bahamas' supervisory framework was assessed as comprehensive and well-developed.<sup>72</sup>

### 2.2.1.2. *Country Profile of Jamaica*

Major incidences of Islamic extremism, radicalisation, or terrorist financing are uncommon in Jamaica. However, in 2017, Sheik Abdullah Faisal, a Jamaican national, was charged by the New York Supreme Court for providing material support to the Islamic State of Iraq and the Levant (ISIL) for terrorist attacks.<sup>73</sup> He was deported from Kenya where he reportedly recruited fighters for ISIL forces in Somalia and was banned by the Islamic Council of Jamaica from preaching in local mosques.<sup>74</sup> After contesting his extradition to the United States in Jamaican courts for three years, he was extradited in August 2020.<sup>75</sup> Jamaica's National Security Policy (NSP) ranks terrorism as a Tier 2 threat, defined in terms of low probability but with the potential for high impact, given its significant tourism sector.<sup>76</sup> The United States considers Jamaica to be a jurisdiction of major concern for ML. This is partly attributed to its primacy as a transshipment point for illicit narcotics drugs trafficked from South America to North America and Europe. Diversifying its financial services industry, as part of its long-term development strategy, to become an IFC, has been on Jamaica's agenda.<sup>77</sup> In a study published in 2014, which purports to be the first comprehensive analysis on the ML in Jamaica, it was reported

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<sup>71</sup> Caribbean Financial Action Task Force, 'Anti-Money Laundering and Counter-Terrorist Financing Measures: The Bahamas Mutual Evaluation Report.' (Port-of-Spain, Trinidad & Tobago: Caribbean Financial Action Task Force, July 2017), <https://cfatf-gafic.org/documents/4th-round-meval-reports/8383-the-bahamas-4th-round-mer/file>.

<sup>72</sup> Caribbean Financial Action Task Force.

<sup>73</sup> Andrew Karim, 'Deported Jamaican Islamic Cleric Charged for Helping ISIS Terrorist Group', *CaribbeanNationalWeekly.com*, 28 August 2017, <https://www.caribbeannationalweekly.com/news/national-news/deported-jamaican-islamic-cleric-charged-helping-isis/>.

<sup>74</sup> Karim.

<sup>75</sup> Editor (The), 'Sheikh Abdullah El-Faisal Extradited to US on Terrorism Charges', *Gleaner (The), Jamaica, W.I.*, 13 August 2020, <http://jamaica-gleaner.com/article/news/20200813/sheikh-abdullah-el-faisal-extradited-us-terrorism-charges>.

<sup>76</sup> Ministry of National Security of Jamaica, 'A New Approach: National Security Policy for Jamaica- Towards a Secure & Prosperous Nation' (Cabinet Office, GoJ, 25 March 2014), <https://cabinet.gov.jm/wp-content/uploads/2017/05/NATSEC-March-25-2014-1-1.pdf>.

<sup>77</sup> Planning Institute of Jamaica, 'Vision 2030: Jamaica National Development Plan- Planning for a Secure and Prosperous Future' (PIOJ, 2009), [http://www.vision2030.gov.jm/Portals/0/NDP/Vision%202030%20Jamaica%20NDP%20Full%20No%20Cover%20\(web\).pdf](http://www.vision2030.gov.jm/Portals/0/NDP/Vision%202030%20Jamaica%20NDP%20Full%20No%20Cover%20(web).pdf).

that the laundering of the illicit proceeds of crime through the remittance sector was especially problematic in Jamaica as well as a “lack of political will to enforce anti-money laundering regulations.”<sup>78</sup> The nexus between ML and corruption, as well as the country’s capacity constraints with respect to the investigation and prosecution of financial crimes were also cited as issues of material concern for Jamaica’s compliance with FATF International Standards.<sup>79</sup>

The CFATF reported that, since its Third Round Mutual Evaluations in 2005, Jamaica made important strides in fortifying its domestic AML/CFTP framework, especially with respect to addressing technical deficiencies in the areas of law enforcement, multi-stakeholder cooperation and coordination, confiscation, targeted financial sanctions and international cooperation.<sup>80</sup> Significant institutional and legislative responses to ML include the establishment of Major Organised Crime and Anti-Corruption Agency (MOCA) with statutory authority to confiscate illicit proceeds and the adoption in 2007 of the Proceeds of Crime Act (POCA), respectively.<sup>81</sup> Several deficiencies in compliance with FATF International Standards were, however, noted by the CFATF including the ineffectiveness of domestic mechanism to tackle terrorism, terrorism financing investigations, and proliferation financing,<sup>82</sup> despite the absence of empirical FTP threats.

### **2.2.1.3. Country Profile of the Republic of Trinidad and Tobago**

In 2017, the Council of the European Union (EU) blacklisted Trinidad and Tobago among “non-cooperative jurisdictions for tax purposes,”<sup>83</sup> and again in February 2020. This is despite that fact that the country was removed from the FATF ‘Grey List’ of jurisdiction under increased monitoring, in February 2020. Economic hardship in Trinidad and Tobago as a result of International Monetary Fund (IMF) structural adjustment programmes (SAPs) in the 1970s,

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<sup>78</sup> Mary Alice Young, ‘Dirty Money in Jamaica’, *Journal of Money Laundering Control* 17, no. 3 (1 January 2014): 355, <https://doi.org/10.1108/JMLC-09-2013-0032>.

<sup>79</sup> Young, ‘Dirty Money in Jamaica’.

<sup>80</sup> Caribbean Financial Action Task Force, ‘Anti-Money Laundering and Counter-Terrorist Financing Measures: Jamaica Mutual Evaluation Report’ (Port-of-Spain, Trinidad & Tobago: Caribbean Financial Action Task Force, January 2017), <https://cfatf-gafic.org/documents/4th-round-meval-reports/7418-jamaica-4th-round-mer/file>.

<sup>81</sup> Young, ‘Dirty Money in Jamaica’.

<sup>82</sup> Caribbean Financial Action Task Force, ‘Fourth Round Mutual Evaluation Report (MER): Jamaica’.

<sup>83</sup> Council of the European Union, ‘EU List of Non-Cooperative Jurisdictions for Tax Purposes’ (Brussels, Belgium: Council of the European Union, 5 December 2017), <http://www.consilium.europa.eu/media/31945/st15429en17.pdf>.

it has been suggested, led to widespread Islamic radicalisation of marginalised urban youths.<sup>84</sup> This precipitated in an attempted coup by Islamic leader Yasin Abu Bakr of the Jamaat Al Muslimeen in July 1990, who sought to exploit religious and racial divisions in the country.<sup>85</sup> Islamic radicalisation due to systemic underdevelopment remains an important policy issue for Trinidad and Tobago. The country reportedly has one of the highest recruitment rates in the Western Hemisphere by ISIL.<sup>86</sup> Only one national has been extradited to the United States, in recent times for terrorist related offences, while others are reportedly being held in Venezuela on similar charges.<sup>87</sup> Trinidad and Tobago's National Anti-Money Laundering and Counter-Financing of Terrorism Committee (NAMLC) and FIU have identified tax evasion, fraud and drug trafficking as the core predicate crimes from which illicit financial flows (IFFs) are generated.<sup>88</sup> Banks and Money Value Transfer Service (MVTs) providers have the two highest reporting rates of suspicious transactions.<sup>89</sup>

### 2.3. Data Collection Procedure

Data sources were selected based on the extent to which they reveal Onshore/Offshore discourses within the TAMLO. The Foucauldian notion of text was adopted, which is broadly taken to include concrete manifestations of knowledge of social practices or discourses, such as written documents and oral utterances.<sup>90</sup> Such texts have been treated as ideological “sites of struggle” for normative dominance.<sup>91</sup> Grounding these texts within their social, political and

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<sup>84</sup> Bishnu Ragoonath, ‘The Failure of the Abu Bakr Coup: The Plural Society, Cultural Traditions and Political Development in Trinidad’, *The Journal of Commonwealth & Comparative Politics* 31, no. 2 (July 1993): 33–53, <https://doi.org/10.1080/14662049308447655>.

<sup>85</sup> Ragoonath.

<sup>86</sup> Al Jazeera, ‘Caribbean to Caliphate’, 17 May 2017, <https://www.aljazeera.com/programmes/peopleandpower/2017/05/caribbean-caliphate-170517073332147.html>.

<sup>87</sup> Caribbean Financial Action Task Force, ‘Anti-Money Laundering and Counter-Terrorist Financing Measures: Trinidad and Tobago Mutual Evaluation Report’ (Port-of-Spain, Trinidad & Tobago: Caribbean Financial Action Task Force, June 2016), <https://cfatf-gafic.org/documents/4th-round-meval-reports/6841-trinidad-and-tobago-4th-round-mutual-evaluation-report/file>.

<sup>88</sup> Caribbean Financial Action Task Force.

<sup>89</sup> Caribbean Financial Action Task Force.

<sup>90</sup> Ruth Wodak, ‘Critical Discourse Analysis’, in *Qualitative Research Practice*, ed. Clive Seale et al. (London ; Thousand Oaks, Calif: SAGE, 2004), 186; Norman Fairclough and Ruth Wodak, ‘Critical Discourse Analysis’, in *Introduction to Discourse Analysis*, ed. Teun A. van Dijk (London (UK): SAGE Publications Ltd, 1997), 258–84.

<sup>91</sup> Wodak, ‘Critical Discourse Analysis’, 187.

historical contexts, has allowed the unpacking and problematisation of latent contradictions, ideological assumptions and the connections among discourses, truth production, and institutions of power.<sup>92</sup> In this regard, perceptions of Commonwealth Caribbean States' sovereignty and sustainable development, by the members of the epistemic community, were accessed through a systematic review of peer-reviewed journal articles and textbooks on AML/CFTP regulation related to the region. The study relied heavily on naturalistic data sources or 'text' of official discourses, to empirically access the Bahamas', Jamaica's and Trinidad and Tobago's perceptions of the TAMLO, through speeches and policy statements by high level governmental officials. These provided valuable insights into how Commonwealth Caribbean States view their discursive objectification and representation as well as the TAMLO. National risk assessments (NRAs), national security policies, and the Caribbean Financial Action Task Force (CFATF) mutual evaluation reports (MER) provided a rich source of data on the state of AML/CFTP regulation and threat environments in the three countries. This is especially the case in MERs, which are the products of multi-stakeholder consultations and contain intelligence and law enforcement information. Legal case reports on money laundering and corruption were also consulted. Recourse was also had to international treaties and the FATF's International Standards, FATF Guidance and typology reports. Commissioned reports on security and money laundering issues in the Caribbean by the IMF, World Bank, the United Nations Office on Drug and Crime (UNODC) were also useful. Archival research was undertaken in respect of annual reports of the FATF and travaux préparatoires of negotiations of relevant United Nations conventions. Relevant communiqués of the Caribbean Community (CARICOM) and the EU also provided data, as were articles and commentaries of the International Consortium of Investigative Journalist (ICIJs) that reported on the Panama and Paradise Papers scandals.

It is thought that data on sensitive topics is most appropriately collected using in-depth semi-structured interviews.<sup>93</sup> As such, onsite visits to the Bahamas, Jamaica and Trinidad and Tobago were planned, to fill gaps in data collection from documentary analysis. However,

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<sup>92</sup> Andrew M. Koch, 'Poststructuralism and the Epistemological Basis of Anarchism', *Philosophy of the Social Sciences* 23, no. 3 (September 1993): 327–51, <https://doi.org/10.1177/004839319302300304>; Jan Selby, 'Engaging Foucault: Discourse, Liberal Governance and the Limits of Foucauldian IR', *International Relations* 21, no. 3 (1 September 2007): 324–45, <https://doi.org/10.1177/0047117807080199>; Wodak, 'Critical Discourse Analysis'.

<sup>93</sup> Rakime Elmir et al., 'Interviewing People about Potentially Sensitive Topics', *Nurse Researcher* 19, no. 1 (2011): 12–16.

fieldwork had to be terminated after a few days of arriving in Jamaica due to government mandated self-isolation and the cancellation of interviews by respondents due to panic surrounding the Covid-19 pandemic. Border closures by the Governments of the Bahamas and Trinidad and Tobago also meant that site visits were no longer possible. Efforts were made to conduct semi-structured interviews by telephone. However, the response rate was very low. There was a sense that relevant law enforcement and regulatory agencies suffered from reporting fatigue and were reluctant to share information unnecessarily. This, by no means, detracted from the quality of the study. Qualitative methodologists have cautioned against ascribing an elevated authenticity to ‘experiential’ data collected using interviews over naturalistic data derived from textual sources.<sup>94</sup> The latter, it is thought, offers accounts of perceptions untainted by the interviewer’s views and presence.<sup>95</sup> Nonetheless, some data was gathered using unstructured interviews with a range of AML/CFTP experts, through contacts made at the annual Cambridge International Symposium on Economic Crime. Respondents were selected based on their direct involvement in AML/CFTP policymaking, regulation, supervision, enforcement or monitoring and academia.

## 2.4. Research Ethics

It was borne in mind that ethical issues arise at different stages of the research process.<sup>96</sup> Prior approval was obtained from the Ethics Committee, Department of Politics and International Studies, in respect of the respondents with whom interviews were to be held. This was done in line with the relevant fieldwork risk assessment and applicable departmental guidelines. Due to the sensitive and highly politicised nature of the issues being researched, informed consent was obtained from all respondents and their anonymity preserved where requested. At the commencement of each expert interview, respondents were informed that the research project was being undertaken purely for academic purposes, and that the collected data would be kept confidential. Regard was had to the core principles of the European

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<sup>94</sup> David Silverman, ‘How Was It for You? The Interview Society and the Irresistible Rise of the (Poorly Analyzed) Interview’, *Qualitative Research* 17, no. 2 (1 April 2017): 144–58, <https://doi.org/10.1177/1468794116668231>.

<sup>95</sup> Silverman.

<sup>96</sup> Creswell and Poth, *Qualitative Inquiry & Research Design*.

Scientific Research Council (ESRC) Framework for Research Ethics, including scientific quality and integrity of the research project, independence, and impartiality.

## 2.5. Data Analysis

In keeping with the emancipatory thrust of Constructivist research,<sup>97</sup> a sustained legal and policy analysis was conducted of the negligible treatment of Commonwealth Caribbean States' sovereignty within transnational AML/CFTP regulatory governance. This analytical approach was, however, framed within a broader critique of the politics of representation of Commonwealth Caribbean States and the transnational regulatory policy choices and posture of transnational institutional actors and powerful onshore States towards the region. Such an analytical approach has served to politicise, problematise and deconstruct how asymmetrical power relations legitimise and normalise discursive constructions of subject-matter and subject-actors, inclusion/exclusion representational practices, and 'truth' claims.<sup>98</sup> The implicit assumption is that the TAMLO has been relationally constructed by sovereign States and other transnational actors, whose normative statuses are mutually and recursively constituted by practices within the TAMLO.

Hegemonic discourses produce and reproduce objects, disciplining techniques, policy practices, and security spaces, based on regimes of truth determined by privileged "subjects authorized to speak and act."<sup>99</sup> As such, it was important to remain cognizant of how significant systems produce, structure and limit policy practices that are viewed as reasonable by onshore policy elites,<sup>100</sup> recursively along the Onshore/Offshore axis within the TAMLO. In other words, the transnational AML/CFTP regulatory responses directed against offshore States, discursively objectified as targets of extraterritorial surveillance, was used to problematise ascribed labels, and expose power inequalities within the TAMLO. This approach has been used, elsewhere, to problematise the normalisation of disciplining practices.<sup>101</sup> Truth

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<sup>97</sup> Devine, 'Epistemology Matters'.

<sup>98</sup> Caterina Carta, "'A Rose by Any Other Name": On Ways of Approaching Discourse Analysis', *International Studies Review* 21, no. 1 (March 2019): 81–106, <https://doi.org/10.1093/isr/viy013>; Milliken, 'The Study of Discourse in International Relations'.

<sup>99</sup> Milliken, 'The Study of Discourse in International Relations', 229.

<sup>100</sup> Milliken, 'The Study of Discourse in International Relations'.

<sup>101</sup> Milliken.

claims about the threat posed by ‘strategic deficiencies’ in Commonwealth Caribbean States’ domestic AML/CFTP regimes to the integrity of the global financial system were scrutinised against empirical national ML/FTP threat assessments. Thus, by leveraging the “emancipatory mission” of anti-hegemonic approaches to deconstructing discourses,<sup>102</sup> the study illuminated the peripheral status of Commonwealth Caribbean States within transnational AML/CFTP regulatory governance, normative processes, and institutional arrangements.

Language use within the TAMLO was accepted as transnational ‘social practice’. The use of the Onshore/Offshore dichotomy and the ‘othering’ of Commonwealth Caribbean States as ‘recalcitrant’, were politicised. It was demonstrated that binary identities of ‘threatened/threatening’ are often ascribed,<sup>103</sup> and boundaries of ‘legitimate/illegitimate’ practices are demarcated,<sup>104</sup> along the ‘Onshore/Offshore’ axis. As such, normative statements revealed in concrete texts across time and space, which produce and structure a particular order of reality,<sup>105</sup> within the TAMLO were also analysed. These include stigmatisation, labelling, ‘naming and shaming’ and other discursively disciplining practices with an especially potent productive power. Among the normative questions with which the study grappled include, how the derogation of Commonwealth Caribbean States’ sovereignty has been discursively constructed and reproduced? Whose interests are served by them being constituted as objects of transnational disciplining for AML/CFTP regulatory purposes? How has the securitisation of offshore spaces as high-risk for ML/FTP mutually legitimised the hegemonic leadership of powerful onshore States within the TAMLO? In the final analysis, how can Commonwealth Caribbean States’ sovereignty and development sustainability be legitimised within transnational AML/CFTP regulatory governance?

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<sup>102</sup> Matthew Donoghue, ‘Beyond Hegemony: Elaborating on the Use of Gramscian Concepts in Critical Discourse Analysis for Political Studies’, *Political Studies* 66, no. 2 (1 May 2018): 392–408, <https://doi.org/10.1177/0032321717722362>.

<sup>103</sup> Hansen, ‘A Case for Seduction?’; Lene Hansen, *Security as Practice: Discourse Analysis and the Bosnian War*, The New International Relations (New York: Routledge, 2006).

<sup>104</sup> Aydın-Düzgüt and Rumelili, ‘Discourse Analysis’, 286.

<sup>105</sup> Annita Lazar and Michelle M. Lazar, ‘The Discourse of the New World Order: “out-Casting” the Double Face of Threat’, *Discourse & Society* 15, no. 2/3 (2004): 224.

### 3. Bridging Sovereignty, Security and Development Discourses: A Vulnerability Assessment of Commonwealth Caribbean States within the Transnational Anti-Money Laundering Legal Order

Discursive practices, whether related to sovereignty, security or development, often, “are constrained by the fact that they inevitably take place within a constituted material reality, with preconstituted ‘objects’ and preconstituted social subjects.”<sup>106</sup> Occupying a postcolonial space, the constitutive signification of Commonwealth Caribbean States is usually framed within two overarching meta-narratives. Firstly, Western development discourse constituted the Global South as an ‘underdeveloped space’.<sup>107</sup> The exercise of ‘positive sovereignty’ is often contingent on material resources and power capabilities.<sup>108</sup> Consequently, empirical inequalities among States have normalised “problematic forms of power... being exercised across borders” of countries of the Global South by powerful Western States and unaccountable transnational and non-state actors.<sup>109</sup> This meta-narrative has provided the justificatory basis for “continual surveillance, discipline and an ever-changing menu of self-improvement programmes.”<sup>110</sup> In effect, the international juridical principle of sovereign equality has proven “dysfunctional and unrealistic,”<sup>111</sup> especially for small developing States.

Secondly, they occupy a peripheral status within hegemonic narratives about the “West and the Rest.”<sup>112</sup> Thus, as it relates to normative discourses about state sovereignty and transnational insecurities and regulatory governance, Commonwealth Caribbean States are

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<sup>106</sup> Norman Fairclough, *Discourse and Social Change*, Reprinted (Cambridge: Polity Press, 1992), 60.

<sup>107</sup> Arturo Escobar, ‘Discourse and Power in Development: Michel Foucault and the Relevance of His Work to the Third World’, *Alternatives* 10, no. 3 (1 July 1984): 377–400, <https://doi.org/10.1177/030437548401000304>; Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World*, Princeton Studies in Culture/Power/History (Princeton, N.J: Princeton University Press, 1995); Marc DuBois, ‘The Governance of the Third World: A Foucauldian Perspective on Power Relations in Development’, *Alternatives* 16, no. 1 (1 January 1991): 1–30, <https://doi.org/10.1177/030437549101600101>.

<sup>108</sup> Miriam Ronzoni, ‘Two Conceptions of State Sovereignty and Their Implications for Global Institutional Design’, *Critical Review of International Social and Political Philosophy* 15, no. 5 (December 2012): 573–91, <https://doi.org/10.1080/13698230.2012.727306>; Janice E. Thomson, ‘State Sovereignty in International Relations: Bridging the Gap between Theory and Empirical...’, *International Studies Quarterly* 39, no. 2 (June 1995): 213, <https://doi.org/10.2307/2600847>.

<sup>109</sup> Ronzoni, ‘Two Conceptions of State Sovereignty and Their Implications for Global Institutional Design’, December 2012, 584.

<sup>110</sup> Selby, ‘Engaging Foucault’, 333.

<sup>111</sup> John H. Jackson, ‘Sovereignty-Modern: A New Approach to an Outdated Concept’, *The American Journal of International Law* 97, no. 4 (2003): 782, <https://doi.org/10.2307/3133680>.

<sup>112</sup> Stuart Hall, ‘The West and the Rest: Discourse and Power’, in *Formations of Modernity*, ed. Stuart Hall and Bram Gieben, Reprinted, *Understanding Modern Societies 1* (Cambridge: Polity Press, 1993), 185.

usually located among ‘othered’ non-Western societies. Moreover, there is a propensity by the West to hegemonically cast securitization discourses in dichotomous constructs of “a radically different, inferior and threatening Other,”<sup>113</sup> while mutually constituting for itself the identity of a “threatened Self.”<sup>114</sup> Insofar as the West has ascribed itself a “veil of moral authority,”<sup>115</sup> it has successfully framed transnational security discourses in moral and value-based terms that universalizes its national interests as beneficial even for those ‘othered’.<sup>116</sup> This approach to securitisation and threat construction has legitimised “extraordinary responses,”<sup>117</sup> which often impinge on the state sovereignty of those ‘othered’. It has further legitimised the imposition of international rules and standards, disciplinary strategies, and the institutionalisation of regulatory structures that less powerful States are unable to resist. These discursive practices have permeated the TAMLO.

The sovereignty, security and development of small States are empirically threatened by kleptocrats, organised criminal and terrorist networks and their subversive activities and cross-border illicit financial flows (IFFs).<sup>118</sup> Organised criminal and terrorist networks have sought to challenge state authority by infiltrating governance institutions and perverting the rule of law.<sup>119</sup> The United Nations 2030 Agenda for Sustainable Development and Sustainable Development Goals (SDGs) embody broad multilateral consensus on the need to curb IFFs, including those derived from money laundering and corruption or intended for terrorist financing. As responsible members of the international community, Commonwealth Caribbean States have always sought to contribute to transnational AML efforts, especially related to narcotics trafficking.<sup>120</sup> Given their development fragility and capacity constraints, Caribbean

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<sup>113</sup> Lene Hansen, ‘Poststructuralism and Security’, in *Oxford Research Encyclopedia, International Studies* (USA: Oxford University Press, 2017), 6, <https://doi.org/10.1093/acrefore/9780190846626.013.278>.

<sup>114</sup> David Campbell, ‘Global Inscription: How Foreign Policy Constitutes the United States’, *Alternatives* 15, no. 3 (1 July 1990): 263–86, <https://doi.org/10.1177/030437549001500302>; Hansen, ‘A Case for Seduction?’; Hansen, ‘Poststructuralism and Security’.

<sup>115</sup> Kishore Mahbubani, ‘The Dangers of Decadence - What the Rest Can Teach the West Comment’, *Foreign Affairs* 72, no. 4 (1993 1992): 12.

<sup>116</sup> Hansen, ‘Poststructuralism and Security’.

<sup>117</sup> Hansen, ‘A Case for Seduction?’, 376.

<sup>118</sup> Ayodeji Aluko and Mahmood Bagheri, ‘The Impact of Money Laundering on Economic and Financial Stability and on Political Development in Developing Countries: The Case of Nigeria’, *Journal of Money Laundering Control* 15, no. 4 (2012): 442–56; ‘UNODC and the Sustainable Development Goals’ (Vienna, Austria: United Nations Office on Drug and Crime, 2017), [https://www.unodc.org/documents/SDGs/UNODC-SDG\\_brochure\\_LORES.pdf](https://www.unodc.org/documents/SDGs/UNODC-SDG_brochure_LORES.pdf).

<sup>119</sup> Bruce Zagaris and Sheila M. Castilla, ‘Constructing an International Financial Enforcement Subregime: The Implementation of Anti-Money-Laundering Policy’, *Brooklyn Journal of International Law* 19, no. 3 (1993): 871–966.

<sup>120</sup> Drayton, ‘Dirty Money, Tax and Banking’.

Small Island Developing States (SIDS) are thought to be particularly vulnerable to these subversive activities.<sup>121</sup> As criminal and terrorist networks and corrupt public officials increasingly exploit financial technologies (FinTech) to evade the criminal jurisdiction of their countries of origin or of territories in which the predicates offences were committed,<sup>122</sup> States' sovereign control over insecurities within their territories has dramatically waned. Ironically, however, transnational AML/CFTP regulatory responses have emerged as a source of threat to the sovereignty of developing countries within the TAMLO.

Discursive practices have been used by powerful States, the institutional arrangements that they hegemonically dominate, as well as by western media and scholars to construct and legitimise transnational normative orders that are characteristically imperialist and reinforce global hierarchies.<sup>123</sup> This has been aptly described as 'symbolic constitutionalism'. That is, the use of legal discourse to further neo-imperialist regulatory agendas that project geopolitical power relations.<sup>124</sup> Consequently, the transnational AML/CFTP legal order has privileged the 'imperative of size', material resources and control of access to the global financial and payment systems. It has further privileged mutually constituting Onshore/Offshore dichotomies within hegemonic discourses on ML/TF risks and sovereignty. Disciplining practices of powerful Western States and the transnational institutional actors that they have vested with normative authority, have relationally and recursively reconstituted state sovereignty,<sup>125</sup> especially that of Commonwealth Caribbean States.

The transnational regulatory and law enforcement responsibilities ascribed to Commonwealth Caribbean States within the TAMLO are costly. These small States must routinely balance compliance obligations with the need to find innovative ways to mobilise sustainable development finance, address security concerns, and maintain political authority and effective territorial control. Absent much credible alternatives, they must leverage their economic sovereignty to overcome the enduring socio-economic legacies of colonialism; meet

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<sup>121</sup> Miguel Goede, 'Transnational Organized Crime (TOC) and the Relationship to Good Governance in the Caribbean: Transnational Organized Crime Democracy (TOCD)', *International Journal of Development Issues* 12, no. 3 (1 January 2013): 253–70, <https://doi.org/10.1108/IJDI-01-2013-0008>.

<sup>122</sup> Iwa Salami, 'Terrorism Financing with Virtual Currencies: Can Regulatory Technology Solutions Combat This?', *Studies in Conflict & Terrorism* 41, no. 12 (2 December 2018): 968–89, <https://doi.org/10.1080/1057610X.2017.1365464>.

<sup>123</sup> Jean L. Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy and Constitutionalism* (Cambridge: Cambridge University Press, 2012).

<sup>124</sup> Cohen.

<sup>125</sup> Thomson, 'State Sovereignty in International Relations'.

human development needs of their citizens, and diversify their economies or risk becoming increasingly marginalised in global value chains. These policy challenges occur in a context where the urgency of climate change adaptation, coping with pandemics and servicing high debt burdens, have never been greater. Their pragmatic responses to these seemingly insurmountable challenges have exposed their economic sovereignty to external challenge.<sup>126</sup> Indeed, their latitude for leveraging economic sovereignty to legitimately pursue development sustainability is increasingly delineated by onshore hegemonic powers.<sup>127</sup> Nowhere else do these complex issues of Commonwealth Caribbean sovereignty, security and development sustainability contend than in the context of their participation in the transnational AML/CFTP legal order.

### 3.1. Historicising and Contextualising State Sovereignty

Constructivists view sovereignty and statehood as discursive constructs of modernity, whose meanings and substance continue to dynamically evolve.<sup>128</sup> They view statehood as a historically contingent form of political organisation, which provided a solution to the problem of political identity in seventeenth century Western Europe by delineating a ‘secure political

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<sup>126</sup> Christopher Clapham, ‘Degrees of Statehood’, *Review of International Studies* 24, no. 2 (1998): 143–57; Peter B. Evans, ‘Transnational Linkages and the Economic Role of the State: An Analysis of Developing and Industrialised Nations in the Post-World War II Period’, in *Bringing the State Back In*, ed. Dietrich Rueschemeyer, Theda Skocpol, and Peter B. Evans (Cambridge [Cambridgeshire]; New York: Cambridge University Press, 1985), 192–226.

<sup>127</sup> Jacqueline Braveboy-Wagner, ‘Opportunities and Limitations of the Exercise of Foreign Policy Power by a Very Small State: The Case of Trinidad and Tobago’, *Cambridge Review of International Affairs* 23, no. 3 (1 September 2010): 407–27, <https://doi.org/10.1080/09557571.2010.484049>.

<sup>128</sup> Tanja E Aalberts, ‘Sovereignty. Evolution of an Idea’, *Acta Politica* 44, no. 4 (1 December 2009): 480–83, <https://doi.org/10.1057/ap.2009.16>; Emanuel Adler, ‘Seizing the Middle Ground: Constructivism in World Politics’, *European Journal of International Relations* 3, no. 3 (1 September 1997): 319–63, <https://doi.org/10.1177/1354066197003003003>; Seán Patrick Eudaily and Steve Smith, ‘Sovereign Geopolitics? – Uncovering the “Sovereignty Paradox”’, *Geopolitics* 13, no. 2 (20 May 2008): 309–34, <https://doi.org/10.1080/14650040801991621>; Ted Hopf, ‘The Promise of Constructivism in International Relations Theory’, *International Security* 23, no. 1 (1998): 171–200, <https://doi.org/10.2307/2539267>; David A. Lake, ‘The New Sovereignty in International Relations’, *International Studies Review* 5, no. 3 (1 September 2003): 303–23, <https://doi.org/10.1046/j.1079-1760.2003.00503001.x>; Rob B. J. Walker, *Inside/Outside: International Relations as Political Theory*, Cambridge Studies in International Relations 24 (Cambridge [England]; New York: Cambridge University Press, 1993).

community' from the dangerous outside world.<sup>129</sup> Heralded by the Treaty of Westphalia 1648, it responded to the need for principles to ensure peaceful international relations and counter the chaos of the Thirty Years' War (1618-1648).<sup>130</sup> Thus, statehood was framed within an anti-hegemonic constitutive theory, premised on the idea that a territorially bounded community had to be recognised by other members of the international community as having juridical personality.<sup>131</sup> On account of its statehood, such territorial entity would be presumed juridically equal to other States, regardless of its size; have exclusive competence over its internal affairs, which were to be free from interference by other States; and not be subject to international normative processes and rules unless expressly consented to.<sup>132</sup> However, a declaratory theory of statehood subsequently emerged whereby juridical personality would be *de facto* established in international law, irrespective of recognition, if four criteria, enunciated in the Montevideo Convention on the Rights and Duties of States (1933), were satisfied, namely- a defined territory, a permanent population, an effective government and the capacity to enter relations with other States.<sup>133</sup>

Whereas statehood has conventionally referred to the juridical personality of a State, sovereignty has treated with its capacity to exercise political power and authority within its territory. Sovereignty implies that a State is:

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<sup>129</sup> Molly Cochran, 'Postmodernism, Ethics and International Political Theory', *Review of International Studies* 21, no. 3 (July 1995): 237–50, <https://doi.org/10.1017/S026021050011767X>; Hansen, 'A Case for Seduction?'; Thomson, 'State Sovereignty in International Relations'.

<sup>130</sup> Jordan Branch, "'Colonial Reflection" and Territoriality: The Peripheral Origins of Sovereign Statehood', *European Journal of International Relations* 18, no. 2 (1 June 2012): 277–97, <https://doi.org/10.1177/1354066110383997>; Anne L. Clunan and Harold A. Trinkunas, eds., 'Conceptualising Ungoverned Spaces: Territorial Statehood, Contested Authority and, Softened Sovereignty', in *Ungoverned Spaces: Alternatives to State Authority in an Era of Softened Sovereignty* (Stanford, Calif: Stanford Security Studies, 2010), 17–33; Daud Hassan, 'The Rise of the Territorial State and the Treaty of Westphalia', *New Zealand Yearbook of International Law* 9 (2006): 62–70; Jackson, 'Sovereignty-Modern'; George Lawson and Robbie Shilliam, 'Beyond Hypocrisy? Debating the "fact" and "Value" of Sovereignty in Contemporary World Politics', *International Politics; Basingstoke* 46, no. 6 (November 2009): 657–70, <http://dx.doi.org/10.1057/ip.2009.23>.

<sup>131</sup> Hassan, 'The Rise of the Territorial State and the Treaty of Westphalia'; Celia R Taylor, 'A Modest Proposal: Statehood and Sovereignty in a Global Age', *University of Pennsylvania Journal of International Economic Law* 18, no. 3 (1997): 745–809.

<sup>132</sup> James Crawford, 'The Criteria for Statehood in International Law', *British Yearbook of International Law* 48, no. 1 (1 January 1977): 93–182, <https://doi.org/10.1093/bybil/48.1.93>.

<sup>133</sup> Crawford.

...not subject, within its territorial jurisdiction, to the governmental, executive, legislative or judicial jurisdiction of a foreign State or to foreign law other than public international law [to which it binds itself].<sup>134</sup>

This conception of Westphalian sovereignty is premised on the analytical assumptions of Classical Realism that States are rational and unitary actors, which subsist in an anarchical international environment characterised by no supranational authority and the competitive pursuit of national interests.<sup>135</sup> Classical Realists held that the agency of sovereign States was maintained by the regulative principle of non-intervention and the exclusion of external authoritative influences from its territory, on account of its juridical independence.<sup>136</sup> However, a State's claim to autonomy over domestic authority structures could be vitiated, for example, where the domestic rules and policies it enforces were the direct result of its penetration by external powers.<sup>137</sup>

The nineteenth century notion of state sovereignty was conditioned by Europe's experience with non-Western societies. It was a political solution to the need to regulate fierce competition among imperial powers seeking to expand their sovereign territories and inter-state trade, including of slaves.<sup>138</sup> It has, therefore, been argued that the admission of non-European nations into the international community of sovereign States and the international legal order was not a transparent process of recognition of their inherent autonomy and legitimacy.<sup>139</sup> Instead, recognition has been a hierarchical and imperialist discursive construct.<sup>140</sup> In other words, sovereignty was not viewed as an inherent attribute of the State but was attributed to it through recognition.<sup>141</sup> The requirement for non-European societies to acquire sovereignty for their legitimacy, discursively normalised a paternalistic 'civilising' practice through which

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<sup>134</sup> Helmut Steinberger, 'Sovereignty', in *Encyclopedia of Disputes Installment 10*, ed. Rudolf L. Bindschedler et al. (Elsevier, 1987), 397–418, <https://doi.org/10.1016/B978-0-444-86241-9.50103-2>.

<sup>135</sup> Justin Rosenberg, 'What Is Wrong with Realism?', *Review of International Studies* 16, no. 4 (1990): 285–303.

<sup>136</sup> Stephen D. Krasner, 'Abiding Sovereignty', *International Political Science Review* 22, no. 3 (1 July 2001): 229–51, <https://doi.org/10.1177/0192512101223002>.

<sup>137</sup> Krasner.

<sup>138</sup> Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, 1st ed. (United Kingdom: Cambridge University Press, 2005), <https://doi.org/10.1017/CBO9780511614262>; Branch, "'Colonial Reflection' and Territoriality'.

<sup>139</sup> Anghie, *Imperialism, Sovereignty and the Making of International Law*.

<sup>140</sup> Anghie.

<sup>141</sup> Thomson, 'State Sovereignty in International Relations'.

European States diffused Western liberal values across the Global South, and which must be complied with to gain legitimacy, despite their juridical sovereignty.<sup>142</sup>

Within this context, the Commonwealth Caribbean was artificially populated as part of the imperialist British Empire during colonialism and structured on the basis of the demands of the international division of capitalist labour.<sup>143</sup> The pedigree of Caribbean States is, therefore, markedly different from those of seventeenth century Europe that took centuries to be consolidated. Decolonisation constituted the formal transferral of sovereignty, the right to self-determination and political independence to peoples of geographic territories with diverging levels of development, resource endowment and governance and institutional capacities.<sup>144</sup> Efforts to accommodate these typologies of States within the post-World War II international constitutional order has led to fierce contestation of the doctrine of state sovereignty.<sup>145</sup>

### 3.2. The Evolving Nature of Sovereignty and Commonwealth Caribbean Small States

Ontological reorientations in international legal and political theory, have reconstituted sovereignty as a fluid discursive construct.<sup>146</sup> Constructivists have sought to problematise the unacknowledged hierarchical nature of the international community in classical realist accounts.<sup>147</sup> In their estimation, imperialism and colonialism were empirical manifestations of the characteristically hierarchical authority structure of international relations. Thus, sovereignty is discursively constructed, negotiated through power dynamics and systematically

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<sup>142</sup> Anghie, *Imperialism, Sovereignty and the Making of International Law*; Robert H. Jackson, *Quasi-States: Sovereignty, International Relations and the Third World*, Transferred to digital reprint, Cambridge Studies in International Relations 12 (Cambridge: Cambridge Univ. Pr, 1990).

<sup>143</sup> Clunan and Trinkunas, 'Conceptualising Ungoverned Spaces: Territorial Statehood, Contested Authority and, Softened Sovereignty'.

<sup>144</sup> Jackson, *Quasi-States*.

<sup>145</sup> Jens Bartelson, 'The Concept of Sovereignty Revisited', *European Journal of International Law* 17, no. 2 (1 April 2006): 463–74, <https://doi.org/10.1093/ejil/chl006>; Ronald A. Brand, 'Sovereignty: The State, the Individual, and the International Legal System in the Twenty First Century', *Hastings International and Comparative Law Review*, no. 3 (2002 2001): 279–96.

<sup>146</sup> Bartelson, 'The Concept of Sovereignty Revisited'.

<sup>147</sup> John Agnew, 'Sovereignty Regimes: Territoriality and State Authority in Contemporary World Politics', *Annals of the Association of American Geographers* 95, no. 2 (1 June 2005): 437–61, <https://doi.org/10.1111/j.1467-8306.2005.00468.x>; Lake, 'The New Sovereignty in International Relations'.

institutionalised and reproduced by state practice.<sup>148</sup> Unsurprisingly, the pragmatic pursuit of self-interest by powerful States has constrained the capacity of small and weaker States to effectively exercise sovereignty.<sup>149</sup> A useful conceptual framework for problematising the inability of Commonwealth Caribbean small States to effectively exercise sovereignty, in the context of the TAMLO, is Robert Jackson's work on quasi-states.

Robert Jackson's scholarly work on quasi-states has distinguished between 'positive' and 'negative' sovereignty.<sup>150</sup> Negative sovereignty pertains to institutionalised moral and legal claims to rights that ought to regulate the relations among States, such as non-intervention and self-determination.<sup>151</sup> On the other hand, 'positive' sovereignty refers to those rights that are substantively permissive,<sup>152</sup> such as a State's exclusive political authority to determine legislative, national security and development policies within its territory or discretion to consensually participate in the TAMLO. Quasi-States, despite their juridical statehood and associated 'negative sovereignty', are often empirically unable to resist being pressurized by powerful States to comply with international standards, accept international agreements, and adapt internal affairs and institutional arrangements to externally set agendas.<sup>153</sup> Politically unjust TLOs, which are hegemonically dominated by powerful Western States, have rendered "access to positive sovereignty unjustifiably difficult,"<sup>154</sup> for quasi-states. Hence, notwithstanding formal sovereign equality, TLOs are typified by *de facto* inequality among States. With respect to reframing the TAMLO by bridging sovereignty, security and sustainable development discourses; the normalisation of the derogation of the sovereignty of quasi-states, is particularly problematic for Commonwealth Caribbean States for two reasons.

Firstly, the pre-War international legal order had spatially differentiated sovereign States based on levels of development,<sup>155</sup> and dichotomously along the Global North/South axis. Post-decolonisation, sovereignty and development have been discursively divorced.<sup>156</sup> Sustainable development has been discursively constituted as a collective international responsibility and

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<sup>148</sup> Lake, 'The New Sovereignty in International Relations'.

<sup>149</sup> Krasner, 'Abiding Sovereignty'; Lake, 'The New Sovereignty in International Relations'.

<sup>150</sup> Jackson, *Quasi-States*.

<sup>151</sup> Jackson.

<sup>152</sup> Jackson.

<sup>153</sup> Ronzoni, 'Two Conceptions of State Sovereignty and Their Implications for Global Institutional Design', December 2012, 581.

<sup>154</sup> Ronzoni, 583.

<sup>155</sup> Jackson, *Quasi-States*.

<sup>156</sup> Jackson.

Commonwealth Caribbean small island developing States (SIDS) as among its primary referents. Consequently, conditioned international institutional and foreign aid for state-building became politicised, normalised and misused by powerful States to subvert the domestic decision-making and political authority of underdeveloped States, without being seen as an infringement of state sovereignty.<sup>157</sup> These transnational discursive practices have discouraged genuine policy-ownership and the external imposition of international rules and norms have deliberately subverted the capacity of weaker States to effectively exercise positive sovereignty and regulatory self-determination.<sup>158</sup> As a case in point, the EU used disaster relief in the aftermath of devastating hurricanes in the Caribbean in 2017 as a highly securitised and politicised tool to compel Commonwealth Caribbean States' compliance with tax transparency and AML/CFTP standards according to strict unilaterally imposed timelines. Despite reeling from the economic dislocation caused by the Covid-19 pandemic, the EU's blacklisting of Jamaica in May 2020 for ML/FTP purposes was described by Senator Kamina Johnson Smith, Minister of Foreign Affairs and Foreign Trade, as indicative of the "crippling structural imbalances in the international economic system."<sup>159</sup> This reveals both perceptions of injustices and development deficit within the TAMLO.

Secondly, several Commonwealth Caribbean States have legitimately leveraged their sovereignty and right to economic self-determination by pursuing offshore financial, corporate, and recreational services as an economic transformation strategy. This has pitted their interests against those of powerful OECD States concerned about 'harmful tax competition' and the risk that banking secrecy and confidential laws in the region may encourage money laundering. OECD States have leveraged their control of access to international capital markets to coerce Caribbean States into compliance with intrusive transnational AML/CFTP regulatory standards and rules. Furthermore, they have been discursively constituted as 'objects' of intrusive transnational surveillance and coercive 'blacklisting' strategies by the OECD and the FATF, where 'strategic deficiencies' have been found in their domestic AML/CFTP regimes. Thus, despite sovereign equality in the formal juridical sense, the empirical status of state sovereignty

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<sup>157</sup> Jackson; Ronzoni, 'Two Conceptions of State Sovereignty and Their Implications for Global Institutional Design', December 2012; Joseph E. Stiglitz, *Making Globalization Work: The next Steps to Global Justice* (London: Penguin Books, 2007).

<sup>158</sup> Ronzoni, 'Two Conceptions of State Sovereignty and Their Implications for Global Institutional Design', December 2012; Stiglitz, *Making Globalization Work*.

<sup>159</sup> Hartman Reckord, 'Jamaica Seeks Support to Remove CARICOM Nations From EU's Blacklist', Jamaica Information Service, 4 June 2020, <https://jis.gov.jm/jamaica-seeks-support-to-remove-caricom-nations-from-eus-blacklist/>.

ultimately remains a question of hierarchical power asymmetries and inequities,<sup>160</sup> within the TAMLO. Transnational ‘soft law’ standards have supplanted the ‘hard’ international legal principles of non-interference in internal matters of States, self-determination, and sovereign equality.<sup>161</sup>

In the final analysis, it would appear that the modern State is experiencing a “crisis of competence” and leakage in its “vessel of sovereignty.”<sup>162</sup> Classical accounts of state sovereignty as territorially bounded and mutually exclusive are increasingly being rendered obsolete.<sup>163</sup> Within the broader discourse on sovereignty, there has been an ongoing “negotiation and redefinition of political authority in geographically complex ways.”<sup>164</sup> Constructivist discourses on sovereignty have been redefining the orthodox, legal prerogatives of sovereign States as historically contingent.<sup>165</sup> Thus the emergence of new transnational institutional actors that exercise political and legal authority over sovereign States, as key players within TLOs, is thought to represent an unconventional but empirical manifestation of sovereignty.<sup>166</sup> Empirically, however, the sovereignty of quasi-states has always been historically negotiated and constituted by hierarchical power relationship, especially in TLOs. The exploitation of technological innovations in value transfer systems and legal and corporate products and services by organised criminal and terrorist syndicates and their professional enablers are emerging threats to quasi-states’ sovereignty. The exponential growth and significance of these disruptive transnational phenomena have evidently challenged States’ control and decision-making authority.<sup>167</sup> However, framed within a pre-existing historically

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<sup>160</sup> Agnew, ‘Sovereignty Regimes’.

<sup>161</sup> Cohen, *Globalization and Sovereignty*.

<sup>162</sup> Richard K. Ashley, ‘The Geopolitics of Geopolitical Space: Toward a Critical Social Theory of International Politics’, *Alternatives* 12, no. 4 (1 October 1987): 404, <https://doi.org/10.1177/030437548701200401>.

<sup>163</sup> John Agnew, ‘The Territorial Trap: The Geographical Assumptions of International Relations Theory’, *Review of International Political Economy* 1, no. 1 (1 March 1994): 53–80, <https://doi.org/10.1080/09692299408434268>; Agnew, ‘Sovereignty Regimes’; Judith Goldstein et al., ‘Introduction: Legalisation and World Politics’, in *Legalization and World Politics*, ed. Judith Goldstein et al. (Cambridge, Massachusetts: MIT Press, 2001), 1–16; Taylor, ‘A Modest Proposal: Statehood and Sovereignty in a Global Age’; Gunther Teubner, ‘Societal Constitutionalism: Alternatives to State-Centric Constitutional Theory?’, in *Transnational Governance and Constitutionalism*, ed. Christian Joerges, Inger-Johanne Sand, and Gunther Teubner, *International Studies in the Theory of Private Law* (Oxford, United Kingdom: Hart Publishing, 2004), 3–28.

<sup>164</sup> Agnew, ‘Sovereignty Regimes’, 438.

<sup>165</sup> Daniel Philpott, *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations*, Princeton Studies in International History and Politics (Princeton N.J: Princeton University Press, 2001).

<sup>166</sup> Bartelson, ‘The Concept of Sovereignty Revisited’.

<sup>167</sup> Ashley, ‘The Geopolitics of Geopolitical Space’; Ronzoni, ‘Two Conceptions of State Sovereignty and Their Implications for Global Institutional Design’, December 2012.

and geographically contingent global legal order, transnational AML/CFTP regulatory responses and discursive practices have also eroded the sovereignty of Commonwealth Caribbean 'quasi-states'.

### 3.3. Structural Risks Factors in the Commonwealth Caribbean: Criminogenic Underdevelopment and Insecurities

Since the wave of political independence from the 1960s onwards, the security agenda within the Commonwealth Caribbean basin has largely been defined by criminogenic consequences of chronic underdevelopment.<sup>168</sup> The most pressing issues have been money laundering and related organised crime and violence, corruption, trafficking in narcotics and small arms,<sup>169</sup> and, to a lesser extent, Islamic radicalisation. During the 1980's these insecurities were exacerbated by the global depression, which caused high unemployment, the deterioration of balance of payment deficits, excessive foreign debt and low to negative economic growth.<sup>170</sup> Also unintendedly criminogenic were the conditionalities imposed under International Monetary Fund (IMF) Structural Adjustment Programmes (SAP), such as mandatory austerity measures, public-sector cuts and the privatisation of state-owned enterprises, which drastically eroded tax revenues and constrained the fiscal capacity of these small economies.<sup>171</sup>

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<sup>168</sup> Paul Sutton, 'The Politics of Small State Security in the Caribbean', *The Journal of Commonwealth & Comparative Politics* 31, no. 2 (July 1993): 1–32, <https://doi.org/10.1080/14662049308447654>.

<sup>169</sup> Ivelaw L. Griffith, 'Illicit Arms Trafficking, Corruption, and Governance in the Caribbean Fourteenth International Symposium on Economic Crime Corruption - The Enemy Within', *Dickinson Journal of International Law* 15, no. 3 (1997 1996): 487–508; Anthony P. Maingot, 'Laundering the Gains of the Drug Trade: Miami and Caribbean Tax Havens', *Journal of Interamerican Studies and World Affairs* 30, no. 2/3 (1988): 167–87, <https://doi.org/10.2307/165985>; United Nations Office on Drugs and Crime and World Bank Group, 'Crime, Violence, and Development: Trends, Costs and Policy Options in the Caribbean'.

<sup>170</sup> Sutton, 'The Politics of Small State Security in the Caribbean'.

<sup>171</sup> Sutton; Thomas E. Weisskopf, 'Capitalism, Underdevelopment and the Future of the Poor Countries', *Review of Radical Political Economics* 4, no. 1 (1 January 1972): 1–35, <https://doi.org/10.1177/048661347200400101>.

### 3.3.1. Geographical Vulnerabilities: The Trafficking in Narcotic Drugs and Small Arms in the Caribbean Basin

The Commonwealth Caribbean is not homogenous. It is constituted of twelve independent States, of which ten are small islands in the Caribbean Sea while Belize and Guyana are on the mainland of Central America and South America respectively.<sup>172</sup> While the thesis is concerned with the independent Commonwealth Caribbean, it should be noted that others have sometimes used the term as including the six British Overseas Territories/Dependencies, namely the Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands, Montserrat and the Turks and Caicos Islands.<sup>173</sup> With a cumulative population of an estimated 6.8 million, they range in size from 2.8 million in Jamaica to just over 9,000 in Montserrat.<sup>174</sup> A major risk factor that they do share, is that three of the most notorious drug trafficking corridors, from South America to the United States, Canada and Europe, are located within the Commonwealth Caribbean.<sup>175</sup> The Yucatan Channel is located between the western tip of Cuba and the Yucatan Peninsula, the Windward Passage between the eastern tip of Cuba and Haiti and the Mona Passage between the Dominican Republic and Puerto Rico.<sup>176</sup>

The trafficking in illicit narcotics and small arms are major generators of criminal proceeds and sources of laundered funds in the Commonwealth Caribbean. Since the 1960s, the Bahamas, Jamaica and Trinidad and Tobago have been exploited as transshipment points and destinations.<sup>177</sup> Constituted of an estimated 700 islands, which extend within fifty miles of the United States and located on the flight path between Colombia and Florida, the Bahamas has

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<sup>172</sup> Jacqueline Braveboy-Wagner, 'The English-Speaking Caribbean', in *The Oxford Companion to Politics of the World*, ed. Nzongola-Ntalaja et al. (Oxford University Press, USA, 2004).

<sup>173</sup> Braveboy-Wagner.

<sup>174</sup> Braveboy-Wagner.

<sup>175</sup> Drayton, 'Dirty Money, Tax and Banking'; Smellie, 'The Work of the Caribbean Regional Division of the Financial Action Task Force'; Stephen Vasciannie, 'Political and Policy Aspects of the Jamaica/United States Shiprider Negotiations', *Caribbean Quarterly* 43, no. 3 (September 1997): 34–53, <https://doi.org/10.1080/00086495.1997.11672100>.

<sup>176</sup> Vasciannie, 'Political and Policy Aspects of the Jamaica/United States Shiprider Negotiations'.

<sup>177</sup> Ivelaw L. Griffith and Trevor Munroe, 'Drugs and Democracy in the Caribbean', *The Journal of Commonwealth & Comparative Politics* 33, no. 3 (November 1995): 357–76, <https://doi.org/10.1080/14662049508447709>; Ivelaw L. Griffith, 'Narcotics Arms Trafficking, Corruption and Governance in the Caribbean', *Journal of Money Laundering Control* 1, no. 2 (February 1997): 138–47, <https://doi.org/10.1108/eb027130>.

been particularly attractive for South American drug cartels.<sup>178</sup> Jamaica's proximity to the United States and its inadequately policed coastlines have contributed to its centrality in the drug trade as well.<sup>179</sup> By the early 2000s, the United Nations had valued the Caribbean's illicit drug market at an estimated US\$3.3 billion, of which the transshipment of cocaine accounted for 85%, cannabis 13% and amphetamine-type drugs just 1%.<sup>180</sup> An estimated 80% of drugs transhipped through the region was destined for the United States.<sup>181</sup>

By 2006, Europol had estimated that approximately 40% of cocaine entering the EU was transhipped through the Caribbean.<sup>182</sup> While narco-trafficking through the Caribbean to the United States has reportedly declined due to the disruption of the Colombian drug cartel in the 1990s, cocaine seizures suggest that cocaine is still being trafficked to Canada from Barbados, Dominica, Grenada, Haiti, Jamaica, St. Lucia, St. Vincent and the Grenadines and Trinidad and Tobago.<sup>183</sup> The complex relationship among the trafficking in drugs and small arms and money laundering,<sup>184</sup> have impinged on the national security interests of several OECD countries. Geopolitically, this has explained the United States' and the OECD's interest in the close surveillance of the Commonwealth Caribbean States in the context of the TAMLO, which was initially conceived to suppress the laundering of the illicit proceeds of drug trafficking.

With respect to insecurity within the Caribbean Basin, armed violent gangs are usually producers of marijuana, facilitators of the transshipment of drugs, launderers of illicit proceeds and are thought to often bribe corrupt law enforcement officials and civil servants.<sup>185</sup> Incidences of violent crimes in the Caribbean are reportedly among the highest in the world, based on victimisation surveys conducted in the Bahamas, Barbados, Jamaica, Suriname and

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<sup>178</sup> Bruce Bullington, 'A Smugglers Paradise: Cocaine Trafficking through the Bahamas', *Crime, Law and Social Change* 16, no. 1 (1 July 1991): 59–83, <https://doi.org/10.1007/BF00389738>; Griffith and Munroe, 'Drugs and Democracy in the Caribbean'.

<sup>179</sup> Griffith and Munroe, 'Drugs and Democracy in the Caribbean'.

<sup>180</sup> United Nations Office on Drugs and Crime, 'Trends in the Illicit Drug Market in the Caribbean' (Vienna, Austria: UNODC Secretariat, 2001 2000), [https://www.unodc.org/documents/barbados/caribbean\\_trends\\_2000-2001.pdf](https://www.unodc.org/documents/barbados/caribbean_trends_2000-2001.pdf).

<sup>181</sup> United Nations Office on Drugs and Crime.

<sup>182</sup> United Nations Office on Drugs and Crime and World Bank Group, 'Crime, Violence, and Development: Trends, Costs and Policy Options in the Caribbean'.

<sup>183</sup> United Nations Office on Drugs and Crime and World Bank Group.

<sup>184</sup> Braveboy-Wagner, 'The English-Speaking Caribbean'; Maingot, 'Laundering the Gains of the Drug Trade'.

<sup>185</sup> Griffith, 'Narcotics Arms Trafficking, Corruption and Governance in the Caribbean'; United Nations Office on Drugs and Crime and World Bank Group, 'Crime, Violence, and Development: Trends, Costs and Policy Options in the Caribbean'.

Trinidad and Tobago.<sup>186</sup> This has affected economic growth from investments, tourism and the development of these countries.<sup>187</sup> Mass deportation of Caribbean nationals from Canada, the United States and the United Kingdom whom have primarily been convicted of drug, fraud and violent offences,<sup>188</sup> has both fuelled insecurities, and amplified onshore political interest, in the Caribbean Basin. An estimated 31,000 Caribbean national were deported from those countries between 1998 and 2004.<sup>189</sup> Some have been suspected to have used remittance channels to launder the proceeds organised crimes or repatriate illicit profits to Jamaica.<sup>190</sup> Financial intelligence experts interviewed during fieldwork confirmed that money laundering in Jamaica is largely perpetrated by organised criminal groups and is linked to the criminal proceeds of illegal narcotics and weapons trafficking, cyber and financial fraud schemes targeted at US citizens, corruption, and extortion. The financial investigators further reported that criminal proceeds from cocaine trafficking are not as substantial as they were in Jamaica in the 1990s and early 2000s. Additionally, they indicated that while still significant, intelligence reports suggest that cocaine trafficked from South America has seemingly been re-routed away from Jamaica through the Bahamas, Central America, the Dominican Republic, and some Eastern Caribbean States. As it relates to arms trafficking from the United States to Jamaica, there is still little knowledge of how they are being financed by organised criminal groups in the island. Marijuana, however, is reportedly bartered for guns from Haiti.

### **3.3.2. Islamic Extremism and Terrorist Financing in the Commonwealth Caribbean**

Risks of terrorism and terrorist financing (TF) in Trinidad and Tobago is high. However, these issues have not been problematic for either the Bahamas or Jamaica. A determinative factor has been ethnic and religious diversity within these islands due to their colonial legacies. Economic hardship in Trinidad and Tobago in the 1970s as a result of SAPs, led to widespread

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<sup>186</sup> Inter-American Development Bank, 'Restoring Paradise in the Caribbean: Combating Violence with Numbers' (Washington, D.C: Inter-American Development Bank (IDB), 2017), [Http://publications.iadb.org/handle/11319/8262](http://publications.iadb.org/handle/11319/8262).

<sup>187</sup> Inter-American Development Bank; Griffith and Munroe, 'Drugs and Democracy in the Caribbean'.

<sup>188</sup> United Nations Office on Drugs and Crime and World Bank Group, 'Crime, Violence, and Development: Trends, Costs and Policy Options in the Caribbean'.

<sup>189</sup> United Nations Office on Drugs and Crime and World Bank Group.

<sup>190</sup> Young, 'Dirty Money in Jamaica'.

radicalisation of young men and their conversion to Islam.<sup>191</sup> This precipitated in an attempted coup by Islamic leader Yasin Abu Bakr of the Jamaat Al Muslimeen in July 1990, who sought to exploit religious and racial divisions in the country.<sup>192</sup> In an interview with Dr Matthew Bishop, he confirmed that contemporary Islamic radicalisation predominantly among marginalised Afro-Trinidadians reflects the convergence of historical legacies, religious plurality introduced by Muslim indentured workers, development failures, and the participation of gangs from radicalised Muslim communities in the illicit narcotics trade in the Eastern Caribbean after the operations and trafficking routes of the Colombian cartels were disrupted in the 1990s. Within the context of the AML/CFTP discourse, Trinidad and Tobago reportedly has one of the highest per capita recruitment rates of foreign terrorist fighters (FTFs) in the Western Hemisphere by the Islamic State of Iraq and the Levant (ISIL).<sup>193</sup>

The Caribbean Community (CARICOM) now considers terrorism, associated violent extremism and terrorism financing as serious security concerns. Interestingly, CARICOM's discursive representation of this threat has highlighted the intrinsic connection between security and development. The opening sentences of the 2018 CARICOM Counter-Terrorism Strategy emphasises the threat posed by terrorist activities to "CARICOM's vision of integrated, inclusive, secure, and prosperous economies reflecting sustainable growth."<sup>194</sup> It further ties the threats of attacks by ISIL and Al Qaeda against "Western interests."<sup>195</sup>

CARICOM States receive a substantial amount of foreign direct investment from the United States ... and Europe, which play a critical role in relation to economic growth and development.<sup>196</sup>

As at the beginning of 2018, intelligence sources confirmed that over 200 individuals from CARICOM States have travelled to conflict zones in Syria and Iraq, reflecting the region's vulnerability to violent extremism, the foreign terrorist fighter (FTF) phenomenon and the

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<sup>191</sup> Bishnu Ragoonath, 'The Failure of the Abu Bakr Coup: The Plural Society, Cultural Traditions and Political Development in Trinidad', in *Size and Survival: The Politics of Security in the Caribbean and the Pacific*, ed. Paul K. Sutton and Anthony Payne (London, England: F. Cass, 1993).

<sup>192</sup> Ragoonath.

<sup>193</sup> Al Jazeera, 'Caribbean to Caliphate'.

<sup>194</sup> Caribbean Community Implementation Agency for Crime and Security, 'The CARICOM Counter-Terrorism Strategy' (Port-of-Spain, Trinidad & Tobago: CARICOM IMPACS, February 2018), 2, <https://www.caricomimpacs.org/Portals/0/Documents/CARICOM%20COUNTER%20TERRORISM%20STRATEGY%20Final.pdf?ver=Jy6XIyBTFFvZXUa5Ox0P6w%3d%3d&timestamp=1592271225746>.

<sup>195</sup> Caribbean Community Implementation Agency for Crime and Security, 5.

<sup>196</sup> Caribbean Community Implementation Agency for Crime and Security, 5.

potential risks to soft targets within the region's tourism sector.<sup>197</sup> These were mostly from Trinidad and Tobago. There are also concerns about the growing relationship between violent, organised crime groups and terrorist radicalisation.<sup>198</sup> In terms of terrorist financing typologies, anecdotal evidence from Trinidad and Tobago's Financial Intelligence Unit (TTFIU) has suggested that one 'subject' left Trinidad and Tobago to participate in terrorist activities in support of the Islamic State of the Levant/Syria (ISIL/ISIS).<sup>199</sup> Prior to his departure, he secured two loans from a financial institution for USD 30,000.00 and a credit card, purchased ten airline tickets to European, South American and Central American destinations and was subsequently confirmed from his online activities to have received training in the use of high-powered rifles and appeared in the ISIL magazine 'DABIQ'.<sup>200</sup> The TTFIU confirmed that another 'subject' had sent funds to individuals in an African and Middle Eastern country through several small transactions between 2009 and 2001.<sup>201</sup> It is important to locate these regional TF threat realities in light of what known about sources, methods and evolving tactics to evade transnational efforts to defund terrorist organisations. This will subsequently permit an assessment of the plausibility of perceptions of both the region's vulnerability to TF and the 'threat' that the regional regulatory context supposedly poses to transnational efforts to curb TF.

Prior to 9/11, TF was treated mostly in terms of state sponsorship and subsequently drug-related money laundering.<sup>202</sup> During the Cold War, both the Carter and Reagan Administrations encouraged the illicit drug trade operations of the Mujahideen guerrillas in Afghanistan as a means of financing their rebellion against the then Soviet-backed regime in Afghanistan, as it subsidised the CIA's covert operations there.<sup>203</sup> Iran remains a primary state sponsor, and

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<sup>197</sup> Caribbean Community Implementation Agency for Crime and Security, 3.

<sup>198</sup> Caribbean Community Implementation Agency for Crime and Security, 'CARICOM Counter-Terrorism Strategy'; Caribbean Financial Action Task Force, 'Trinidad & Tobago 4th Round MER'.

<sup>199</sup> Caribbean Financial Action Task Force, 'CFATF Risk, Trends & Methods Group Typology Report on Money Laundering and Terrorist Financing' (Port-of-Spain, Trinidad & Tobago: Caribbean Financial Action Task Force, 2018), <https://cfatf-gafic.org/documents/typologies/10970-cfatf-typology-report-on-money-laundering-and-terrorist-financing/file>.

<sup>200</sup> Caribbean Financial Action Task Force.

<sup>201</sup> Caribbean Financial Action Task Force.

<sup>202</sup> Anne L. Clunan, 'The Fight against Terrorist Financing', *Political Science Quarterly* 121, no. 4 (2006): 569–96; Hamed Tofangfaz, 'Rethinking Terrorist Financing; Where Does All This Lead?', *Journal of Money Laundering Control*; London 18, no. 1 (2015): 112–30, <http://dx.doi.org/10.1108/JMLC-12-2013-0049>.

<sup>203</sup> Michael Freeman, 'The Sources of Terrorist Financing: Theory and Typology', *Studies in Conflict & Terrorism* 34, no. 6 (June 2011): 461–75, <https://doi.org/10.1080/1057610X.2011.571193>; Mahmood Mamdani, *Good Muslim, Bad Muslim: America, the Cold War, and the Roots of Terror*, 1st ed (New York: Pantheon Books, 2004).

reportedly supplies Hezbollah with an estimated US\$100 million annually.<sup>204</sup> Syria is a known sponsor of Hezbollah, Hamas and the Palestinian Jihad, whereas the Pakistani Inter-services Intelligence agency (ISI) has been for the Afghan Taliban.<sup>205</sup> In the late 1990s, intelligence sources confirmed that the Afghan Taliban was successfully levying between US\$15 and 27 million on opium production to evade economic sanctions targeted at its engagement in licit activities.<sup>206</sup> They were estimated to have been making up to \$400 million in profit from the drug trade.<sup>207</sup> The al Qaeda 9/11 terrorist attacks amplified the need to identify, freeze and confiscate the assets of terrorist organisations and their financiers. Within a sympathetic global milieu, the United States' transnationally securitised TF.<sup>208</sup> This discourse on terrorist financing was geopolitically framed not only as a 'collective problem', but almost exclusively in terms of 'enemy construction' and vilification of the 'Islamic threat',<sup>209</sup> and the categorical delegitimization of Islamic finance.<sup>210</sup> In the current TAMLO, the Islamic State of Iraq and the Levant (ISIL) has been discursively constructed as the biggest threat to 'Western interests'. ISIL was consolidated from al Qaeda in Iraq and Islamic State of Iraq (ISI) under the leadership of Abou Bakr al-Baghdadi in 2013.<sup>211</sup> Since then, the need to disrupt financial flows among ISIL, its financiers and terrorist cells was elevated on policy agenda within the TAMLO.

Direct costs of perpetrating terrorist attacks are relatively low,<sup>212</sup> especially given the emerging typologies of terrorist threats such as 'home-grown' radicalisation and low casualty

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<sup>204</sup> Freeman, 'The Sources of Terrorist Financing'.

<sup>205</sup> Freeman; Jimmy Gurulé, 'The Need to Refocus the U.S. Government's Post-9/11 Counter-Terrorist Financing Strategy Directed at Al Qaeda to Target the Funding of ISIS', *Valparaiso University Law Review* 50, no. 2 (21 November 2016): 493–518.

<sup>206</sup> Clunan, 'The Fight against Terrorist Financing'.

<sup>207</sup> Freeman, 'The Sources of Terrorist Financing'.

<sup>208</sup> Clunan, 'The Fight against Terrorist Financing'.

<sup>209</sup> Clunan; Tanja Collet, 'Civilization and Civilized in Post-9/11 US Presidential Speeches', *Discourse & Society* 20, no. 4 (2009): 455–75; Richard Jackson, 'Constructing Enemies: "Islamic Terrorism" in Political and Academic Discourse', *Government and Opposition* 42, no. 3 (2007): 394–426, <https://doi.org/10.1111/j.1477-7053.2007.00229.x>; Lazar and Lazar, 'The Discourse of the New World Order'.

<sup>210</sup> Mona Atia, 'In Whose Interest? Financial Surveillance and the Circuits of Exception in the War on Terror', *Environment and Planning D: Society and Space* 25, no. 3 (1 June 2007): 447–75, <https://doi.org/10.1068/d1805g>.

<sup>211</sup> Dimitrios Stergiou, 'ISIS Political Economy: Financing a Terror State', *Journal of Money Laundering Control*; London 19, no. 2 (2016): 189–207, <http://dx.doi.org/10.1108/JMLC-06-2015-0021>; Michael Tierney, 'Well Funded and Dangerous: Assessing the Islamic State's Financing Operations', *Journal of Money Laundering Control*; London 20, no. 2 (2017): 159–71, <http://dx.doi.org/10.1108/JMLC-07-2016-0026>.

<sup>212</sup> Freeman, 'The Sources of Terrorist Financing'; Nikos Passas, 'Fighting Terror with Error: The Counter-Productive Regulation of Informal Value Transfers', *Crime, Law and Social Change* 45, no. 4 (1 May 2006): 315–36, <https://doi.org/10.1007/s10611-006-9041-5>; Alessio Shostak, 'Striking at Their Core: De-Funding the Islamic State of Iraq and Syria', *Contemporary Voices: St Andrews Journal of International Relations* 8, no. 1 (8 February 2017): 43–52, <https://doi.org/10.15664/jtr.1327>; Tofangsaz, 'Rethinking Terrorist Financing; Where Does All This Lead?'

attacks by lone actors and small cells (LASCs) that are neither directly connected to established terrorist networks nor in need of detectable uses of the formal financial system to perpetrate attacks.<sup>213</sup> However, operational costs for terrorist organizations are quite significant.<sup>214</sup> ISIL has operated like a ‘state-like’ entity in Iraq and Syria.<sup>215</sup> For ISIL, these costs cover direct terrorist attacks, paying salaries, arms, military training and equipment, recruitment, propaganda and providing social services to consolidate its power and legitimacy in occupied territories.<sup>216</sup> Moreover, funds and material support for TF may be derived from either licit or illicit sources. ISIL is widely regarded as one of the most well-funded terrorist organisations.<sup>217</sup> An estimated 19,000 foreign fighters from over 90 countries joined ISIL.<sup>218</sup> Intelligence reports have confirmed that ISIL foreign fighters have smuggled cash into Iraq.<sup>219</sup> On occasions they have to finance their living costs and transfer funds from their respective countries of origin.<sup>220</sup> However, unlike other terrorist organisations, ISIL is known to be largely self-financing with only an estimated 5% of its budget provided by foreign financiers particularly from Gulf States such as Kuwait and Qatar.<sup>221</sup> ISIL has leveraged its territorial control for fundraising.<sup>222</sup> Smuggling Iraq’s oil into Iran, Jordan and Turkey, and running gas stations generate most of its funds.<sup>223</sup> Intelligence reports have suggested that ISIL has been generating between \$100 and \$200 million annually from trading oil and gas.<sup>224</sup> ISIL was estimated to have had an estimated US\$2 billion in assets at its disposal in 2014.<sup>225</sup> ISIL cells have also resorted to illicit

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<sup>213</sup> Stuart Croft and Cerwyn Moore, ‘The Evolution of Threat Narratives in the Age of Terror: Understanding Terrorist Threats in Britain’, *International Affairs* 86, no. 4 (2010): 821–35, <https://doi.org/10.1111/j.1468-2346.2010.00914.x>; Raffaello Pantucci, Clare Ellis, and Lorien Chaplais, ‘Lone-Actor Terrorism: Literature Review’, *Countering Lone-Actor Terrorism No.1* (London (UK): Royal United Services Institute for Defence and Security Studies (RUSI), 2015), [https://rusi.org/sites/default/files/201512\\_clat\\_literature\\_review\\_0.pdf](https://rusi.org/sites/default/files/201512_clat_literature_review_0.pdf); Stephen Reimer and Matthew Redhead, ‘Financial Intelligence in the Age of Lone Actor Terrorism’, *Research Briefing No.3* (Brussels, Belgium: Royal United Services Institute for Defence and Security Studies (RUSI), Europe, November 2019).

<sup>214</sup> Freeman, ‘The Sources of Terrorist Financing’.

<sup>215</sup> Stergiou, ‘ISIS Political Economy’; Tierney, ‘Well Funded and Dangerous’.

<sup>216</sup> Clunan, ‘The Fight against Terrorist Financing’; Shostak, ‘Striking at Their Core’; Tofangsaz, ‘Rethinking Terrorist Financing; Where Does All This Lead?’

<sup>217</sup> Shostak, ‘Striking at Their Core’; Tierney, ‘Well Funded and Dangerous’.

<sup>218</sup> Gurulé, ‘The Need to Refocus the U.S. Government’s Post-9/11 Counter-Terrorist Financing Strategy Directed at Al Qaeda to Target the Funding of ISIS’; Stergiou, ‘ISIS Political Economy’.

<sup>219</sup> Freeman, ‘The Sources of Terrorist Financing’.

<sup>220</sup> Stergiou, ‘ISIS Political Economy’.

<sup>221</sup> Freeman, ‘The Sources of Terrorist Financing’; Shostak, ‘Striking at Their Core’; Stergiou, ‘ISIS Political Economy’.

<sup>222</sup> Shostak, ‘Striking at Their Core’.

<sup>223</sup> Stergiou, ‘ISIS Political Economy’.

<sup>224</sup> Shostak, ‘Striking at Their Core’; Tierney, ‘Well Funded and Dangerous’.

<sup>225</sup> Shostak, ‘Striking at Their Core’; Stergiou, ‘ISIS Political Economy’; Tierney, ‘Well Funded and Dangerous’.

activities including extortion, kidnapping for ransom, smuggling of drugs, cash, diamonds and people;<sup>226</sup> the sale of antiquities and cultural artefacts on black markets.<sup>227</sup> ISIL has benefited from the diversion of charitable donations from non-profit organisations (NPOs) involved in humanitarian relief operations in territories under ISIL control.<sup>228</sup>

With respect to the cross-border transfer of funds for terrorist financing, Hawalas based on informal networks remain problematic. However, increased regulation of the formal financial system, and especially the ban on wire transfers, to banks in ISIL controlled territory, have meant that it is unlikely that the global financial system will be significantly exploited by ISIL.<sup>229</sup> An estimated 90 Iraqi banks are located in ISIL occupied territories, but the Iraqi Central Bank has instructed local banks to prevent wire transfers to those banks.<sup>230</sup> International banks would also face economic sanctions for wire funds to those banks. Given their domestic sources of funding, TF of ISIL is likely to be most effectively targeted within ISIL controlled territories. This has guided the United States' strategy on the ground, of recovering vital oil infrastructures and resources in collaboration with Kurdish and Iraqi forces to defund ISIL.<sup>231</sup> Prepaid cards (i.e. cards loaded with certain amount of electronic value redeemable at points of sale or ATMs), are thought to be an emerging TF method for smuggling cash transnationally and have been found in the possession of actual perpetrators.<sup>232</sup> Informal value transfer systems such as Hawala networks, carry a high risk of being misused for TF as they leave not audit trail and are operated through networks of intermediaries to make funds accessible across borders without the physical movement of cash.<sup>233</sup> However, there has been a noticeable lack of recent evidence of hawalas' use by ISIL, which could suggest they are no longer being extensively relied upon.<sup>234</sup> While there is the risk of new payment methods (NPMs) and services being exploited for TF, there is little empirical evidence that they are

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<sup>226</sup> Freeman, 'The Sources of Terrorist Financing'; Shostak, 'Striking at Their Core'.

<sup>227</sup> Tierney, 'Well Funded and Dangerous'.

<sup>228</sup> Clunan, 'The Fight against Terrorist Financing'; Freeman, 'The Sources of Terrorist Financing'; Stergiou, 'ISIS Political Economy'.

<sup>229</sup> Peter R. Neumann, 'Don't Follow the Money: The Problem with the War on Terrorist Financing Essays', *Foreign Affairs* 96, no. 4 (2017): 93–102; Shostak, 'Striking at Their Core'.

<sup>230</sup> Stergiou, 'ISIS Political Economy'.

<sup>231</sup> Neumann, 'Don't Follow the Money'; Shostak, 'Striking at Their Core'.

<sup>232</sup> Shostak, 'Striking at Their Core'.

<sup>233</sup> Freeman, 'The Sources of Terrorist Financing'; Shostak, 'Striking at Their Core'.

<sup>234</sup> Shostak, 'Striking at Their Core'.

being significantly misused.<sup>235</sup> For instance, given the need for cash, claims that ISIL has been resorting to the use of virtual currencies via Dark Wallet, has been questioned.<sup>236</sup>

The funding methods of terrorist groups have historically evolved in response to counter-measures.<sup>237</sup> As ISIL's territorial control is eroded and critical oil infrastructure either recaptured or destroyed by ongoing airstrikes, it has been predicted that ISIL will come to rely on its transnational network for funding.<sup>238</sup> The FATF has already reported that transnational law enforcement efforts and targeted financial sanctions have disrupted ISIL's financial structure, including empowering foreign branches to raise funds locally.<sup>239</sup> Like Hezbollah, ISIL may also attempt to further consolidate its domestic funding sources by increasing its legitimacy among local Sunni populations through its social services branch.<sup>240</sup> However, its capacity to do so will depend on its ability to maintain a steady income stream. A study based on interviews with 65 former and current jihadist operative in recruitment, fundraising and movement facilitation confirmed the importance of the use of cash to evade electronic surveillance or detection and faith-based admonishment by the Qur'an in 'giving generously to the jihadist cause' in sustaining terrorist finance from thousands of contributors.<sup>241</sup> This raises questions about whether the overregulation of the formal financial sector is fit-for-purpose given rising compliance costs;<sup>242</sup> or could disruptively render TF less reliable, efficient or more costly,<sup>243</sup> as was envisaged.

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<sup>235</sup> Financial Action Task Force, 'Emerging Terrorist Financing Risks' (Paris, France: FATF/OECD Secretariat, 2015), <http://www.fatfgafi.org/media/fatf/documents/reports/Emerging-Terrorist-Financing-Risks.pdf>; Shostak, 'Striking at Their Core'.

<sup>236</sup> Stergiou, 'ISIS Political Economy'.

<sup>237</sup> Freeman, 'The Sources of Terrorist Financing'; Tierney, 'Well Funded and Dangerous'.

<sup>238</sup> Tierney, 'Well Funded and Dangerous'.

<sup>239</sup> Financial Action Task Force, 'FATF Actions to Identify and Disrupt ISIL, Al-Qaeda and Affiliates' Financing' (FATF/OECD Secretariat), accessed 16 July 2020, <http://www.fatfgafi.org/publications/methodsandtrends/documents/fatf-action-against-terrorist-financing-june-2019.html>.

<sup>240</sup> Tierney, 'Well Funded and Dangerous'.

<sup>241</sup> Aimen Dean, Edwina Thompson, and Tom Keatinge, 'Draining the Ocean to Catch One Type of Fish: Evaluating the Effectiveness of the Global Counter-Terrorism Financing Regime', *Perspectives on Terrorism* 7, no. 4 (2013): 62–78.

<sup>242</sup> Dean, Thompson, and Keatinge.

<sup>243</sup> Matthew Levitt, 'Follow the Money: Leveraging Financial Intelligence to Combat Transnational Threats', *Georgetown Journal of International Affairs* 12, no. 1 (2011): 34–43.

### 3.3.3. Capitalism and Special Differentiation: Commonwealth Caribbean Offshore Finance and Business Services Sector

The decision by many Commonwealth Caribbean States to establish offshore finance and business sectors in the 1960s,<sup>244</sup> eventually led to their ‘othering’ as ‘high-risk’ jurisdictions for money laundering and ‘disciplining’ as discursively constituted ‘objects’ of compliance-inducing regulation within TAMLO. To problematise these discursive representations, it is important to contextualise and historicise the emergence of the offshore finance and business industry within the region. Since the 1960s, Commonwealth Caribbean States have been ‘locked-in’ a trajectory of chronic criminogenic underdevelopment, exacerbated by their resource constraints as mostly small island developing states (SIDS). The historical structuring of their economies on unsustainable agricultural trade and dependence on preferential EU market access has determined the region’s growth trajectory and ‘path dependence’. Thus, the contemporary struggles to reverse the region’s economic trajectory are a direct consequence of historical choices,<sup>245</sup> made on its behalf, during colonialism, as to its role within the global division of labour and the agrarian value chain. Diversification into trade in services was, therefore, an economic imperative.<sup>246</sup> It was driven by declining terms-of-trade and export revenue from agriculture, successful challenges to EU preferential market access for bananas and sugar;<sup>247</sup> and a futile anti-imperialist struggle against the capitalist exploitation of the Global South to sustain economic progress in the Global North,<sup>248</sup> despite successfully

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<sup>244</sup> John Christensen and Mark P. Hampton, ‘Economics of Offshore: Who Wins, Who Loses?’, *The Regulator* 4, no. 4 (2000): 1–7.

<sup>245</sup> Klaus Dodds, ‘Political Geography III: Critical Geopolitics after Ten Years’, *Progress in Human Geography* 25, no. 3 (1 September 2001): 469–84, <https://doi.org/10.1191/030913201680191790>; Ron Martin and Peter Sunley, ‘Path Dependence and Regional Economic Evolution’, *Journal of Economic Geography* 6, no. 4 (1 August 2006): 395–437, <https://doi.org/10.1093/jeg/lbl012>.

<sup>246</sup> Dirk Willem te Velde and Swapna Nair, ‘Foreign Direct Investment, Services Trade Negotiations and Development: The Case of Tourism in the Caribbean’, *Development Policy Review* 24, no. 4 (2006): 437–54, <https://doi.org/10.1111/j.1467-7679.2006.00333.x>.

<sup>247</sup> Nand C. Bardouille, ‘The Offshore Services Industry in the Caribbean: A Conceptual and Sub-Regional Analysis’, *Economic Analysis and Policy* 31, no. 2 (1 September 2001): 111–24, [https://doi.org/10.1016/S0313-5926\(01\)50016-8](https://doi.org/10.1016/S0313-5926(01)50016-8); Lorand Bartels, ‘The Trade and Development Policy of the European Union’, *European Journal of International Law* 18, no. 4 (1 September 2007): 715–56, <https://doi.org/10.1093/ejil/chm042>; Karen E. Bravo, ‘Challenges to Caribbean Economic Sovereignty in a Globalizing World Symposium Articles’, *Michigan State University College of Law International Law Review* 20, no. 1 (2012 2011): 33–56.

<sup>248</sup> Veront M. Satchell, ‘Capitalism and Slavery Fifty Years Later: Eric Eustace Williams - A Reassessment of the Man and His Work’, *The Journal of Caribbean History; Kingston* 36, no. 1 (2002): 189–VII.

advocating for the declaration of a New International Economic Order.<sup>249</sup> Offshore finance and business services were a deliberate ‘regional path creation’ strategy by several Commonwealth Caribbean States to ‘reinvent’ themselves. The sector was seen as an economic solution to increasing marginalisation within the globalised economy, taking ownership for financing their sustainable development, and reducing dependence on ‘conditioned’ foreign aid that usually impinged on their sovereignty.

The difficulties that Caribbean countries face in accessing international capital markets are only seldom recognised and, consequently, their need to prospect for alternative, low-cost mobile capital using liberal financial regimes supported by banking secrecy laws.<sup>250</sup> Servicing their sovereign debt,<sup>251</sup> for instance, has been difficult. The classification of most Commonwealth Caribbean States as Middle-Income Countries (MICs) by the IMF, on the basis of GDP per capita levels, without regard to entrenched inequalities or vulnerability indices, has rendered these heavily indebted middle income countries (HIMICs) ‘insufficiently poor’ to access the Heavily Indebted Poor Countries Initiative (HIPC) or the Multilateral Debt Relief Initiative (MDRI).<sup>252</sup> Furthermore, in 2011 the EU adopted its ‘An Agenda for Change’ policy, which proposed to improve the effectiveness of its delivery of foreign development assistance by focusing on countries most in need. Based on its ‘differentiation principle’, Caribbean MICs, have been deemed as already on a ‘sustained growth path’ and, consequently, will be progressively “graduated” from EU development aid.<sup>253</sup> Least Developed Countries (LDCs), perceived to offer the “best value for money” in terms of poverty eradication, would be

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<sup>249</sup> Liam Campling, ‘A Critical Political Economy of the Small Island Developing States Concept: South–South Cooperation for Island Citizens?’, *Journal of Developing Societies* 22, no. 3 (1 September 2006): 235–85, <https://doi.org/10.1177/0169796X06068031>; Dennis C. Canterbury, *European Bloc Imperialism*, Studies in Critical Social Sciences, Critical Global Studies, v. 23. v. 1 (Leiden; Boston: Brill, 2010); Margot E. Salomon, ‘From NIEO to Now and the Unfinishable Story of Economic Justice’, *International and Comparative Law Quarterly* 62, no. 1 (2013): 31–54.

<sup>250</sup> Barry A. K. Rider, ‘The Crusade against Money Laundering - Time to Think’, *European Journal of Law Reform* 1, no. 4 (1999): 501–26.

<sup>251</sup> United Nations, ‘Addis Ababa Action Agenda of the Third International Conference on Financing for Sustainable Development’ (United Nations Secretariat, 2015), [http://www.un.org/esa/ffd/wp-content/uploads/2015/08/AAAA\\_Outcome.pdf](http://www.un.org/esa/ffd/wp-content/uploads/2015/08/AAAA_Outcome.pdf).

<sup>252</sup> International Monetary Fund, ‘IMF Factsheet - Debt Relief under the Heavily Indebted Poor Countries (HIPC) Initiative’ (International Monetary Fund, 2007), <https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/16/11/Debt-Relief-Under-the-Heavily-Indebted-Poor-Countries-Initiative>.

<sup>253</sup> European Commission, ‘Increasing the Impact of EU Development Policy- An Agenda for Change’, European Commission Communication (Brussels, Belgium: European Commission, 13 October 2011), [https://ec.europa.eu/international-partnerships/system/files/agenda-for-change-com2011-637-final\\_en.pdf](https://ec.europa.eu/international-partnerships/system/files/agenda-for-change-com2011-637-final_en.pdf).

prioritised.<sup>254</sup> Such aid is often leveraged as a ‘disciplining’ tool even within the TAMLO. It may be recalled that after being ravaged by hurricanes, the EU threatened eight Commonwealth Caribbean countries with the withdrawal of development assistance should they fail to take adequate steps strengthen their AML/CFTP and tax transparency regulatory frameworks according to unilaterally imposed timetable.<sup>255</sup> This exemplified powerful onshore States’ complete disregard for the sovereignty and development realities of these small economics where their own economic interests in capital flight and ‘harmful tax competition’ are engaged. The foregoing contextualisation of development and geopolitical realities in which Commonwealth Caribbean offshore finance sectors operate is not intended to justify their alleged harbouring of illicit capital. Rather, recognising that genuinely problematic access to global finance has materially shaped the region’s strategic interests,<sup>256</sup> could offer greater insight into their participation within the TAMLO. Offshore finance has undisputedly been a major driver of economic growth, employment, and infrastructural development in the Commonwealth Caribbean. In some cases, like the Bahamas, it has contributed significantly more to GDP than tourism or other economic sectors.<sup>257</sup> Its importance to regional development has been recognised by the Commonwealth Secretariat/World Bank Joint Task Force on Small States, which concluded that the survival of small economies necessarily depends on how well they adapt their economic strategies to maximize the opportunities presented by globalization.<sup>258</sup>

Commonwealth Caribbean States’ offshore strategy has conventionally been framed as their sovereign prerogative and jurisdictional autonomy to determine their fiscal policies.<sup>259</sup> Contrary to the discursive representation of the Caribbean as a ‘shadowy’ and ‘ungoverned’ offshore space, their OFCs have provided several legitimate financial services, underpinned by banking secrecy and confidentiality, little or no tax liabilities and the protection of assets from

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<sup>254</sup> European Commission.

<sup>255</sup> European Commission.

<sup>256</sup> Rider, ‘The Crusade against Money Laundering - Time to Think’.

<sup>257</sup> William Vlcek, ‘Money Laundering Prevention and Small State Development: Insights from the Case of the Bahamas’, *Commonwealth & Comparative Politics* 48, no. 3 (1 July 2010): 373–91, <https://doi.org/10.1080/14662043.2010.492973>.

<sup>258</sup> David Peretz, Rumman Faruqi, and Eliawony J. Kisanga, *Small States in the Global Economy: Background Papers Presented to the Commonwealth Secretariat/World Bank Joint Task Force on Small States* (London, UK: Commonwealth Secretariat, 2001).

<sup>259</sup> Rose-Marie Belle Antoine, ‘The Caribbean Offshore Financial Services Revolution- A Bold, Futuristic Initiative Requiring Brave Leadership’ (Forum on the Future of the Caribbean, Faculty of Law, University of the West Indies, St. Augustine, Trinidad & Tobago, 5 May 2015); Christensen and Hampton, ‘Economics of Offshore: Who Wins, Who Loses?’

legal, political and fiscal risks.<sup>260</sup> Furthermore, they often operate as financial market intermediaries or offshore booking centres offering both financial and non-financial services such as trust and estate planning, international banking, international business company (IBC) registration and incorporation and captive insurance and mutual funds management.<sup>261</sup>

The commercialisation of offshore finance in the Commonwealth Caribbean also had colonial precedence. Long before its political independence from the United Kingdom, the Bahamas became the first OFC in the Commonwealth Caribbean in 1936. British and Canadian financial interests used the jurisdiction to run wealth management operations for international private clients, which were eventually acquired by the National Westminster Bank.<sup>262</sup> The Bahamas hosts the fourth largest OFC in the world, valued at an estimated US\$332 billion as at December 2016.<sup>263</sup> It consists of approximately of 79 international banks with trust licences owned by Bahamian, Canadian, US and Swiss interests with assets of approximately US\$175 billion; 920 investment funds with assets totalling US\$135 billion, 174 trusts and insurance companies and 175,675 international business corporations.<sup>264</sup> The shrink in assets held by international banks in the Bahamas from US\$500 billion in 2011 to US\$175 in 2016, has been attributed to the impact of global regulatory efforts targeted at OFCs.<sup>265</sup> As a deliberately conceived development strategy, offshore sectors in the Bahamas, the British Virgin Islands and the Cayman Islands had precipitated in the expansion of the tourism sector, large capital investments in information and communication technologies (ICT) and transportation infrastructures and incrementally attracted foreign direct investments.<sup>266</sup> Thus, from the 1960s through to the 1990s newly independent Commonwealth Caribbean countries were lured into the provision of offshore financial services as well by the prospect of increased employment opportunities, the collection of tax revenue through licencing fees, the leasing of properties and economic growth without large capital investments.<sup>267</sup>

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<sup>260</sup> Jack A. Blum et al., 'Financial Havens, Banking Secrecy and Money-Laundering', *Criminal Justice Matters* 36, no. 1 (1 January 1999): 22–23, <https://doi.org/10.1080/09627259908552870>.

<sup>261</sup> Bardouille, 'The Offshore Services Industry in the Caribbean'; Nand C. Bardouille, 'Towards a Convergence of Regulatory and Supervisory Modalities of Offshore and Onshore Banking Sectors in the OECS Sub-Region', *Journal of Money Laundering Control* 4, no. 4 (2001): 384–94.

<sup>262</sup> Esther Suss, Oral Williams, and Chandima Mendis, 'Offshore Financial Centres in the Caribbean: Prospects in a New Environment', *The World Economy* 28 (1 February 2005): 1173–88, <https://doi.org/10.1111/j.1467-9701.2005.00686.x>.

<sup>263</sup> International Monetary Fund, 'Concept of Offshore Financial Centres'.

<sup>264</sup> International Monetary Fund.

<sup>265</sup> International Monetary Fund.

<sup>266</sup> Suss, Williams, and Mendis, 'Offshore Financial Centres in the Caribbean'.

<sup>267</sup> Suss, Williams, and Mendis.

### 3.3.3.1. *Principled Hypocrisy or Misguided Truth? Onshore Complicity in Offshore Finance in the Commonwealth Caribbean*

Without [truly] understanding tax havens we will never properly understand the economic history of the modern world.<sup>268</sup>

The development of the offshore financial sector in the Commonwealth Caribbean was a product of sustainability engineering by the United Kingdom,<sup>269</sup> before becoming securitised as a ‘harmful’ and opportunistic tax competition strategy. Save for the United States’ historical vigilance, given the importance of drug trafficking and money laundering on its national security agenda, the Caribbean was actively encouraged by the United Kingdom and other European countries to pursue OFC-led development.<sup>270</sup> The establishment of the Eurodollar market in the City of London in 1957,<sup>271</sup> arguably, has been one of the most influential factors contributing to the emergence of OFCs in the Commonwealth Caribbean. A regulatory vacuum was created by a finding by UK courts, at common law, that the jurisdiction of a company’s registration did not automatically confer residency and therefore tax liabilities if its management and operations occurred in a foreign jurisdiction.<sup>272</sup> The development of the Eurodollar market therefore signalled a retrenchment of the Bretton Woods’ ethos of restrictive international capital controls as third-party currency transactions were accounted as having occurred offshore and therefore placed outside the United Kingdom’s regulatory and taxation control. This effectively supplanted aspects of the United Kingdom’s fiscal sovereignty with a largely unregulated international capital market.<sup>273</sup>

In terms of onshore complicity, the UK Government, through the Foreign and Commonwealth Office, played a deliberate and arguably pivotal role in financing the

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<sup>268</sup> Nicholas Shaxson, ‘Follow the Money: Inside the World’s Tax Havens’, *The Guardian*, 2015, <https://www.theguardian.com/business/2015/jun/19/tax-havens-money-cayman-islands-jersey-offshore-accounts>.

<sup>269</sup> Shaxson, *Treasure Islands*.

<sup>270</sup> Mark Hampton, *The Offshore Interface: Tax Havens in the Global Economy* (Basingstoke, Hampshire: Macmillan [u.a.], 1996).

<sup>271</sup> Gary Burn, ‘The State, the City and the Euromarkets’, *Review of International Political Economy* 6, no. 2 (1 January 1999): 225–61, <https://doi.org/10.1080/096922999347290>.

<sup>272</sup> Vlcek, ‘Behind an Offshore Mask’.

<sup>273</sup> Burn, ‘The State, the City and the Euromarkets’.

development of OFCs in the Commonwealth Caribbean, and particularly in British Overseas Territories, beginning in 1961.<sup>274</sup> One of the few historical inquiries into the emergence of OFCs, based on the analysis of thousands of British official records, documented the United Kingdom's initial permissiveness and encouragement of its dependencies establishing OFCs as an international development policy, premised on Westminster's concerns about the cost of development assistance to then colonial jurisdictions during an economic depression.<sup>275</sup> Indeed, the hefty budgetary costs were becoming increasingly unjustifiable in Westminster given its failed attempts to persuade the Commonwealth Caribbean to remain in the British West Indies Federation instead of pursuing independence. This was largely attributable to political squabbles between Jamaica and Trinidad and Tobago over how the region's development was to be financed within the context of the West Indies Federation.<sup>276</sup> The emergence in 1961 of a British policy on tax havens in the Commonwealth Caribbean directly coincides with advanced independence movements in Jamaica and Trinidad and Tobago. This, perhaps, explains why these two countries did not pursue offshore finance, as they would have been preoccupied with the political, economic, and foreign policy necessities of their then imminent independence in August 1962.

Serious concerns only emerged in the United Kingdom following losses in tax revenues and a deterioration of its balance of payments as a result of tax avoidance and capital flight encouraged by the emergence of banking secrecy laws and innovative offshore purpose trusts in some Commonwealth Caribbean jurisdictions.<sup>277</sup> There have been instances of the criminal misuse of offshore finance. For instance, prior to the Bahamas becoming independent in 1973, the infamous Mr. Wallace Groves, a prominent US financier who was convicted of fraud and had known association with the Miami mafia, had negotiated a series of infrastructural development agreements with the Bahamian authorities between the 1950s and 1960s, which permitted him to lease over 50,000 acres of land on the Grand Bahía Island, enter the hospitality and gaming industries and awarded tax concessions.<sup>278</sup> In return, he would develop the country's port, construct affordable housing solutions for Bahamians and procure medical and

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<sup>274</sup> European Business History Association, 'The Formation of a British Tax Haven Policy, 1961-1971: Transit Capitalism in an Era of Decolonization', 2017, [Http://ebha.org/public/C7:paper\\_file:154](http://ebha.org/public/C7:paper_file:154).

<sup>275</sup> European Business History Association.

<sup>276</sup> Patsy Lewis, *Surviving Small Size: Regional Integration in Caribbean Ministates* (University of the West Indies Press, 2002).

<sup>277</sup> European Business History Association, 'The Formation of a British Tax Haven Policy, 1961-1971: Transit Capitalism in an Era of Decolonization'.

<sup>278</sup> European Business History Association.

school supplies.<sup>279</sup> Yet, up to the late 1970s, the United Kingdom had been providing technical assistance to support Commonwealth Caribbean countries that were venturing in the offshore finance, including to build their capacities for monitoring and regulation of the sector.<sup>280</sup> The United Kingdom has come to play a prominent and arguably hypocritical role in the G7's efforts to tightly regulate Commonwealth Caribbean OFCs and coercively diffuse and transnational AML/CFTP standards. It has been observed that it is precisely because of its historical complicity in offshore finance in the region why it initially appeared ambivalent while other G20 countries were forcefully advocating for a stronger regulatory approach towards British Overseas Territories/Dependencies.<sup>281</sup> However, the later consolidation of Caribbean offshore finance sector was also a deliberate competition strategy in response to key fiscal policy developments in OECD countries.

Onshore austerity and taxation policies and the consequent capital flight offshore, contributed to the growth of the offshore sector. In the case of the historically dominant presence of American banks in the Caribbean, the prohibition of commercial banks from engaging in investment banking under the Glass-Steagall Act of 1933 and the imposition of high tax and restrictive capital controls in the United States and other OECD countries to reduce balance of payment deficits, created a facilitative environment in the Caribbean for the proliferation of OFCs in the 1960s and 1970s.<sup>282</sup> Offshore finance in the Caribbean also developed in tandem with the imposition of unfavourable capital controls and balance of payment stabilisation measures introduced under the 1963 Interest Equalisation Act and the 1965 Voluntary Credit Restraint Programme.<sup>283</sup> Another contributing factor was the subsequent decision by the Board of the US Federal Reserve in 1966 to prevent massive transfers of deposits to non-bank financial institutions in the United States by authorising the establishment of offshore branches in jurisdictions with nominal or no tax, no reserve restrictions and deposit insurance.<sup>284</sup> Thus, the Caribbean offshore sector was largely unproblematic for the United States' strategic interests until the US Federal Reserve authorised the establishment of International Banking Facilities locally in the early 1980s.<sup>285</sup> It then

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<sup>279</sup> European Business History Association.

<sup>280</sup> European Business History Association.

<sup>281</sup> European Business History Association.

<sup>282</sup> Ali, *Money Laundering Control in the Caribbean*.

<sup>283</sup> Ali.

<sup>284</sup> Ali.

<sup>285</sup> Ali.

became a competition issue. The global oil shocks in the late 1970s precipitated into a global debt crisis in the 1980s, which forced OECD countries to implement unfavourable austerity measures and tax regulations to service mounting international debt and which led to capital flight and tax-related money laundering.<sup>286</sup>

### 3.3.3.2. *The Discursive Stigmatisation of Caribbean Offshore Jurisdictions as ‘Tax Havens’ and ‘Pariah States’*

Some vivid terms serve political and normative ends admirably, despite hindering explanation of the social phenomenon at which they point.<sup>287</sup>

Authority to tax is fundamental to state sovereignty.<sup>288</sup> There is a view that Caribbean States with liberal tax regimes have commercialised their sovereignty by offering virtual sites for legal and natural persons to circumvent onshore “sovereign demands for disclosure, regulation and taxation.”<sup>289</sup> In effect, they are perceived to undercut the sovereign ability of onshore States to exercise their regulatory and fiscal authority over their citizens.<sup>290</sup> Indeed, OFCs have been facilitative of tax evasion and tax avoidance by residents of onshore high-tax welfare States.<sup>291</sup> Nonetheless, the politicised use of AML/CFTP countermeasures and other criminal treaties to enforce fiscal sovereignty claims is problematic,<sup>292</sup> where the tax matters involve legitimate wealth and corporate planning rather than economic crimes. Still, there is no clear normative solution to reconciling to competing sovereignty interests of onshore and

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<sup>286</sup> Kris Hinterseer, *Criminal Finance: The Political Economy of Money Laundering in a Comparative Legal Context* (Kluwer Law International B.V., 2002).

<sup>287</sup> Charles Tilly, ‘Terror, Terrorism, Terrorists’, *Sociological Theory* 22, no. 1 (1 March 2004): 5–13, <https://doi.org/10.1111/j.1467-9558.2004.00200.x>.

<sup>288</sup> Don D. Marshall, ‘Governance and Re-Regulation of Offshore Financial Centres: (Re)Framing the Confines of Legitimate Debate and Protest’, in *Living at the Borderlines: Issues in Caribbean Sovereignty and Development*, ed. Cynthia Barrow-Gilles and Don D. Marshall (Kingston, Jamaica: Ian Randle Publishers, 2003), 63–74.

<sup>289</sup> Alexander Cooley, ‘Thinking Rationally about Hierarchy and Global Governance’, *Review of International Political Economy* 10, no. 4 (November 2003): 679, <https://doi.org/10.1080/09692290310001601939>.

<sup>290</sup> Cooley, ‘Thinking Rationally about Hierarchy and Global Governance’; Palan, ‘Tax Havens and the Commercialization of State Sovereignty’.

<sup>291</sup> Terry Dwyer, ‘“Harmful” Tax Competition and the Future of Offshore Financial Centres’, *Journal of Money Laundering Control* 5, no. 4 (1 January 2002): 302–17, <https://doi.org/10.1108/eb027311>.

<sup>292</sup> Dwyer; Benjamin R. Hartman, ‘Coercing Cooperation from Offshore Financial Centers: Identity and Coincidence of International Obligations against Money Laundering and Harmful Tax Competition’, *Boston College International and Comparative Law Review* 24, no. 2 (2001 2000): 253–90; Marshall, ‘Governance and Re-Regulation of Offshore Financial Centres: (Re)Framing the Confines of Legitimate Debate and Protest’.

offshore States. To escape mitigate the stigmatisation of offshore financial services as “parasitic state strategies,”<sup>293</sup> Commonwealth Caribbean OFCs have helplessly sought to rebrand themselves as reputable International Financial Centres (IFCs).<sup>294</sup> However, onshore political hostility towards Caribbean OFCs was exacerbated by the global economic and financial crisis in 2007 that caused the collapse of businesses, massive unemployment and the erosion of tax revenue in OECD countries.<sup>295</sup> Illustratively, this hostility seeped into the political rhetoric of Barack Obama during his 2008 presidential campaign when he described Uglund House, which is the residential address of an estimated 18,000 shell companies, as “the biggest tax scam in the world” and which he suggested was depriving the United States of at least US\$50 billion per year in tax revenue.<sup>296</sup> However, despite the US Federal Government’s efforts to police the rest of the world, it has limited jurisdiction over ‘tax haven’ states such as Delaware, Nevada, Wyoming and South Dakota.<sup>297</sup>

By demonising Caribbean OFCs, their sovereignty and interests have been rendered negligible within the transnational AML/CFTP discourse. In the case of the ‘Paradise Papers’ scandal, for instance, there has been no repudiation of the fact that Caribbean OFC’s confidentiality and banking secrecy laws were flouted by the leaks. There was no discussion about the potential economic fallout for the region from the confidential information leaked from the corporate registries of the Bahamas, Barbados, and St. Kitts and Nevis. Furthermore, powerful States and actors within the TAMLO have reproduced mutually constitutive imageries of onshore spaces as inherently more robustly governed, transparent, and low-risk for money laundering, which is empirically inaccurate. However, onshore economies have been beneficiaries of the economic development and growth driven by OFCs through the facilitation of international trade, foreign direct investments and the efficient movement of international capital.<sup>298</sup> Nonetheless, by demonising Caribbean OFCs, onshore economies have successfully diverted attention from their own failures and responsibility to regulate powerful multinational corporations, high-net-worth individuals and corrupt politically exposed persons

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<sup>293</sup> BS Tranoy, ‘Offshore Finance and Money Laundering: The Politics of Combating Parasitic State Strategies’ (Ministry of Foreign Affairs of Norway 2002).

<sup>294</sup> Caroline Allen, ‘Offshore Centres: What We Suspected’, *Investment Week*; London, 12 July 2010, 27.

<sup>295</sup> Burns and McConvill, ‘An Unstoppable Force’.

<sup>296</sup> Burns and McConvill.

<sup>297</sup> European Parliamentary Research Service, ‘EU-US Trade and Investment Relations: Effects on Tax Evasion, Money Laundering and Tax Transparency- Ex-Post Impact Assessment’, March 2017, [http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/598602/EPRS\\_IDA\(2017\)598602\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/598602/EPRS_IDA(2017)598602_EN.pdf).

<sup>298</sup> Stein, ‘OFFSHORE’.

(PEPs) that originate in their jurisdictions but operate in the Commonwealth Caribbean. For instance, the ‘Paradise Papers’ implicated as Appleby’s collaborators, the law firms Baker McKenzie and Akin Gump Strauss Hauer & Feld; global accounting powerhouses KPMG, Ernst & Young and PricewaterhouseCoopers; mega-banks Citigroup, the Bank of America, HSBC, Credit Suisse and Wells Fargo; which are all incorporated in onshore States. Nevertheless, the ‘Paradise Papers’ and ‘Panama Papers’ scandals have redirected international scrutiny towards Commonwealth Caribbean offshore jurisdictions. These scandals have reinforced calls for stronger transnational law enforcement and regulatory responses to money laundering and terrorism financing.<sup>299</sup> They have fuelled growing fears among onshore financial institutions about the risk of reputational loss that is likely to result from providing intermediary services to Caribbean banks. In fact, several banks in North America have already terminated their Correspondent Banking Relationships (CBRs) with Caribbean financial institutions.<sup>300</sup> An important question raised by these scandals, which remains to be addressed, is at what cost to the Caribbean’s sustainable development should onshore interests in combatting capital flight be pursued?

Preliminary observations have suggested that the transnational AML/CFTP discourse has provided a plausible securitised narrative to retaining mobile capital onshore. As will be demonstrated, the TAMLO is steeped in geopolitics as much as it is in transnational law. Caribbean legislators must necessarily manage the trade-off between using effective AML/CFTP regulation to safeguard the integrity of their financial and economic systems without reducing the cost-effectiveness and efficiency of financial intermediaries operating within their jurisdictions or compromising national security.<sup>301</sup> However, from a cost-benefit perspective, this becomes particularly problematic. The utility of enforcing transnational AML/CFTP standards, depends on whether the expected benefits outweigh the typically expensive cost of law enforcement.<sup>302</sup> In the context of offshore participation in the TAMLO,

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<sup>299</sup> David Chaikin, ‘The Law Enforcement Implications of the Panama Papers’, in *Corporate and Trust Structures: Legal and Illegal Dimensions*, ed. David Chaikin and Gordon Hook (Melbourne, Australia: Australian Scholarly Publishing Pty Ltd, 2018), 108–21.

<sup>300</sup> Caribbean Policy Research Institute (CAPRI), ‘The Correspondent Banking Problem: Impact of de-Banking Practices on Caribbean Economies’.

<sup>301</sup> Donato Masciandaro, ‘Money Laundering: The Economics of Regulation’, *European Journal of Law and Economics* 7, no. 3 (1 May 1999): 225–40, <https://doi.org/10.1023/A:1008776629651>.

<sup>302</sup> Peter Lewisch, ‘Money Laundering Laws as a Political Instrument: The Social Cost of Arbitrary Money Laundering Enforcement’, *European Journal of Law and Economics* 26, no. 3 (1 December 2008): 405–17, <https://doi.org/10.1007/s10657-008-9073-7>; Hans Geiger and Oliver Wuensch, ‘The Fight against Money Laundering: An Economic Analysis of a Cost-benefit Paradoxon’, *Journal of Money Laundering Control* 10,

the benefits of AML/CFTP law enforcement typically materialise onshore from which the illicit funds originate and where the predicate crimes are committed.<sup>303</sup> Yet, it is often expected that existential socio-economic and security threats, should be supplanted by money laundering and terrorist financing because of their discursive construction as ‘strategic priorities’ by FATF sponsors,<sup>304</sup> even if they do not reflect money laundering and terrorist financing realities and risk assessments within the region. It would be understandably difficult for Caribbean countries to justify the diversion of limited resources to support transnational AML/CFTP efforts, at least at the standard expected of them by powerful onshore States, when, discursively, the economic costs of the AML/CFTP regime to small Commonwealth Caribbean States are neglected as collateral damage. There is also the problematic issue of the discursive construction of the Commonwealth Caribbean and its offshore finance sector as high-risk for criminal finance. However, systematic reviews of claims made as to the scope and effect of money laundering and terrorism financing have found them to be mostly speculative.<sup>305</sup> These claims have been found to be replete with inconsistencies and premised on figures that have been “wrongly cited, misinterpreted or just invented.”<sup>306</sup> There is an accepted complex relationship among transnational organised crime, money laundering, terrorism financing and OFCs. However, contrary to how it has been discursively represented, it is not a uniquely developing country problem.<sup>307</sup>

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no. 1 (1 January 2007): 91–105, <https://doi.org/10.1108/13685200710721881>; Sharman, ‘Power and Discourse in Policy Diffusion’.

<sup>303</sup> Lewisch, ‘Money Laundering Laws as a Political Instrument’; Geiger and Wuensch, ‘The Fight against Money Laundering’; Sharman, ‘Power and Discourse in Policy Diffusion’.

<sup>304</sup> Dean, Thompson, and Keatinge, ‘Draining the Ocean to Catch One Type of Fish’.

<sup>305</sup> Peter Andreas and Ethan A. Nadelmann, *Policing the Globe: Criminalisation and Crime Control in International Relations* (New York: Oxford University Press, 2006); Daniel W. Drezner, *All Politics Is Global: Explaining International Regulatory Regimes*, 1. paperback print (Princeton: Princeton Univ. Press, 2008); Michael G. Findley, Jason Sharman, and Daniel Nielson, *Global Shell Games: Experiments in Transnational Relations, Crime, and Terrorism*, Cambridge Studies in International Relations 128 (New York: Cambridge University Press, 2014); Richard Friman, ed., *Crime and the Global Political Economy* (Boulder, Colorado: Lynne Reiner Publishers, 2009); Michael Levi and Peter Reuter, ‘Money Laundering’, *Crime and Justice* 34, no. 1 (January 2006): 289–375, <https://doi.org/10.1086/501508>; Ronen Palan, Richard Murphy, and Christian Chavagneux, *Tax Havens: How Globalization Really Works* (Ithaca, NY: Cornell University Press, 2009), <https://doi.org/10.7591/9780801468568>.

<sup>306</sup> Marco Arnone and Leonardo Borlini, ‘International Anti-Money Laundering Programs: Empirical Assessment and Issues in Criminal Regulation’, *Journal of Money Laundering Control; London* 13, no. 3 (2010): 226–71, <http://dx.doi.org/10.1108/13685201011057136>; Raffaella Barone and Donato Masciandaro, ‘Organized Crime, Money Laundering and Legal Economy: Theory and Simulations’, *European Journal of Law and Economics* 32, no. 1 (1 August 2011): 115–42, <https://doi.org/10.1007/s10657-010-9203-x>.

<sup>307</sup> Louise Shelley, ‘The Unholy Trinity: Transnational Crime, Corruption, and Terrorism Illuminating the Shadow Economy’, *Brown Journal of World Affairs* 11, no. 2 (2005 2004): 101–12.

#### 4. Deconstructing the Transnational Anti-Money Laundering Legal Order: The Onslaught on Commonwealth Caribbean States' Sovereignty

The preceding chapter contextualised the intrinsic link among geopolitics and structural insecurities in the Commonwealth Caribbean Basin, as well as the materiality of small size and underdevelopment for the effective exercise of sovereignty by quasi-states within the transnational anti-money laundering legal order (TAMLO). This chapter uses the theory of transnational legal orders (TLO) to deconstruct the framing, institutionalisation, discursive and deliberative processes within the TAMLO. It critically engages with several foundational empirical questions such as- how ML and TF become represented as transnational security issues requiring legal solutions? Which contextual factors accounted for the institutionalisation of the TLO at the time that it was? Why has the TAMLO elicited the degree of state response it has from Commonwealth Caribbean small States? How problematic power relationships have discursively constituted these quasi-states as significant objects of disciplinary regulation within the TAMLO? Furthermore, what are consequences of their participation within the TAMLO, on the terms on which they have been, for their sovereignty and sustainable development?

A TLO denotes “a collection of legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions,”<sup>308</sup> in respect of a perceived problematic issue area. The theory of TLO critiques the state centric ‘national/international’ dichotomy by acknowledging the fact that regulatory legal norms are developed, transmitted and crystallised across national frontiers through discursive processes mediated by a multiplicity of public and private actors beyond the sovereign nation-states.<sup>309</sup> It, therefore, problematizes the modern Westphalian legal order’s immutable assumption of the

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<sup>308</sup> Terence C. Halliday, ‘Transnational Legal Orders’, in *Transnational Legal Orders*, ed. Terence C. Halliday and Gregory Shaffer (Cambridge: Cambridge University Press, 2015), 5, <https://doi.org/10.1017/CBO9781107707092>; Halliday and Shaffer, ‘Researching Transnational Legal Orders’, 475; Gregory Shaffer, ‘Transnational Legal Ordering and State Change’, in *Transnational Legal Ordering and State Change*, ed. Gregory C. Shaffer (Cambridge: Cambridge University Press, 2012), 7, <https://doi.org/10.1017/CBO9781139206662.001>.

<sup>309</sup> Halliday and Shaffer, ‘Researching Transnational Legal Orders’.

sovereign State's exclusive authority to make and apply laws within its territorial borders without external interference in its internal affairs.<sup>310</sup> Consequently, TLO both transcend and permeate the nation-State's law-making and regulatory processes, and may affect the allocation of enforcement, supervisory or regulatory powers within the State.<sup>311</sup> In the case of Commonwealth Caribbean quasi-states, the TAMLO has proven very effective at challenging their regulatory policy and law-making competencies with respect to suppressing money laundering and the financing of terrorism and proliferation of weapons of mass destruction.

#### 4.1. Framing the Transnational Anti-Money Laundering Order and Sources of Transnational Legal Norms

The TAMLO is a site of discursive contestation. The framing of TLOs can be unpacked using critical discourse analysis to reveal ideological and latent power dimensions.<sup>312</sup> By framing, reference is being made to the deliberate construction of the problem to be 'ordered', at a significant time.<sup>313</sup> Insofar as TLOS are constructed to regulate a transnational issue area that has been problematized and deemed to require legal or normative solutions by relevant actors,<sup>314</sup> framing is usually a politicised process.<sup>315</sup> The extent to which framed norms are 'settled' depends on their sources, the transnational institutional context in which they are produced or transmitted, and the extent to which they directly or indirectly affect national law-making and other State behaviours and practices of sub-state actors.<sup>316</sup> Thus, international treaties on ML and TF that reflect the sovereign will of state Parties might have more legitimacy than transnational soft law norms.

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<sup>310</sup> Halliday and Shaffer.

<sup>311</sup> Gregory Shaffer, 'Theorizing Transnational Legal Ordering', *Annual Review of Law and Social Science* 12, no. 1 (2016): 231–53, <https://doi.org/10.1146/annurev-lawsocsci-110615-085128>.

<sup>312</sup> Terence C. Halliday and Bruce G. Carruthers, *Bankrupt: Global Lawmaking and Systemic Financial Crisis* (Stanford, Calif: Stanford University Press, 2009); Shaffer, 'Theorizing Transnational Legal Ordering'.

<sup>313</sup> Halliday and Shaffer, 'Researching Transnational Legal Orders'; Shaffer, 'Theorizing Transnational Legal Ordering'.

<sup>314</sup> Terence Halliday, Michael Levi, and Peter Reuter, 'Anti-Money Laundering: An Inquiry into a Disciplinary Transnational Legal Order', *UC Irvine Journal of International, Transnational, and Comparative Law* 4 (2019): 1–25; Halliday and Shaffer, 'Researching Transnational Legal Orders'; Shaffer, 'Theorizing Transnational Legal Ordering'.

<sup>315</sup> Halliday and Carruthers, *Bankrupt*; Shaffer, 'Theorizing Transnational Legal Ordering'.

<sup>316</sup> Shaffer, 'Theorizing Transnational Legal Ordering'.

### 4.1.1. International Treaty Law

Within the context of the TAMLO, money laundering and terrorist financing were initially framed through transnational criminalisation. It has been observed that framing transnational problems in terms of criminalisation has tended to increase the reception, institutionalisation and propagation of norms intended to remedy them, as such framing appears to discursively preserve State sovereignty and executive power.<sup>317</sup> Until the late 1990s, drug-related money laundering was framed as a “governance risk for states,” which stood to corrupt state institutions and threaten the rule of law and national sovereignty.<sup>318</sup> This framing would have presumably helped to coalesce Commonwealth Caribbean States’ interest around the TAMLO.

#### 4.1.1.1. *The Transnational Criminalisation of Money Laundering*

Prior to 1986 money laundering was not criminalized.<sup>319</sup> The United States was the first country to do so, and subsequently led the transnational securitisation of money laundering within the United Nations,<sup>320</sup> as part of its ‘war on drugs’.<sup>321</sup> Criminalisation of money laundering was intended to ‘remove the profit’ from domestic economic crimes and disrupt organised crime groups by preventing their misuse of the banking sector for ‘cleaning’ the proceeds of the illicit narcotics trade.<sup>322</sup> Multilateral efforts on targeting the proceeds of drug

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<sup>317</sup> Paulette Lloyd and Beth A. Simmons, ‘Framing for a New Transnational Legal Order: The Case of Human Trafficking’, in *Transnational Legal Orders*, ed. Terence C. Halliday and Gregory Shaffer (Cambridge: Cambridge University Press, 2015), 400–438, <https://doi.org/10.1017/CBO9781107707092>; Shaffer, ‘Theorizing Transnational Legal Ordering’.

<sup>318</sup> Paulette Lloyd, ‘Framing and Transnational Legal Organization: The Case of Human Trafficking’, *Proceedings of the Annual Meeting (American Society of International Law)* 110 (2016): 68, <https://doi.org/10.2307/26420154>.

<sup>319</sup> Sharman, ‘Power and Discourse in Policy Diffusion’.

<sup>320</sup> Brigitte Unger, ‘Money Laundering Regulation: From Al Capone to Al Qaeda’, in *Research Handbook on Money Laundering*, ed. Brigitte Unger and Daan van der Linde (Northampton, MA: Edward Elgar Publishers, 2013), 19–34.

<sup>321</sup> Rider, ‘The Crusade against Money Laundering - Time to Think’.

<sup>322</sup> Halliday, Levi, and Reuter, ‘Disciplinary Transnational Legal Order’; Michael Levi, ‘Pecunia Non Olet: Cleansing the Money-Launderers from the Temple’, *Crime, Law and Social Change* 16, no. 3 (November 1991), <https://doi.org/10.1007/BF00204329>; Mark Pieth, ‘Criminalizing the Financing of Terrorism’, *Journal of International Criminal Justice* 4, no. 5 (2006): 1074–86.

trafficking,<sup>323</sup> led to the adoption of the United Nations against Illicit Traffic in Narcotics Drugs and Psychotropic Substances (1988 Vienna Convention). Interestingly, the travaux préparatoires reveal an almost exclusive preoccupation with the forfeiture of illicit proceeds during the negotiations of the 1988 Vienna Convention and that criminalisation of enablers was introduced quite late.<sup>324</sup>

It is instructive that the framing of the criminalization of the laundering of illicit proceeds of narcotics trafficking was expressly based on consensual international cooperation, which was expressly made subject to state sovereignty. Before criminalising money laundering, Article 2(2) of the 1988 Convention provides that:

The Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

Article 2(3) further provides that:

A Party shall not undertake in the territory of another Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other Party by its domestic law.

Article 3 of the 1988 Convention expressly established money laundering as a core transnational crime. That is, a domestic offence, enacted by State Parties on the basis of either tortious or delictual obligations, assumed under an international legal instrument.<sup>325</sup> Rather than defining money laundering, Article 3(1)(b)(ii) obliges State Parties to criminalise the concealment or disguise of the true nature, source, location, disposition, movement, rights, or ownership of property, knowing that such property is derived from an offence established in accordance with the Convention. Criminalisation extends to enabling the conversion or transfer of property known to be derived from a relevant offence or from participation in such offence, for the purpose of concealing or disguising its illicit origin or of assisting any person who is involved in the commission of such an offence to evade relevant legal consequences (Article

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<sup>323</sup> Mariano-Florentino Cuellar, 'The Mismatch between State Power and State Capacity in Transnational Law Enforcement Stefan A. Riesenfeld Symposium 2003: International Money Laundering: From Latin America to Asia, Who Pays', *Berkeley Journal of International Law* 22, no. 1 (2004): 15–58.

<sup>324</sup> Pieth, 'Criminalizing the Financing of Terrorism Criminal Law Responses to Terrorism After September 11'.

<sup>325</sup> Neil Boister, 'Further Reflections on the Concept of Transnational Criminal Law', *Transnational Legal Theory* 6, no. 1 (2 January 2015): 9–30, <https://doi.org/10.1080/20414005.2015.1042232>.

3(1)(b)(i)). The acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from a relevant offence is also to be criminalised (Article 3(c) (1)). Article 5 provides for the identifying, tracing, and freezing or seizing proceeds or instrumentalities with a view to eventual confiscation; Article 6, extradition; and Article 7 (mutual legal assistance). The TAMLO was, therefore, underpinned by a ‘follow the money’ policy to deprive persons engaged in illicit drug trafficking the criminal profits and disrupt the operations of illicit transnational networks.<sup>326</sup>

The international legal basis of the TAMLO was strengthened by the adoption of the United Nations Convention against Transnational Organized Crime (Palermo Convention, 2000), particularly its provisions on prevention, investigation, and prosecution.<sup>327</sup> It effectively, expanded predicate offences of ML from the illicit proceeds of drug trafficking to “all serious crimes” of a transnational nature, including corruption (Article 8). In terms of regulation of the financial service sector, it has mandated the institution of comprehensive national regulatory and supervisory regimes, including requirements for customer identification and the reporting of suspicious transactions (Article 7(1)(a)). Importantly, Article 4 (protection of sovereignty) reiterated the provision of Article 2 of the 1988 Vienna Convention on sovereign equality, territorial integrity, and non-interference in internal matters. The United Nations Convention against Corruption (Article 14) complements the Palermo Convention in criminalising money laundering. It squarely focuses international attention on curbing the laundering of the proceeds of stolen assets by kleptocratic regimes that plunder national wealth and private sector bribery of corrupt public officials.

At the operational level, money laundering is generally presumed to occur in three stages- placement, layering, and integration phases. The first phase, placement, generally involves introducing the illicit proceeds or ‘dirty money’ into the financial system through a legitimate enterprise, including by transnational transfers to create jurisdictions hurdles for regulatory and law enforcement authorities in the country of origin, where the offence was perpetrated.<sup>328</sup>

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<sup>326</sup> Rider, ‘The Crusade against Money Laundering - Time to Think’; Thomas R. Naylor, ‘Wash-out: A Critique of Follow-the-Money Methods in Crime Control Policy’, *Crime, Law and Social Change* 32, no. 1 (1 September 1999): 1–58, <https://doi.org/10.1023/A:1008386203362>; Thomas R. Naylor, ‘Follow-the-Money Methods in Crime Control Policy’, in *Critical Reflections on Transnational Organized Crime, Money Laundering, and Corruption*, ed. Margaret E. Beare (Toronto: University of Toronto Press, 2003), 256–90, <https://doi.org/10.3138/9781442670242>.

<sup>327</sup> Gerhard Kemp, ‘The United Nations Convention against Transnational Organized Crime: A Milestone in International Criminal Law’, *South African Journal of Criminal Justice* 14, no. 2 (2001): 152–67.

<sup>328</sup> Rider, ‘The Crusade against Money Laundering - Time to Think’.

Currency smuggling, casino gambling, the purchase of assets and property, as well as the use of smurfing transactions intended to avoid raising suspicion of financial institutions, are placement practices.<sup>329</sup> The second phase, layering, usually involves running the funds through a series of complex, or often multijurisdictional, transactions to distort their illicit origins and prevent law enforcement agencies from tracking the criminal proceeds.<sup>330</sup> In the context of the offshore industry, this would normally involve the establishment of shell companies and their trading through several financial institutions in several jurisdictions.<sup>331</sup> In the third phase, integration, the ‘cleaned’ funds are usually repatriated to the jurisdiction of origin and reintroduced to its economy.<sup>332</sup> The ‘cleaned’ money is often used through bank notes, loans, securities, among others.<sup>333</sup> It is worth pointing out, however, that there is a growing body of evidence from investigations of money laundering offences related to drug trafficking, which suggests that the laundering of the illicit proceeds of drug trafficking, for instance, may not necessarily conform to the theoretical three stage model.<sup>334</sup> It has been found that hard cash is more prominent in the laundering of the illicit proceed of drugs, especially, the physical moving of illicit proceeds outside the legal economy through smuggling by air, sea, or the use of bankers on the black financial market, as opposed to the use of the formal banking system which leaves a paper trail.<sup>335</sup> While money laundering and terrorism financing are inextricably related, there are important differences with respect to the motivation for and modalities through which the latter occurs.

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<sup>329</sup> Angela Samantha Maitland Irwin, Kim-Kwang Raymond Choo, and Lin Liu, ‘An Analysis of Money Laundering and Terrorism Financing Typologies’, *Journal of Money Laundering Control* 15, no. 1 (1 January 2012): 85–111, <https://doi.org/10.1108/13685201211194745>.

<sup>330</sup> Rider, ‘The Crusade against Money Laundering - Time to Think’.

<sup>331</sup> Hinterseer, *Criminal Finance*.

<sup>332</sup> Rider, ‘The Crusade against Money Laundering - Time to Think’.

<sup>333</sup> Amos N. Guiora and Brian J. Field, ‘Using and Abusing the Financial Markets: Money Laundering as the Achilles’ Heel of Terrorism’, *University of Pennsylvania Journal of International Law* 29, no. 1 (2008 2007): 59–104.

<sup>334</sup> Melvin R.J. Soudijn, ‘Rethinking Money Laundering and Drug Trafficking: Some Implications for Investigators, Policy Makers and Researchers’, *Journal of Money Laundering Control* 19, no. 3 (1 January 2016): 298–310, <https://doi.org/10.1108/JMLC-07-2015-0028>.

<sup>335</sup> Soudijn.

#### 4.1.1.2. *The Transnational Criminalisation of Terrorist Financing*

Until the late 1990s international treaties on terrorism did not expressly criminalise terrorism financing.<sup>336</sup> Prior to 9/11, few countries prioritised disrupting TF,<sup>337</sup> which was tied more to US geopolitical interests. There was no multilateral consensus on a definition of terrorism,<sup>338</sup> and distinguishing between ‘freedom fighters’ and terrorists was particularly polarizing within the UN General Assembly.<sup>339</sup> Particularly, it had impinged on state sponsorship of liberation movements in the Middle East and Africa. This perhaps explains the lack of prominence of provisions on sovereign equality, territorial integrity, and non-intervention in the domestic affairs of other States within the 1999 International Convention on the Suppression of Terrorism Financing (Article 20), in contrast to the 1988 Vienna Convention (Article 2).

While TF was transnationally framed in terms of criminalisation, the accompanying securitisation discourse normalised the need for pre-emptive and preventative political and risk-based regulatory responses.<sup>340</sup> TF was also securitised within the ‘war on terror’, which was deliberately and rhetorically constituted by the United States as a unifying defence of western liberal values while, simultaneously, mutually constituting the primacy of its leadership in global security.<sup>341</sup> Furthermore, its reception within the TAMLO benefited from the fact that its framing rhetorical bridged the discourses on ML, drug trafficking and proliferation of weapons of mass destruction.<sup>342</sup> Criminalisation of TF adopted the “follow the

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<sup>336</sup> David Cole, ‘Counterterrorism: Democracy’s Challenge’, in *Counterterrorism: Democracy’s Challenge*, ed. Andrea Bianchi and Alexis Keller, Studies in International Law (Portland, Oregon: Hart Publishing, 2008), 233–50.

<sup>337</sup> Barry A. K. Rider, ‘Editorial: Good Intentions May Not Be Enough!’, *Journal of Money Laundering Control*; London 5, no. 2 (Autumn 2001): 102.

<sup>338</sup> Ilias Bantekas, ‘The International Law of Terrorist Financing’, *The American Journal of International Law*; Washington 97, no. 2 (April 2003): 315.

<sup>339</sup> Zaiton Hamin et al., ‘Conceptualizing Terrorist Financing in the Age of Uncertainty’, *Journal of Money Laundering Control*; London 19, no. 4 (2016): 397–406, <http://dx.doi.org/10.1108/JMLC-06-2015-0022>; Pieth, ‘Criminalizing the Financing of Terrorism Criminal Law Responses to Terrorism After September 11’.

<sup>340</sup> Karen Cooper and Clive Walker, ‘Security From Terrorism Financing: Models of Delivery Applied to Informal Value Transfer Systems’, *The British Journal of Criminology* 56, no. 6 (1 November 2016): 1125–45, <https://doi.org/10.1093/bjc/azw057>.

<sup>341</sup> Barry Buzan, ‘Will the “Global War on Terrorism” Be the New Cold War?’, *International Affairs (Royal Institute of International Affairs 1944-)* 82, no. 6 (2006): 1101–18; Croft and Moore, ‘The Evolution of Threat Narratives in the Age of Terror’.

<sup>342</sup> Buzan, ‘Will the “Global War on Terrorism” Be the New Cold War?’

money” approach to ML, which albeit of questionable effectiveness,<sup>343</sup> sought to identify, detect, freeze, seize and ultimately confiscate terrorist assets (Article 8).

Article 2 of 1999 Convention defines TF in terms of unlawfully and wilfully providing or collecting funds, (which in Article 1(1) include assets of any kind and however acquired), intending or knowing that they will be used for terrorist activities. These include offences under the listed treaties related to terrorism (Article 2(1)(a)); acts intended to cause death or serious bodily injury to a civilian or any person not participating in hostilities in armed conflict, in order to compel a government or international organisation to act or abstain from acting (Article 2(1)(b)). It is immaterial whether or not the funds reach their criminal destination. It has been observed that the requirement of unlawful conduct, has preserved the ultimate sovereign legislative discretion of State Parties over criminal matters.<sup>344</sup> Attempts (Article 2(4); participation as accomplice, organizing or directing or contributing to the commission of a relevant offence (Article 2(5)), are criminalised.

The Palermo Convention (2000) further criminalised TF, as a serious offence of a transnational nature (Article 3). The Commonwealth Caribbean States have further assumed obligations to suppress TF, with the accession to the Inter-American Convention on Terrorism (2002). Article 4 commits State Parties to take steps to prevent, combat and eradicate terrorism financing, including through transnational criminal justice cooperation, the exchange of financial information, the monitoring of cross-border transactions and the tracing, seizure and confiscation of funds and assets either derived or intended to support the commission of terrorism. Interestingly, Article 6 expands the scope of the obligations under relevant UN conventions by obliging State Parties to establish as predicate offences to money laundering, a host of terrorist related acts such as hijacking and hostage taking. At the time of writing, the Bahamas and Jamaica signed the Convention on 3<sup>rd</sup> June 2002, but had not ratified, while Trinidad and Tobago signed on 2<sup>nd</sup> October 2002 and ratified on 14<sup>th</sup> November 2005. In a strong assertion of sovereignty, the Convention expressly recognised that the FATF Recommendations were merely guidance.

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<sup>343</sup> Pieth, ‘Criminalizing the Financing of Terrorism Criminal Law Responses to Terrorism After September 11’.

<sup>344</sup> Pieth.

#### 4.1.2. Transnational Soft Law

The locus of transnational AML/CFTP legal norms have shifted from international treaties to soft law standards,<sup>345</sup> and increasingly in the post 9/11 TAMLO. Evolving typologies and increasingly sophisticated methods of money laundering and financing of terrorism and proliferation of WMD have increasingly undermined States' territorial control. Powerful States within the TAMLO have seen soft law as equipped to deliver "superior institutional solutions" to governance and political problems that impinge of state sovereignty,<sup>346</sup> mutually beneficial cooperation and compromise absent formalistic obligations,<sup>347</sup> or to intentionally bypass the deliberative challenge of securing consensus in formalistic juridical processes.<sup>348</sup> These States have ceded public powers and informal rule-making authority to supranational institutions, trans-governmental networks and other "collaborators" that they influence, in transnational normative processes and the transmission and legitimisation of promulgated norms.<sup>349</sup>

By transnational soft law, reference is being made to legal norms that have not been promulgated through formal international juridical processes, are not meant to provide authoritative legal rules or provide any prescribed means of enforcement.<sup>350</sup> Usefully recall that within the corpus of international law, the sources codified in Article 38(1) of the Statute of the International Court of Justice in 1945 are - international conventions that set out rules expressly consented to by the contracting State Parties; international customs that evidence general practices that have crystallised into law; general principles of law recognised by States; and judicial decisions and writings of well-respected academics as a subsidiary means of determining rules of international law. These sources are respecting of state sovereignty and consent in assuming international obligations. Transnational soft law takes the form of these recognised sources.<sup>351</sup> However, the diffusion of soft law among Commonwealth Caribbean

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<sup>345</sup> Nicholas W. Turner, 'The Financial Action Task Force: International Regulatory Convergence through Soft Law Part I: Combating Threats to the International Financial System: The Financial Action Task Force', *New York Law School Law Review* 59, no. 3 (2015 2014): 547–60.

<sup>346</sup> Kenneth W. Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance', *International Organization* 54, no. 3 (ed 2000): 421, <https://doi.org/10.1162/002081800551280>.

<sup>347</sup> Armin Schäfer, 'Resolving Deadlock: Why International Organisations Introduce Soft Law', *European Law Journal* 12, no. 2 (2006): 194–208, <https://doi.org/10.1111/j.1468-0386.2006.00315.x>.

<sup>348</sup> Turner, 'The Financial Action Task Force'.

<sup>349</sup> Shaffer, 'Theorizing Transnational Legal Ordering'.

<sup>350</sup> Turner, 'The Financial Action Task Force'.

<sup>351</sup> László Blutman, 'In the Trap of a Legal Metaphor: International Soft Law', *International and Comparative Law Quarterly* 59, no. 3 (2010): 605–24.

States within the TAMLO, it is often underpinned by problematic power relations along the ‘Onshore/Offshore’ axis. Increasingly, less powerful States have become implementers of extraterritorially derived ‘soft law’.<sup>352</sup> Some soft law norms have ‘hardened’ to acquire legal force and, therefore, challenge the juridical, substantive, and procedural norms of conventional international legal orders.<sup>353</sup> The enforcement of such soft law standards has been normalised within the TAMLO by powerful onshore States that have grown impatient with States invoking their sovereignty to frustrate compliance with international treaty law.<sup>354</sup>

#### 4.1.2.1. *United Nations Security Council and General Assembly Resolutions*

The UN General Assembly and Security Council have played an important role to promulgation of transnational soft law norms, especially relating to combating terrorist financing, within the TAMLO. In 1945, proposals for the United Nations General Assembly to have legal authority to create international law were outrightly rejected in favour of the power to either recommend or advise.<sup>355</sup> Although generally juridically non-binding, the UNGA’s resolutions carry significant political weight. Illustratively, following the bombing of United States’ embassies in Kenya and Tanzania in 1998, UNGA adopted Resolutions 1267 (1999) establishing a sanctions regime for the financial sectors of Member States, aimed at suppressing the financing of Taliban and Al-Qaeda terrorist networks in Afghanistan and 1333 (2000) for the freezing of related assets.<sup>356</sup> These were instrumental initial steps in the global diffusion of CFT standards. The UNGA subsequently adopted a further nine resolutions in 2001 in the immediate aftermath of the terrorist attacks in New York on 11<sup>th</sup> September 2001 and a series of others thereafter.<sup>357</sup>

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<sup>352</sup> Shaffer, ‘Theorizing Transnational Legal Ordering’.

<sup>353</sup> Blutman, ‘In the Trap of a Legal Metaphor’; Chris Brummer, ‘Why Soft Law Dominates International Finance—and Not Trade’, *Journal of International Economic Law* 13, no. 3 (1 September 2010): 623–43, <https://doi.org/10.1093/jiel/jgq026>; Christine M. Chinkin, ‘The Challenge of Soft Law: Development and Change in International Law’, *The International and Comparative Law Quarterly* 38, no. 4 (1989): 850–66.

<sup>354</sup> Norman Mugarura, ‘Has Globalisation Rendered the State Paradigm in Controlling Crimes, Anachronistic?: The Notion of Borders, State and New Crime Typologies’, *Journal of Financial Crime* 21, no. 4 (30 September 2014): 249, <https://doi.org/10.1108/JFC-04-2013-0026>.

<sup>355</sup> Gregory J. Kerwin, ‘Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts, The Notes’, *Duke Law Journal* 1983, no. 4 (1983): 876–99.

<sup>356</sup> Mugarura, ‘Has Globalisation Rendered the State Paradigm in Controlling Crimes, Anachronistic?’

<sup>357</sup> Mugarura.

Pursuant to Article 25 of the UN Charter, UN Security Council resolutions are legally binding on all UN Member States where made under Chapter VII of the Charter concerning the preservation of international peace and security.<sup>358</sup> Post-9/11, the UN Security Council unanimously adopted resolution 1617 (2005), which reinforced sanctions against Al-Qaeda and obliged UN Members States to implement the FATF's Recommendations.<sup>359</sup> A glaring example of the UN Security Council's problematic legislative competence is its use of Chapter VII of the UN Charter to obligate all UN member States to implement key provisions of the 1999 International Convention on the Suppression of Terrorist Financing that had not yet come into force. The Convention entered into force on 10 April 2002.<sup>360</sup> At the time of the 9/11 terrorist attacks in New York and Washington D.C, there were only four signatories to the 1999 Convention.<sup>361</sup> The United States was not a signatory. Under the United States' leadership, the UN Security Council took the unprecedented step of passing UNSC Resolution 1373, on 28<sup>th</sup> September 2001, which was tantamount to transnational counter-terrorism financing law-making.<sup>362</sup> It is also of questionable legality under the UN Charter. By 2003, there were 132 signatories.<sup>363</sup> Post-9/11, the UNSC, and particularly its five permanent members, have used Chapter VII executive powers of the UN Charter to assume leadership from the UN General Assembly in counter-terrorism financing legislative and policy agenda-setting.<sup>364</sup> As UNSC resolutions are binding on all States under international law, the imposition of obligations on States that permeate their criminal laws, especially if influenced by the United States 'anti-constitutionalist' values in foreign security policy, without their deliberative input or representation, raises questions of democratic legitimacy.<sup>365</sup>

More recently, in response to the emerging problem of Foreign Terrorist Fighters (FTFs), UN Security Council adopted Resolution 2178 (2014), under the chairmanship of US President

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<sup>358</sup> Marko Divac Öberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ', *European Journal of International Law* 16, no. 5 (1 November 2005): 879–906, <https://doi.org/10.1093/ejil/chi151>.

<sup>359</sup> Mugarura, 'Has Globalisation Rendered the State Paradigm in Controlling Crimes, Anachronistic?'

<sup>360</sup> Cooper and Walker, 'Security From Terrorism Financing'; Levi, 'Combating the Financing of Terrorism: A History and Assessment of the Control of "Threat Finance"'.  
<sup>361</sup> Cooper and Walker, 'Security From Terrorism Financing'; Levi, 'Combating the Financing of Terrorism: A History and Assessment of the Control of "Threat Finance"'.  
<sup>362</sup> Cian C. Murphy, 'Transnational Counter-Terrorism Law: Law, Power and Legitimacy in the "Wars on Terror"', *Transnational Legal Theory* 6, no. 1 (2 January 2015): 31–54, <https://doi.org/10.1080/20414005.2015.1042229>.

<sup>363</sup> Cooper and Walker, 'Security From Terrorism Financing'; Levi, 'Combating the Financing of Terrorism: A History and Assessment of the Control of "Threat Finance"'.  
<sup>364</sup> Murphy, 'Transnational Counter-Terrorism Law'.  
<sup>365</sup> Murphy, 51.

<sup>364</sup> Murphy, 'Transnational Counter-Terrorism Law'.  
<sup>365</sup> Murphy, 51.

Barak Obama, exemplifying the propensity to use hegemonic State power in transnational law-making post-9/11.<sup>366</sup> Article 6 of UNSC Resolution 2178 (2014) obliges UN Member States to criminalise activities of FTFs and ensure criminal penalties and prosecution commensurate to the seriousness of such activities. These acts include travelling to perpetrate terrorist acts, funding or facilitating the funding or planning of such acts or participating in training. The UN Security Council legislative powers, therefore, permeate the sovereign criminal jurisdictions of States. In fact, because of its binding nature UN Security Council Resolution 1617, has had far-reaching implications for the Caribbean as it obliged all UN Member States to implement financial surveillance measures to combat money laundering and terrorism financing, which directly conflict with the regulatory framework of the region's offshore financial sector which is premised on banking secrecy and confidentiality.<sup>367</sup>

#### **4.1.2.2. *The FATF's International Standards on Combating Money Laundering, and the Financing of Terrorism and Proliferation- The G7 and OECD***

It has been recalled how “painstaking, time-consuming and exhausting,”<sup>368</sup> the diplomatic process for negotiating the 1988 Vienna Convention was for the United States and the G7. In fact, the 1988 Vienna Convention was negotiated over a period of ten years.<sup>369</sup> Furthermore, even G7 members were reluctant to circumvent the UN legal framework for combating money laundering pursue the United States recommendation for over a year before eventually establishing the Financial Action Task Force on Money Laundering in 1989.<sup>370</sup> Since its establishment in 1989, the FATF has provided the institutional and normative framework for the TAMLO. Its self-professed function is to ‘safeguard the integrity of the global financial system’ and harmonise national legal and regulatory frameworks for suppressing money laundering and the financing of terrorism and proliferation of WMD.<sup>371</sup> Notwithstanding the fact that the FATF was mandated by the G7, it curiously purports to be an ‘independent’

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<sup>366</sup> Murphy, ‘Transnational Counter-Terrorism Law’.

<sup>367</sup> Vlcek, ‘Money Laundering Prevention and Small State Development’.

<sup>368</sup> Halliday, Levi, and Reuter, ‘Disciplinary Transnational Legal Order’, 4.

<sup>369</sup> Mark T. Nance, ‘The Regime That FATF Built: An Introduction to the Financial Action Task Force’, *Crime, Law and Social Change* 69, no. 2 (March 2018): 109–29, <https://doi.org/10.1007/s10611-017-9747-6>.

<sup>370</sup> Halliday, Levi, and Reuter, ‘Disciplinary Transnational Legal Order’; Nance, ‘The Regime That FATF Built’.

<sup>371</sup> Turner, ‘The Financial Action Task Force’.

intergovernmental organisation. Little intellectual thought went into the design of the FATF as a global governance institution. In 1989, the Group of Seven mandated a one-year fact-finding financial task force to take stock of international cooperation to prevent the misuse of the banking system to launder the illicit proceeds of narco-trafficking and “consider additional preventative efforts..., including the adaptation of legal and regulatory systems so as to enhance multilateral judicial assistance.”<sup>372</sup> Up to the late 1990s, the FATF had described its transnational activities as intended “to raise awareness in non-member nations or regions of the need to combat money laundering and offer the Forty Recommendations as a basis for doing so.”<sup>373</sup> Notwithstanding the FATF’s expanding mandate as a global standard-setting body within the TAMLO, for over 190 jurisdictions, it still does not have international legal personality.

Nonetheless, the FATF’s promulgated transnational soft norms for the detection, prevention and suppression of ML and FTP have been globally diffused. The consolidation of the FATF International Standards has followed a dynamic and responsive to emerging ML/TFP threats and typologies across various economic sectors.<sup>374</sup> The initial FATF Forty Recommendations on Money Laundering (1990), sought to support the implementation of the 1988 Vienna Drug Convention, as was reflected in the recommendation 1. The Recommendations were revised in 1996 to expand predicate money laundering offences beyond drug trafficking. Following 9/11 terrorist attacks in the United States, the FATF mandate was expanded to include combating terrorist financing, which led to the adoption of eight Special Recommendations on Terrorism Financing and another in 2004 leading to the FATF 40+9 Recommendations. The revised Recommendations took note of the entry into force of the UN Convention on Transnational Organised Crime (Palermo Convention), which was incorporated in Recommendation 1 as a precedent legal source for the criminalisation of money laundering. The last major revisions occurred in 2012, during which the Nine Special Recommendations were incorporated into the core text of the Forty Recommendations. The FATF also expanded the list of predicate offences to include tax offences, corruption, and

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<sup>372</sup> Nance, ‘The Regime That FATF Built’; Group of Seven, ‘Economic Declaration- G7/8 Paris Summit.’, 16 July 1989, <http://www.g8.utoronto.ca/summit/1989paris/communique/index.html>.

<sup>373</sup> Financial Action Task Force, ‘Financial Action Task Force on Money Laundering Annual Report 1998-1999’ (Paris, France: FATF/OECD Secretariat, 2 July 1999), 34, <http://www.fatf-gafi.org/media/fatf/documents/reports/1998%201999%20ENG.pdf>.

<sup>374</sup> William Vlcek, ‘Global Financial Governance and the Informal: Limits to the Regulation of Money’, *Crime, Law and Social Change* 69, no. 2 (March 2018): 249–64, <https://doi.org/10.1007/s10611-017-9754-7>.

incorporated provisions on the financing of the proliferation of weapons of mass destruction (WMD). It also established a risk-based approach for the assessment of technical compliance and effectiveness of national AML/CFTP regimes. Reflecting the progressive ‘hardening’ the FATF transnational soft law norms into authoritative prescriptions bearing the expectation of enforcement,<sup>375</sup> the Forty Recommendations have been discursively reconstituted as the ‘FATF International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation’. This effectively reproduces its institutional legitimacy and normative legitimacy of the Standards. Furthermore, UN Security Council Resolution 2462 (2019) incorporated the FATF Standards on combating terrorist financing into international law.

The FATF International Standards cover seven (7) thematic areas, namely- AML/CFTP policies and coordination; money laundering offence and confiscation of illicit funds; measures to combat terrorist and proliferation financing; preventative measures including customer due diligence (CDD) and record-keeping and the regulation of high-risk clients and products; transparency and beneficial ownership; defining the powers and responsibilities of national authorities and institutions; and lastly, promoting international cooperation.<sup>376</sup> Interestingly, insofar as the FATF has prescribed the criminalisation of the financing of terrorism, terrorist acts and terrorist organisations, as predicate offences of money laundering, collecting licit funds intended for TF would now constitute both an offence of TF and ML, thereby extending international treaty law.<sup>377</sup>

#### **4.1.2.3. *Caribbean Financial Action Task Force and CFATF Recommendations***

The Caribbean Financial Action Task Force (CFATF) was the first of nine FATF-style regional bodies to be established. The CFATF was borne out of a FATF-sponsored regional conference on drugs and money laundering in Aruba in 1990 to examine the FATF’s first annual report, and consider the adoption and implementation of its Forty Recommendations.<sup>378</sup>

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<sup>375</sup> Turner, ‘The Financial Action Task Force’.

<sup>376</sup> Financial Action Task Force, ‘International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations’ (Paris, France: FATF/OECD Secretariat, 2019 2003), <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf>.

<sup>377</sup> Pieth, ‘Criminalizing the Financing of Terrorism Criminal Law Responses to Terrorism After September 11’.

<sup>378</sup> Ali, *Money Laundering Control in the Caribbean*; Smellie, ‘The Work of the Caribbean Regional Division of the Financial Action Task Force’.

The Conference adopted twenty-one complementary region-specific Recommendations, approved in 1992 at its meeting in Jamaica, to ‘guide’ the future direction of AML/CFTP policy in the region.<sup>379</sup> These Recommendations address the regulation of the region’s financial services industry as well as the expansion of predicate offences of money laundering. In 1993, FATF Secretary Dilwyn Griffiths, remarked that if the FATF were to set up further regional Task Forces on the Caribbean model, it had “to be satisfied that there is sufficient commitment to make it worthwhile.”<sup>380</sup> Unpacking that statement, the commitment of the Caribbean to the TAMLO can be inferred. Illustratively, the Honourable Mr. Justice Anthony Smellie, Judicial Grand Court, Cayman Islands, noted in 1993 that as is the case of the FATF “the CFATF does not depend on external or international legal compulsion of its members for its growth and effectiveness.”<sup>381</sup> Instead, the CFATF reflected the Caribbean’s own recognition of, its responsibility to join transnational efforts to suppress the laundering of the illicit proceeds of drugs; its vulnerability to the “perils of drug trafficking” including the ‘insidious threat’ of corruption; and the susceptibility of offshore finance to “transient illicit funds.”<sup>382</sup>

It was intended to implement and ensure compliance with, “its [own] recommendations by a programme of regular reporting, internal self-evaluation of ... laws and regulations ... and mutual evaluation amongst themselves” rather than by the FATF.<sup>383</sup> Interestingly, the 1992 Kingston Declaration on Money Laundering, affirmed that banking secrecy laws should not hinder the reporting suspicious transactions or local law enforcement.<sup>384</sup> The CFATF Recommendations have guided the development of legislative reform on money laundering, asset seizure and forfeiture, and mutual legal assistance. The CFATF’s twenty-five members include jurisdictions of the Commonwealth Caribbean, included British Dependencies; and Central and South America. At the 1990 Aruba meeting, governments in the region had recognised that implementing the relevant recommendations required “human and financial resources beyond their actual capability.”<sup>385</sup> CFATF Recommendation 1 committed Member States to adequately financing the fight against money laundering; Recommendation 2 to

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<sup>379</sup> Ali, *Money Laundering Control in the Caribbean*; Smellie, ‘The Work of the Caribbean Regional Division of the Financial Action Task Force’.

<sup>380</sup> Dilwyn Griffiths, ‘International Efforts to Combat Money Laundering: Developments and Prospects’, *Commonwealth Law Bulletin* 19, no. 4 (1993): 1829.

<sup>381</sup> Smellie, ‘The Work of the Caribbean Regional Division of the Financial Action Task Force’, 1830.

<sup>382</sup> Smellie, 1831.

<sup>383</sup> Ali, *Money Laundering Control in the Caribbean*.

<sup>384</sup> Smellie, ‘The Work of the Caribbean Regional Division of the Financial Action Task Force’.

<sup>385</sup> Smellie, 1832–33.

criminalising money laundering while recognising the sovereign discretion of each jurisdiction to determine predicate offences; and Recommendations 17-20 to international criminal justice cooperation. However, the CFATF has problematically been dependent on external financing from powerful affiliate members with political and economic interests in the region, namely Canada, France, the Netherlands, the United Kingdom, and the United States. The European Union has been funding the implementation of the CFATF's Mutual Evaluation Programme under the 11<sup>th</sup> European Development Fund since September 2018.

#### **4.1.2.4. *The Commonwealth Secretariat and the Commonwealth Heads of State and Government and Law Ministers Processes***

Prior to, and independently of the CFATF, Caribbean States had sought to mobile technical assistance to build capacity for countering drug related money laundering,<sup>386</sup> within the Commonwealth of Nations. The Commonwealth had been promulgating transnational AML soft law since the 1980s.<sup>387</sup> Instrumental in this regard, was the adopted of the seminal 1979 Memorandum of Understanding, '*The Promotion and Development of International Cooperation to Combat Commercial and Economic Crime,*' at the Commonwealth Law Ministers' Meeting in Barbados. As regards the development of soft law norms on the tracing, seizure, and confiscation of the illicit proceeds of drug trafficking that are laundered, the Commonwealth Heads of State and Government adopted several influential communiqués urging Member States to adopt legislative measures and engage in transnational criminal justice cooperation.<sup>388</sup> The 1989 Harare Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth is a case in point.<sup>389</sup>

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<sup>386</sup> Smellie, 'The Work of the Caribbean Regional Division of the Financial Action Task Force'.

<sup>387</sup> Ali, *Money Laundering Control in the Caribbean*.

<sup>388</sup> Ali.

<sup>389</sup> Ali.

#### 4.1.2.5. *Other Transnational Regulatory Actors that Promulgate or Diffuse AML/CFTP Soft Law Standards*

Other international institutions that have proffered relevant transnational soft law include the Basel Committee on Banking Supervision (BCBS).<sup>390</sup> Although its membership is limited to forty-five central banks and banking supervisors from twenty-eight jurisdictions, it is a global standard-setter for prudential regulation of banks. Its 1988 ‘Statement of Principles on the Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering’ constitute authoritative soft law standards. The Statement has prescribed measures for customer identification and freezing accounts or denying customers financial service where it appears their deposits are the proceeds of illicit activities. The BCBS also issued a set of ‘Core Principles for Effective Banking Supervision’ (1997) and, more recently the revised ‘Sound Management of Risks related to Money Laundering and the Financing of Terrorism’ (2020).<sup>391</sup> These ‘guidelines’ address the assessment, monitoring, management, and mitigation of risks of the abuse of financial services for money laundering and terrorism financing, using customer due diligence (CDD), reporting of suspicious transactions and asset freezing. The Egmont Group of Financial Intelligence Units, the Offshore Group of Banking Supervisors, the International Organisation of Securities Commission and Financial Stability Board (FSB) have also played important roles promulgating prudential regulatory standards to combat criminal finance. Insofar as their technocratic soft law standards are directly complied with by Commonwealth Caribbean central banks, to meet ‘international best practices’, they generally bypass sovereign legislative processes in shaping domestic regulatory norms and local banking practices.

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<sup>390</sup> Kern Alexander, Rahul Dhumale, and John Eatwell, *Global Governance of Financial Systems: The International Regulation of Systemic Risk* (Oxford University Press, 2005); Rosa Maria Lastra, ‘Recent Developments in International Financial Regulatory Cooperation Financial Law Developments in 1996’, *Yearbook of International Financial and Economic Law* 1 (1996): 405–18.

<sup>391</sup> Basel Committee on Banking Supervision, ‘Guidelines: Sound Management of Risks Related to Money Laundering and Financing of Terrorism’ (Switzerland: Bank for International Settlements, 2020), <https://www.bis.org/bcbs/publ/d505.pdf>.

## 4.2. Problematising the Deliberative Processes within the Transnational Anti-Money Laundering Legal Order

Deliberative processes are usually sites of contestation and relational struggles within TLOs.<sup>392</sup> Within the TAMLO, deliberative sites have shifted from inclusive multilateral fora such as the United Nations General Assembly to exclusive public and private fora dominated by powerful onshore States such as the G7, OECD, UN Security Council, FSB, and the FATF. This has manifested in a corresponding shift in the locus of transnational AML/CFTP norms from international treaties to transnational soft law standards.<sup>393</sup> Consequent to this ‘regulatory capture’, Commonwealth Caribbean States have been marginalised from substantive participation within deliberative processes and institutions that promulgate, convey, and institutionalise transnational soft law standards. The resulting ‘democratic deficit’ has brought into question the relevance, coherence, and ownership of transnational AML/CFTP policy for these small jurisdictions given structural specificities within the Caribbean Basin.

By democratic deficit, reference is being made to the perceived degree of input legitimacy, output legitimacy and procedural fairness,<sup>394</sup> among a majority of constituents within the TAMLO. Input legitimacy underscores the extent to which transnational AML/CFTP policy choices have failed to reflect the will of all constituent members of the TAMLO consequent to the marginalisation many developing countries from relevant policymaking and deliberative processes. It has been argued, for instance, that the illegitimacy of the FATF’s exclusive membership, despite pivoting itself as a global standard-setter, has not been attenuated by the establishment of FATF-Style regional bodies. Although the latter are consulted in policymaking, they largely administer mutual evaluation processes and regional surveillance. Output legitimacy refers to the extent to which the TAMLO effectively promotes the interests of majority of constituents, including developing countries. There is a collective interest in suppressing ML/FTP. However, the increasingly recognised unintended consequences of

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<sup>392</sup> Shaffer, ‘Theorizing Transnational Legal Ordering’.

<sup>393</sup> Rainer Hülse and Dieter Kerwer, ‘How International Organizations Rule the World: The Case of the Financial Action Task Force on Money Laundering’, *Journal of International Organizations Studies* 2, no. 1 (2011): 50–67.

<sup>394</sup> John Glenn, ‘Global Governance and the Democratic Deficit: Stifling the Voice of the South’, *Third World Quarterly* 29, no. 2 (1 February 2008): 217–38, <https://doi.org/10.1080/01436590701806798>; Joseph S. Nye, ‘Globalization’s Democratic Defecit - How to Make International Institutions More Accountable Comment’, *Foreign Affairs* 80, no. 4 (2001): 2–6.

transnational AML/CFTP regulation for developing countries have amplified the concerns about output legitimacy. De-risking and financial exclusion due to the negligible treatment of the sustainable development/regulatory compliance nexus have been particularly acute in the Commonwealth Caribbean. Procedural fairness refers to the degree to which asymmetrical power relations within the TAMLO affect the degree of openness and transparency of decision-making processes. It is uncontroversial that the hegemonic role of the FATF, G7 and OECD in transnational AML/CFTP governance and lack of bi-directional accountability along the Onshore/Offshore axis have undermined procedural fairness in the TAMLO. Moreover, the relegation of Commonwealth Caribbean States as ‘conferees’ of externally designed AML/CFTP norms has undermined their sovereignty. This is particularly problematic because the TAMLO is, perceivably, “one of the most comprehensive, far reaching, ... deeply penetrating, and ... punitive” TLOs.<sup>395</sup> Relational power dynamics within the TAMLO, and especially within the FATF’s deliberative practices, have been noticeably polarized along the ‘Global North/South’ axis.<sup>396</sup> As post-colonial societies, Commonwealth Caribbean States have been especially defensive of their sovereignty, notwithstanding their small size.<sup>397</sup> Still, as will be demonstrated, their ability to exercise sovereignty over AML/CFTP policy-making within the TAMLO has been severely restricted by their small size, geopolitical influences in the Caribbean Basin, as well as capacity constraints and the resultant dependence on external technical assistance including to combat criminal finance.

#### **4.2.1. AML/CFTP Agenda-Setting: Transnational Criminal Justice Policy & Defunding Terrorism Post-9/11**

Powerful States and non-state actors often create, shape, and dominate standard-setting within TLOs to promote particularistic interests to the exclusion of those of weaker actors.<sup>398</sup> Since the 1980s, the G7 and OECD States have exercised hegemonic leadership in agenda-

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<sup>395</sup> Halliday, Levi, and Reuter, ‘Disciplinary Transnational Legal Order’, 2.

<sup>396</sup> Maíra Rocha Machado, ‘Similar in Their Differences’, in *Transnational Legal Ordering and State Change*, ed. Gregory C. Shaffer (Cambridge: Cambridge University Press, 2012), 50–88, <https://doi.org/10.1017/CBO9781139206662.003>.

<sup>397</sup> Linden Lewis, *Caribbean Sovereignty, Development and Democracy in an Age of Globalization* (Routledge, 2013).

<sup>398</sup> Halliday, ‘Transnational Legal Orders’.

setting within the TAMLO.<sup>399</sup> These deliberative processes have involved the ‘uploading’ and ‘downloading’, ‘importing’ and exporting’ of norms.<sup>400</sup> The flow of AML/CFTP norms has largely been top-down,<sup>401</sup> from powerful onshore States to an othered ‘offshore space’ with little co-learning. In fact, the elevation of transnational organised crime and related criminal finance, as a ‘threat’ to the integrity of the global financial system, on the policy agenda of the G7 was facilitated by the end of ‘East/West’ Cold War rivalry.<sup>402</sup> The resulting security vacuum enabled the ‘West’ to discursively construct the post-war security agenda in terms of global crime control.<sup>403</sup> From the outset, therefore, the United States and its allies strategically influenced global AML/CFTP agenda-setting,<sup>404</sup> by ‘uploading’ their respective domestic anti-crime policies and national security ‘threat’ constructions. Instigated by the United States,<sup>405</sup> Western insecurity was framed using belligerent rhetoric of the ‘war on drugs’ and the criminalisation of money laundering to reassure OECD publics that state sovereignty was not under siege by organised criminal networks.<sup>406</sup> In the 1980s, as one of the largest illicit markets for cocaine, concerns were mounting in the United States that mafias and other organised criminal groups were laundering the illicit proceeds of drug trafficking and using their wealth to exert significant economic influence.<sup>407</sup> The United States became the first country to criminalise money laundering by enacting the Money Laundering Control Act of 1986, and has since established more than 150 predicate offences.<sup>408</sup> The United Kingdom followed but

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<sup>399</sup> Morten Ougaard, ‘The OECD’s Global Role: Agenda-Setting and Policy Diffusion’, in *Mechanisms of OECD Governance: International Incentives for National Policy-Making*, ed. K. Martens and A. Jakobi (Oxford, United Kingdom: Oxford University Press, 2010), 26–49; Zagaris and Castilla, ‘Constructing an International Financial Enforcement Subregime’.

<sup>400</sup> Santos B. De Sousa, *Towards a New Legal Common Sense*, 2nd ed. (New York: Cambridge University Press, 2002); Shaffer, ‘Theorizing Transnational Legal Ordering’.

<sup>401</sup> James Thuo Gathii, ‘The Financial Action Task Force and Global Administrative Law FATF Symposium’, *Journal of the Professional Lawyer* 2010 (2010): 197–210.

<sup>402</sup> Adam Edwards and Pete Gill, ‘The Politics of “Transnational Organized Crime”: Discourse, Reflexivity and the Narration of “Threat”’, *The British Journal of Politics & International Relations* 4, no. 2 (2002): 245–70, <https://doi.org/10.1111/1467-856X.t01-1-00004>.

<sup>403</sup> Edwards and Gill.

<sup>404</sup> Inês Sofia de Oliveira, ‘The Governance of the Financial Action Task Force: An Analysis of Power and Influence throughout the Years’, *Crime, Law and Social Change* 69, no. 2 (March 2018): 153–72, <https://doi.org/10.1007/s10611-017-9749-4>.

<sup>405</sup> Nicholas Ryder, *Money Laundering-- an Endless Cycle? A Comparative Analysis of the Anti-Money Laundering Policies in the United States of America, the United Kingdom, Australia and Canada* (London ; New York: Routledge, 2012).

<sup>406</sup> Edwards and Gill, ‘The Politics of “Transnational Organized Crime”’.

<sup>407</sup> Clint Peinhardt and Todd Sandler, *Transnational Cooperation: An Issue-Based Approach* (Oxford University Press, 2015).

<sup>408</sup> Peinhardt and Sandler.

initially favoured a narrow money laundering offence,<sup>409</sup> whereas France was more concerned about laundering the proceeds of tax evasion. These G7 countries led the transnational securitisation of money laundering,<sup>410</sup> and eventually the adoption of the 1988 United Nations Vienna Convention.

The inclusive deliberative processes within the United Nations surrounding the negotiation of the 1988 Vienna Convention firmly established a discursive nexus between criminal finance and sustainable development. Linguistic analysis of the 1988 Vienna Convention has revealed that developing countries were constituted as especially vulnerable to criminal networks infiltrating their governance institutions, destabilizing their financial systems, derailing economic development processes, and flouting the rule of law. However, their recognised vulnerability was intended to prioritise mutual legal assistance, criminal intelligence exchange, and technical capacity building to combat drug-related money laundering.<sup>411</sup> This starkly contrasts with the increasing securitisation of developing States' vulnerability by the 'Great Powers' as a pretext for transnational surveillance and 'disciplining' within the current TAMLO. At the hemispheric level, the United States' geopolitical influence shaped the Caribbean's security agenda,<sup>412</sup> including on drug-related money laundering. The region became subject to the United States' aggressive "counter narco-diplomacy."<sup>413</sup> Thus, the United States discursively constituted the Caribbean Basin as its 'third border' and has aggressively extended prescriptive criminal jurisdiction extraterritorially,<sup>414</sup> including "over matters presenting only a tenuous link with the US."<sup>415</sup> It has done so with little regard for the sovereignty of Caribbean States. Additionally, OECD States have sought to compel Caribbean States to conclude mutual legal assistance treaties that circumvent dual criminality laws that might prevent transnational cooperation where offences such as tax evasion have not been

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<sup>409</sup> Griffiths, 'International Efforts to Combat Money Laundering'.

<sup>410</sup> Peinhardt and Sandler, *Transnational Cooperation*.

<sup>411</sup> Annabelle Bolt, 'Practical Problems in Mutual Assistance in Criminal Matters', *Commonwealth Law Bulletin* 19, no. 4 (1993): 1911–16.

<sup>412</sup> Paul Sutton, 'The Concept of Small States in the International Political Economy', *The Round Table* 100, no. 413 (1 April 2011): 141–53, <https://doi.org/10.1080/00358533.2011.565625>.

<sup>413</sup> Fitzroy Baptiste, 'United States- Caribbean Relations from WWII to Present: The Social Nexus', in *United States-Caribbean Relations: Their Impact on Peoples and Cultures*, ed. Ransford W. Palmer (Westport, Conn: Praeger, n.d.), 7–52.

<sup>414</sup> Sutton, 'The Politics of Small State Security in the Caribbean'.

<sup>415</sup> Anna Gardella, 'The Fight against the Financing of Terrorism between Judicial and Regulatory Cooperation Articles - General', *Studies in International Financial, Economic, and Technology Law* 6 (2004 2003): 19.

designated as predicate offences in their jurisdictions.<sup>416</sup> This practice has been aimed at enmeshing Caribbean States in a network of transnational agreements,<sup>417</sup> for extraterritorial regulation of money laundering.<sup>418</sup> Furthermore, they have been criticised as a veiled attempt to rob Caribbean jurisdictions of their sovereign right to determine liberal tax regimes and modernise and enforce their criminal laws within their territorial jurisdictions.<sup>419</sup>

Since the 9/11 al Qaeda terrorist attacks, the United States has used the martial rhetoric of the “war against terror” and “fight against terrorist financing,”<sup>420</sup> to discursively elevated the criminalisation of FTP on the policy agenda of the TAMLO. Transnational legal responses to terrorist financing have focused on cross-border money laundering techniques used by terrorist financiers to abuse the international financial system.<sup>421</sup> The attacks were significant, in this regard, because they claimed approximately 3,000 lives and constituted the largest attack on the United States’ soil.<sup>422</sup> This galvanised an immediate and collective transnational response. Prior to 9/11, the United States had opted to unilaterally extend its prescriptive jurisdiction, extraterritorially, as it did not view the FATF’s AML regime as an effective mechanism given its initial mandate.<sup>423</sup> However, in 2001, the G7 expanded the FATF’s policy-making mandate, effectively merging both the anti-money laundering and counter-terrorism financing regimes within one TAMLO.

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<sup>416</sup> Mark P. Hampton and Michael Levi, ‘Fast Spinning into Oblivion? Recent Developments in Money-Laundering Policies and Offshore Finance Centres’, *Third World Quarterly* 20, no. 3 (1 June 1999): 645–56, <https://doi.org/10.1080/01436599913730>.

<sup>417</sup> Baptiste, ‘United States- Caribbean Relations from WWII to Present: The Social Nexus’.

<sup>418</sup> Alexander, Dhumale, and Eatwell, *Global Governance of Financial Systems*.

<sup>419</sup> Peter Alldridge, ‘Money Laundering and Globalization’, *Journal of Law and Society* 35, no. 4 (December 2008): 437–63, <https://doi.org/10.1111/j.1467-6478.2008.00446.x>; Vaughn E. James, ‘Twenty-First Century Pirates of the Caribbean: How the Organization for Economic Cooperation and Development Robbed Fourteen Caricom Countries of Their Tax and Economic Policy Sovereignty’, *University of Miami Inter-American Law Review* 34, no. 1 (2003 2002): 1–50.

<sup>420</sup> Gathii, ‘The Financial Action Task Force and Global Administrative Law FATF Symposium’, 187.

<sup>421</sup> Shima Baradaran et al., ‘Funding Terror’, *University of Pennsylvania Law Review* 162, no. 3 (2014 2013): 477–536; Gardella, ‘The Fight against the Financing of Terrorism between Judicial and Regulatory Cooperation Articles - General’; Jimmy Gurulé, *Unfunding Terror: The Legal Response to the Financing of Global Terrorism* (Cheltenham, UK ; Northampton, MA: Edward Elgar, 2008).

<sup>422</sup> Miriam Ververde, ‘A Look at the Data on Domestic Terrorism and Who’s behind It’ (Politifact, 2017), [www.Politifact.Com/Truth-o-Meter/Article/2017/Aug/16/Look-Data-Domestic-Terrorism-and-Whos-behind-It.Politifact](http://www.Politifact.Com/Truth-o-Meter/Article/2017/Aug/16/Look-Data-Domestic-Terrorism-and-Whos-behind-It.Politifact).

<sup>423</sup> Alldridge, ‘Money Laundering and Globalization’; Gardella, ‘The Fight against the Financing of Terrorism between Judicial and Regulatory Cooperation Articles - General’.

#### 4.2.2. AML/CFTP Agenda-Setting: Financial Services Regulation and Supervision- The Offshore Scrutiny

Post-9/11, the policy agenda of the TAMLO has increasingly shifted from transnational criminal justice cooperation to risk-based prudential regulation of financial service sectors and financial intelligence gathering.<sup>424</sup> This has been due, in part, to the influence of transnational private regulatory networks and onshore banking sectors on AML/CFTP governance, which has challenged the State's exclusive regulatory competence.<sup>425</sup> Although The Bahamas has been focal to the United States' concern from the 1960s about illicit activities of offshore banks,<sup>426</sup> Commonwealth Caribbean offshore jurisdictions have generally become the principal targets of this regulatory policy shift. They have been discursively constructed as 'hotspots' for money laundering and terrorism financing. Banking secrecy and confidentiality services offered have been categorically presumed to entice "dishonest clients" irrespective of the legality of their needs, indicative of a lack of moral legitimacy, and a justificatory basis for barring OFCs from accessing the global financial and payment systems.<sup>427</sup> In fact, it was too closely scrutinise Commonwealth Caribbean offshore jurisdictions,<sup>428</sup> why Canada, the United Kingdom and the United States prioritised the establishment of the CFATF in 1990, as the first FATF-style regional body, and have maintained affiliate membership. By the late 1990s, the FATF had signalled its concern that "a number of countries and territories, including some offshore financial centres, continue to offer excessive banking secrecy and allow shell companies to be used for illegal purposes."<sup>429</sup> This policy focus was underscored by the G7 at its Okinawa Summit in 2000, in Japan. The G7 Finance Ministers', reporting to the G7 Heads

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<sup>424</sup> Geiger and Wuensch, 'The Fight against Money Laundering'; Bill Maurer, 'From Anti-Money Laundering To... What? The Aftermath of "Compliance" for Offshore Financial Services', in *Ungoverned Spaces: Alternatives to State Authority in an Era of Softened Sovereignty*, ed. Anne Clunan and Trinkunas A. Harold (Stanford University Press, 2010), 215–31.

<sup>425</sup> de Oliveira, 'The Governance of the Financial Action Task Force'; Mark Pieth and Gemma Aiolfi, 'The Private Sector Become Active: The Wolfsberg Process', *Journal of Financial Crime* 10, no. 4 (1 October 2003): 359–65.

<sup>426</sup> Ryder, *Money Laundering-- an Endless Cycle?*; Shaxson, *Treasure Islands*.

<sup>427</sup> Jackie Johnson, 'Repairing Legitimacy after Blacklisting by the Financial Action Task Force', *Journal of Money Laundering Control; London* 7, no. 1 (Summer 2003): 47.

<sup>428</sup> Kenneth S Blazjewski, 'The FATF and Its Institutional Partners: Improving the Effectiveness and Accountability of Transgovernmental Networks', *Temple International & Comparative Law Journal* 22, no. 1 (2008): 1–61.

<sup>429</sup> Financial Action Task Force, 'Financial Action Task Force on Money Laundering Annual Report 1998-1999', 35.

of State and Government, made it clear that offshore jurisdictions would be targeted through increased financial supervision and surveillance.<sup>430</sup> For instance, the G7 Finance Ministers' problematic reference to "those so-called offshore financial centres,"<sup>431</sup> in its Okinawa Summit report, inferably othered offshore jurisdictions as non-compliant with transnational AML standards, delegitimised their financial and corporate service sectors, while mutually constituting onshore financial centres as presumably more compliant and legitimate.

By discursively constituting the 'abuse of the global financial system' as the core policy concern of the TAMLO, the G7 effectively blurred the remit of the transnational AML regulatory agenda. As a case in point, by inaccurately representing OFCs as "tax havens" typified by "poor regulatory standards, excessive bank secrecy, and harmful tax competition,"<sup>432</sup> the G7 has conflated its onshore economic interests in curbing the erosion of national tax bases due to tax avoidance and evasion with fighting money laundering. Yet, in 2000, tax evasion had not been established as a predicate offence of money laundering within the TAMLO, and tax avoidance has involved completely legitimate offshore tax planning. Nonetheless, as a matter of policy, the G7 and OECD have become invested in increased extraterritorial surveillance of Commonwealth Caribbean OFCs. They have insisted on timely transnational financial intelligence sharing and making beneficial ownership and control of shell companies and other corporate and trust vehicles publicly accessible.<sup>433</sup> Powerful onshore States have reproduced narratives of offshore jurisdictions as using banking secrecy and confidentiality laws to facilitate laundering of illicit proceeds; failing to implement AML, customer due-diligence standards; and refusing to engage in cross-border exchange of financial intelligence to support investigations and prosecutions onshore.<sup>434</sup> This has led to a series of multilateral regulatory initiatives coming to occupy the AML/CFTP agenda.

The Bill Clinton Administration in the United States co-opted the Financial Stability Board (FSB) in combating rogue banking, money laundering and tax evasion.<sup>435</sup> The FSB started to

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<sup>430</sup> Colin Powell, 'The Regulation of Offshore Financial Centres', *Commonwealth Law Bulletin* 31, no. 2 (January 2005): 69–91, <https://doi.org/10.1080/03050718.2005.9986681>.

<sup>431</sup> Bank for International Settlements, 'Actions against Abuse of the Global Financial System- Report from the G7 Finance Ministers to the Heads of State and Government, Okinawa Summit' (Basel, Switzerland: BIS, 21 July 2000), para.9, <http://www.g8.utoronto.ca/summit/2000okinawa/abuse.htm>.

<sup>432</sup> Bank for International Settlements, 'G7 Finance Ministers' Okinawa Summit Report (2000)'.

<sup>433</sup> William Witherell, 'Strengthening the Offshore Defences against Economic Crime and Abuse', *Journal of Financial Crime* 10, no. 4 (1 January 2003): 387–91, <https://doi.org/10.1108/13590790310808943>.

<sup>434</sup> Gordon, 'On the Use and Abuse of Standards for Law'.

<sup>435</sup> Wechsler, 'Follow the Money Essay'.

signify OFCs as frustrating the supervision of onshore financial intermediaries that operate in offshore jurisdictions.<sup>436</sup> Furthermore, offshore jurisdictions were discursively signified as lacking the political will to strengthen banking supervision and, therefore, threatened the integrity of onshore financial markets.<sup>437</sup> Additionally, the G7 advocated for increased transnational cooperation on banking supervision and lobbied for the IMF and World Bank's co-option within the TAMLO.<sup>438</sup> The United States and France, reportedly leveraged their membership of the Executive Board of the IMF to influence an AML regulatory agenda and, thereby, determined the prominence that the surveillance of OFCs came to occupy in the organisation's work.<sup>439</sup> To appease the United States and France, the IMF reluctantly agreed to participate in efforts to combat money laundering by collaborating with the FATF.<sup>440</sup> However, for fear of losing its legitimacy if it participated in the FATF's Non-Cooperative Countries and Territories (NCCT) 'blacklisting' initiative, the IMF initially rejected the United States' insistence on the FATF's Recommendations being incorporated into the IMF's Financial Sector Assessment Programme (FSAP) and Offshore Sector Assessment Programme.<sup>441</sup> Following the 9/11 terrorist attacks, however, the IMF Executive Board, yielded to the United States' lobbying efforts and, in 2001, endorsed the revised FATF Recommendations while proposing their inclusion in its FSAP.<sup>442</sup> Thus, although seemingly neutral and technocratic, the IMF's AML policy agenda has always been politicised. Proliferation financing was included in the FATF's mandate in October 2008.<sup>443</sup>

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<sup>436</sup> Financial Stability Forum, 'Report of the Working Group on Offshore Centres' (Financial Stability Forum, 2000), [http://www.fsb.org/wp-content/uploads/r\\_0004b.pdf?page\\_moved=1](http://www.fsb.org/wp-content/uploads/r_0004b.pdf?page_moved=1).

<sup>437</sup> Financial Stability Forum.

<sup>438</sup> Blazejewski, 'The FATF and Its Institutional Partners: Improving the Effectiveness and Accountability of Transgovernmental Networks'; Gordon, 'On the Use and Abuse of Standards for Law'.

<sup>439</sup> Gordon, 'On the Use and Abuse of Standards for Law'.

<sup>440</sup> Gordon.

<sup>441</sup> Gardella, 'The Fight against the Financing of Terrorism between Judicial and Regulatory Cooperation Articles - General'; Gordon, 'On the Use and Abuse of Standards for Law'.

<sup>442</sup> Gardella, 'The Fight against the Financing of Terrorism between Judicial and Regulatory Cooperation Articles - General'; Gordon, 'On the Use and Abuse of Standards for Law'.

<sup>443</sup> Gathii, 'The Financial Action Task Force and Global Administrative Law FATF Symposium'.

### 4.2.3. (Re)politicising the Transnational Institutional Architecture of the TAMLO: ‘Agency Capture’ and its Deliberative Challenges

The deliberative challenges within the TAMLO have arisen as a result of an unrepresentative and fragmented transnational institutional framework for AML/CFTP normative policymaking, regulatory oversight, and enforcement. This has reflected a shift in AML/CFTP standard-setting from inclusive multilateral fora to exclusive institutions in which powerful States can impose top-down policies preferences.<sup>444</sup> Unquestionably, the FATF has become the principal deliberative and policy-making mechanism for the promulgation and diffusion of transnational AML/CFTP regulatory and legal standards.<sup>445</sup> It was the United States and France, at the G7 Summit in 1989 in Paris, which proposed the establishment of a financial action task force with the mandate to audit and promote the criminalisation of money laundering, strengthen transnational cooperation and engage the private sector in AML efforts.<sup>446</sup> Since then, the FATF’s policy direction has been determined by an exclusive group of ‘Great Powers’.<sup>447</sup> In fact, the initial Forty Recommendations were largely drafted by the United States’ domestic regulatory and criminal law enforcement agencies.<sup>448</sup> At the time of their adoption, the FATF had an exclusive membership of sixteen advanced industrialised economies.<sup>449</sup> The FATF was, therefore, never intended to be a globally inclusive deliberative forum. A decade after its establishment, in 1999, Dilwyn Griffiths, FATF Secretary, declared that:

The FATF is not and has no pretensions to become the United Nations of the anti-money laundering world... to remain a cohesive ... body would be threatened if our membership were to become significantly larger.<sup>450</sup>

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<sup>444</sup> Gathii.

<sup>445</sup> Anja P. Jakobi, ‘Governing Illicit Finance in Transnational Security Spaces: The FATF and Anti-Money Laundering’, *Crime, Law and Social Change* 69, no. 2 (March 2018): 173–90, <https://doi.org/10.1007/s10611-017-9750-y>; Nance, ‘The Regime That FATF Built’; Vlcek, ‘Global Financial Governance and the Informal’.

<sup>446</sup> Anja P. Jakobi, ‘The OECD and Crime: The Fight against Corruption and Money Laundering’, in *Mechanisms of OECD Governance: International Incentives for National Policy-Making?*, ed. Kerstin Martens and Anja P. Jakobi (OUP Oxford, 2010), 139–62.

<sup>447</sup> de Oliveira, ‘The Governance of the Financial Action Task Force’.

<sup>448</sup> Gordon, ‘On the Use and Abuse of Standards for Law’.

<sup>449</sup> Hülse and Kerwer, ‘How International Organizations Rule the World: The Case of the Financial Action Task Force on Money Laundering’; Vlcek, ‘Money Laundering Prevention and Small State Development’.

<sup>450</sup> Griffiths, ‘International Efforts to Combat Money Laundering’, 1827.

Interestingly, this statement occurred in the context of the FATF having commenced work to expand its membership in 1998-1999. Still, it only contemplated admitting "...a limited number of strategically important countries which could play a major role in their regions in the process of combating money laundering."<sup>451</sup> This deliberately exclusionary ethos has continued to underpinned criticisms levied the FATF for 'regulatory capture'. Despite now having diffused its 'International Standards' across an estimated 200 States, only eight of its thirty-six permanent members are from the Global South and none are small Commonwealth jurisdictions. The FATF has paternalistically justified the transnational institutionalisation of the TAMLO, among non-member developing economies on the basis of safeguarding their emerging financial centres and economic development processes from the entrenchment of organised crime in their jurisdictions as onshore States increase AML/CFTP regulation.<sup>452</sup> This questionable justification for subjecting non-members to the degree of interference in the legislative and regulatory processes of non-member States that they have been,<sup>453</sup> has deprived them of their agency for self-regulation and, ultimately, their regulatory sovereignty.

The institutional legitimacy of the FATF, absent any judicial authority to create legally binding rules, has also raised deliberative concerns. To legitimise the FATF International Standards, OECD countries sought to include reference to them within the United Nations Convention against Transnational Organised Crime and the Protocols Thereto (2000). Article 7 (measures to combat money laundering) obligates each State Party to:

Institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions ... in order to deter and detect all forms of money-laundering, which regime shall emphasize requirements for customer identification, record-keeping and the reporting of suspicious transactions.

Furthermore, sub-paragraph 3 provides that:

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<sup>451</sup> Financial Action Task Force, 'Financial Action Task Force on Money Laundering- Annual Report 1999-2000' (Paris, France: FATF/OECD Secretariat, 22 June 2000), 7, <https://www.fatf-gafi.org/media/fatf/documents/reports/1999%202000%20ENG.pdf>.

<sup>452</sup> Alldridge, 'Money Laundering and Globalization'; Hülse and Kerwer, 'How International Organizations Rule the World: The Case of the Financial Action Task Force on Money Laundering'.

<sup>453</sup> Alldridge, 'Money Laundering and Globalization'; Todd Doyle, 'Cleaning up Anti-Money Laundering Strategies: Current FATF Tactics Needlessly Violate International Law', *Houston Journal of International Law*, no. 2 (2002 2001): 279-314.

In establishing a domestic regulatory and supervisory regime ... States Parties are called upon to use as a guideline the relevant initiatives of regional, interregional, and multilateral organizations against money-laundering.

Yet, as the travaux préparatoires have revealed, the FATF members sought to influence the negotiations to consolidate the organisation's legitimacy. With respect to the draft provisions of the Convention requiring States to take steps to institute comprehensive anti-money laundering domestic regulatory and supervisory regimes (then Article 4 bis), the FATF strongly endorsed the formulation that expressly provided that "State Parties shall adopt and adhere to the international standards set by the Financial Action Task Force on Money Laundering."<sup>454</sup>

The United Kingdom had proposed language providing that:

In establishing regimes to combat money-laundering, States Parties should consider, in particular, the 40 Recommendations of the Financial Action Task Force on Money Laundering, as well as other relevant anti-money-laundering initiatives endorsed by the Organization of American States, the European Union, the Council of Europe and the Caribbean Financial Action Task Force.<sup>455</sup>

Rejecting the United Kingdom's formulation on the basis of deliberative marginalisation, some delegations expressed concern about "the appropriateness of incorporating in a global instrument, standards set by a group of States with limited membership."<sup>456</sup> Furthermore, it was felt that the "inherently optional nature of these recommendations" were incompatible with the obligatory language of this paragraph.<sup>457</sup> Some delegations outrightly rejected the inclusion of the forty recommendations of the Financial Action Task Force on Money Laundering in the text.<sup>458</sup> Others underscoring their unpreparedness to accept such language, highlighted that while there was a recognized need for the international community to "set high standards for measures to combat money-laundering, or at least benefit from already existing standards that had received broad recognition," the matter required further discussion.<sup>459</sup>

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<sup>454</sup> Financial Action Task Force, 'Financial Action Task Force on Money Laundering Annual Report 1998-1999', 38.

<sup>455</sup> United Nations Secretariat, 'Travaux Préparatoires for the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and Protocols Thereto' (New York: United Nations Office on Drug and Crime, 2006), 64, [https://www.unodc.org/pdf/ctoccop\\_2006/04-60074\\_ebook-e.pdf](https://www.unodc.org/pdf/ctoccop_2006/04-60074_ebook-e.pdf).

<sup>456</sup> United Nations Secretariat, 67.

<sup>457</sup> United Nations Secretariat, 67.

<sup>458</sup> United Nations Secretariat, 'Travaux Préparatoires for the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and Protocols Thereto'.

<sup>459</sup> United Nations Secretariat, 67.

The FATF has come to rely on the backing of its powerful Member States of the G7, OECD and UN Security Council, as well as institutional partnerships with the IMF to diffuse and harden its Forty Recommendation in a manner that arguably confers on them legal effect.<sup>460</sup> In fact, they have been so hardened that they have now been rebranded as International Standards, signalling their legitimacy. Successive UN Security Council Resolutions have directly incorporated the FATF ‘International Standards’ into international law,<sup>461</sup> and have mandated their incorporation into domestic legislative and regulatory frameworks of UN Member States.<sup>462</sup> For example, para.7 of UNSC Res.1617 of July 2005 urged UN 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.”

Questions surrounding the FATF’s institutional legitimacy have not been satisfactorily resolved by the establishment of FATF-Style Regional Bodies (FSRBs) including the CFATF. During fieldwork, Calvin Wilson, former Executive Director of the CFATF, recalled that the perceived legitimacy of the FATF within the Caribbean was initially uncontentious as there was a clear understanding that the CFATF “would have undertaken self-assessment against the benchmarks.”<sup>463</sup> That is, the regionally specific CFATF Recommendations which mirrored the FATF’s Forty Recommendations. Likewise, in 1999, the FATF noted that:

CFATF member governments have made a firm commitment to submit to mutual evaluations of their compliance both with the Vienna Convention and with the CFATF and FATF Recommendations... signaled by the decision, made in October 1997 by the CFATF Council of Ministers in Barbados, to adopt a mandatory schedule of mutual evaluations.<sup>464</sup>

The establishment of the CFATF, and other subsequent FSRBs sought to increase the FATF’s legitimacy by integrating regional networks of non-members into the TAMLO to ensure external regulatory oversight of mutual evaluations processes. As an Associate Member

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<sup>460</sup> Blazejewski, ‘The FATF and Its Institutional Partners: Improving the Effectiveness and Accountability of Transgovernmental Networks’; Gathii, ‘The Financial Action Task Force and Global Administrative Law FATF Symposium’.

<sup>461</sup> Gathii, ‘The Financial Action Task Force and Global Administrative Law FATF Symposium’.

<sup>462</sup> Blazejewski, ‘The FATF and Its Institutional Partners: Improving the Effectiveness and Accountability of Transgovernmental Networks’.

<sup>463</sup> Transcript of the response from fieldwork is in the author’s possession.

<sup>464</sup> Financial Action Task Force, ‘Financial Action Task Force on Money Laundering Annual Report 1998-1999’, 36.

of the FATF, the CFATF has sought to participate in the FATF's deliberative processes on crafting and revising the International Standards and by amplifying regional experiences in the global dialogue. However, the CFATF does not have a vote on important policy issues. Moreover, Ministers of CFATF Member States decided not to apply the Nineteen CFATF Recommendations, in the Third Round of Mutual Evaluations, as the revised FATF Forty Recommendations had become aligned with them.<sup>465</sup> Since then, mutual evaluations have been undertaken on the basis of the non-negotiable technical compliance with the FATF's International Standards and effectiveness ratings, despite the fact that mutual evaluations are being conducted by neighbouring countries within the Latin American and Caribbean region. Insofar as the CFATF is funded by OECD/FATF members states, including bilateral donors with particular economic interests in the region, namely, the United States, the United Kingdom, and the Netherlands,<sup>466</sup> they may exert considerable influence or soft power over the policy direction of the CFATF and the operation of the CFATF Secretariat. The World Bank, the European Union and the Commonwealth Secretariat also provide institutional financial support.

It is important to note that the democratic deficit in the FATF deliberative processes appears to have increasingly strained the relationship between the FATF and CFATF, particularly in the context of the emerging unintended sustainable development consequences related to overregulation, de-risking, and financial inclusion. Over the years, Member States of the CFATF have asserted the need for mutual confidence and respect within the TAMLO. Lamenting the democratic deficit in these transnational deliberative processes, they have insisted that "it should not fall to the FATF alone to devise and impose Recommendations. These matters are for us all."<sup>467</sup> As Chair of the CFATF, Antigua and Barbuda, through its Chief Foreign Affairs Representative, Sir Ronald Sanders, bemoaned the need for:

A genuinely consultative and participatory mechanism for all members of the FATF and ... FATF-style regional bodies to meet as equal partners in the fight against money laundering and terrorism financing. All parties should have an equal

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<sup>465</sup> Caribbean Financial Action Task Force, 'CFATF Annual Report 2003-2004' (Port-of-Spain, Trinidad & Tobago: CFATF Secretariat, 2004), 3–4, <https://www.cfatf-gafic.org/documents/cfatf-annual-reports/15-annual-report-2003-2004>.

<sup>466</sup> Ali, *Money Laundering Control in the Caribbean*.

<sup>467</sup> Caribbean Financial Action Task Force, 'CFATF Annual Report 2003-2004', 8.

voice. None should be subject to coercion by another. Blacklists should be a thing of the past.<sup>468</sup>

With respect to institutional fragmentation within the TAMLO, there remains the perennial issues of accountability and transparency of transnational regulatory networks (TRNs). As has been observed, “membership of these bodies is often selective and leaves much of the world on the outside looking in.”<sup>469</sup> Notwithstanding, they have set global regulatory standards, on sovereign regulatory issues, which are then incorporated into national laws of countries marginalised from the deliberative processes or implemented by central banks without domestic legislative scrutiny. This regulatory capture has created a conflict of interest. The States of the Global South, and especially the Commonwealth Caribbean, are notoriously underrepresented within the most influential TRNs that make the regulatory rules on illicit financial flows.<sup>470</sup> These include the Basel Committee on Banking Supervision, the Bank of International Settlements (created by central banks and private US financial institutions), the Egmont Group on Financial Intelligence Units, and the Financial Stability Board (whose members are mostly central bankers and financial regulators from G20 countries). These TRNs are often represented as a disaggregation of the state insofar as interactions generally occur at the level of the technical agencies with their foreign counterparts.<sup>471</sup> On this account, it has been argued that TRNs facilitate cooperation to tackle collective transnational problems without undermining national sovereignty and democracy since participating agencies are domestically accountable.<sup>472</sup> However, from a deliberative perspective, Commonwealth Caribbean States are often underrepresented within these fora. Owing to resource and capacity constraints, developing countries cannot effectively participate in deliberative processes to shape transnational norms, or wield ‘counter-hegemonic influences in regulatory discourses.’<sup>473</sup> Participatory inclusiveness may also be undermined by asymmetrical power realities among technical agencies, along the Onshore/Offshore axis. While national regulatory agencies are accountable within their respective jurisdictions, they are nonetheless tasked with pursuing and

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<sup>468</sup> Caribbean Financial Action Task Force, 8.

<sup>469</sup> Financial Transparency Coalition, ‘Who Makes the Rules on Illicit Financial Flows? Six Financial Institutions You’ve Never Heard Of...’, Policy Brief (Boston, U.S.A: Financial Transparency Coalition, 22 February 2017), [https://financialtransparency.org/wp-content/uploads/2017/02/WhoMakesTheRules\\_Final.pdf](https://financialtransparency.org/wp-content/uploads/2017/02/WhoMakesTheRules_Final.pdf).

<sup>470</sup> Financial Transparency Coalition.

<sup>471</sup> Pierre-Hugues Verdier, ‘Transnational Regulatory Networks and Their Limits’, *Yale Journal of International Law* 34, no. 1 (2009): 113–72.

<sup>472</sup> Verdier.

<sup>473</sup> Shaffer, ‘Theorizing Transnational Legal Ordering’; De Sousa, *Towards a New Legal Common Sense*.

preserving relevant national interests, and where these conflict with general international policy objective of a TRN, national interests of powerful States will ultimately take precedent.<sup>474</sup>

In the final analysis, the sustainability of the G7's and OECD's Anglo-American hegemonic influence over global financial governance and deliberative processes has been questioned, not least because of the legitimacy crisis created by their exclusive membership. Emergent financial markets in the Global South are becoming key players in international financial decision-making processes.<sup>475</sup> This has been reflected in the G20 effectively supplanting the G7 in global financial governance and changing the pre-crisis financial orthodoxy and balance of power in global regulatory agenda-setting.<sup>476</sup> Additionally, it has been suggested that the capacity of powerful G7 and OECD countries to restrict access to their financial markets by non-compliant small jurisdictions to enforce global regulatory standards is being eroded as some OFCs have resorted to emerging financial markets.<sup>477</sup> Still, Commonwealth Caribbean States, whose financial institutions are largely dependent on access to global financial and payment systems through correspondent banking relationships, have not managed to evade the regulatory grasp of American, Canadian and British authorities that have insisted on subjecting them to heightened transnational AML/CFTP scrutiny. Thus, the cumulative effect of the democratic deficit in the participation of non-Western States in the propagation of AML/CFTP norms and exercise of hegemonic power by wealthy States in controlling and setting the agenda, has been to effectively exclude issues that address the realities of developing countries.<sup>478</sup>

Although conferred with a “new open-ended mandate” in 2019,<sup>479</sup> its core membership remains restricted to “strategically important” jurisdictions that have significant financial centres and are demonstrably committed to the FATF's International Standards,<sup>480</sup> and two regional organisations (i.e., the European Commission and Gulf Cooperation Council). In June

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<sup>474</sup> Verdier, ‘Transnational Regulatory Networks and Their Limits’.

<sup>475</sup> Jeffrey Chwieroth, ‘The Crisis in Global Finance: Political Economy Perspectives on International Financial Regulatory Change’, in *Beyond National Boundaries: Building a World Without Walls* (Academy of Korean Studies Press, 2011), <http://book.aks.ac.kr/index.asp>; Sharman, ‘Canaries in the Coal Mine: Tax Havens, the Decline of the West and the Rise of the Rest’.

<sup>476</sup> Chwieroth, ‘The Crisis in Global Finance’.

<sup>477</sup> Sharman, ‘Canaries in the Coal Mine: Tax Havens, the Decline of the West and the Rise of the Rest’.

<sup>478</sup> Gathii, ‘The Financial Action Task Force and Global Administrative Law FATF Symposium’.

<sup>479</sup> ‘FATF Ministers Give FATF an Open-Ended Mandate’, accessed 8 April 2020, <http://www.fatf-gafi.org/publications/fatfgeneral/documents/fatf-mandate.html>.

<sup>480</sup> Financial Action Task Force, ‘Financial Action Task Force on Money Laundering Annual Report 1998-1999’, 34.

2019, the FATF celebrated its 30th anniversary, coincidentally, under the United States' Presidency. The major strategic initiatives set for the FATF under the US Presidency were mitigating the risk of abuse of virtual assets and their providers for money laundering and terrorist financing; strengthening FATF Standards on financing the proliferation of WMD, targeting the financing of ISIL and al Qaeda, and the launch of a Strategic Review to evaluate compliance with FATF Standards; reassess the FATF and FATF-Style Regional Bodies (FSRBs) assessment processes; and identify “drivers of positive change.”<sup>481</sup> Unsurprisingly, the AML/CFTP policy priorities all correspond to the United States', and its allies', strategic foreign security interests. They are also the least relevant to small Commonwealth Caribbean States in terms of empirically assessed ML/FTP threats. The most pressing issues for the region, namely, de-risking and financial inclusion, were notably missing from the strategic review agenda.

#### **4.3. (De)naturalising the Role of Asymmetrical Power Relations in Transnational AML/CFTP Policy Diffusion – Discursive Labelling, Shaming and Conditioned Capacity Building**

By unpacking the discursive mechanisms and practices that have diffused transnational AML/CFTP norms and institutionalised the TAMLO along the Offshore/Onshore axis, it is intended to lay bare the problematic power dynamics that have affected Commonwealth Caribbean States' sovereignty and, increasingly, their sustainable development. By transnational policy diffusion, reference is being made to the process by which patterns of domestic governmental decision-making and policy adoption are systematically influenced by prior policy choices made in foreign jurisdictions.<sup>482</sup> It is therefore distinguishable from policy convergence, which is the increasing popularity of similar policies across several countries.<sup>483</sup> Transnational norms are often recursively negotiated, contested and resisted within TLOs,

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<sup>481</sup> Financial Action Task Force, 'Outcomes: FATF Plenary 2019' (FATF/OECD Secretariat, 21 June 2019), <http://www.fatf-gafi.org/publications/fatfgeneral/documents/outcomes-plenary-june-2019.html>.

<sup>482</sup> Fabrizio Gilardi, 'Transnational Diffusion: Norms, Ideas and Politics', in *Handbook of International Relations*, ed. Walter Carlsnaes, Thomas Risse-Kappen, and Beth A. Simmons, Second edition (Los Angeles: SAGE, 2013), 453–77.

<sup>483</sup> Gilardi.

because of divergences among actors that diagnose and securitise the relevant problem, promulgate the legal norms, and those expected to comply with them.<sup>484</sup> However, the diffusion of AML/CFTP standards across Commonwealth Caribbean States, by the United States, and other OECD Member States acting through the European Union, has been unjustifiably coercive and paternalistic.

The global financial system has been analogised as a chain that is as strong as its “weakest links.”<sup>485</sup> By discursively constructing offshore developing countries as invariably having weak financial transparency and criminal laws and, therefore, as presumably more facilitative of the laundering of criminal and terrorist finance, onshore States have been mutually and uncritically constituted as having stronger legal and regulatory frameworks that effectively curb ML/FTP. Poor and weak States that cannot effectively resist unfair and intrusive transnational AML/CFTP scrutiny have been subject most to sanctions, irrespective of compliance failures in powerful countries,<sup>486</sup> which hegemonically dominate the TAMLO. Yet, as observed by FATF Executive Secretary David Lewis, based on the last ten years of mutual evaluation reports, “everyone is doing badly, but some are doing less badly than others.”<sup>487</sup> Within the TAMLO, claims by marginalised Commonwealth Caribbean States about regulatory capture and the democratic deficit in deliberative processes are often quashed by disciplinary discursive practices. Discursive mechanisms have included transnational AML/CFTP soft law standards themselves, as well as the strategies used to diffuse them such as highly intrusive peer review processes, surveillance, ratings, blacklisting, economic coercion as well as the accountability practices of epistemic networks or intergovernmental organisations.<sup>488</sup>

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<sup>484</sup> De Sousa, *Towards a New Legal Common Sense*; Machado, ‘Similar in Their Differences’; Shaffer, ‘Theorizing Transnational Legal Ordering’.

<sup>485</sup> Financial Action Task Force, ‘Global Money Laundering and Terrorist Financing Threat Assessment: A View of How and Why Criminals and Terrorists Abuse Finances, the Effects of This Abuse and the Steps to Mitigate These Threats’ (Paris, France: FATF/OECD, July 2010), <http://www.fatf-gafi.org/media/fatf/documents/reports/Global%20Threat%20assessment.pdf>; Sharman, ‘Power and Discourse in Policy Diffusion’.

<sup>486</sup> Halliday, Levi, and Reuter, ‘Disciplinary Transnational Legal Order’.

<sup>487</sup> Simon Bowers, ‘Everyone Is Doing Badly’, *Anti-Money Laundering Czar Warns*, International Consortium of Investigative Journalists, 11 May 2020, <https://www.icij.org/investigations/panama-papers/everyone-is-doing-badly-anti-money-laundering-czar-warns/>.

<sup>488</sup> William Gilmore, ‘International Initiatives’, in *Butterworths International Guide to Money Laundering: Law and Practice*, ed. Richard Parlour (London ; Boston: Butterworths, 1995), 135–38; Terence C. Halliday and Pavel Osinsky, ‘Globalization of Law’, *Annual Review of Sociology* 32 (2006): 447–70; Hampton and Levi, ‘Fast Spinning into Oblivion?’; Shaffer, ‘Theorizing Transnational Legal Ordering’; Sharman, ‘Power and Discourse in Policy Diffusion’.

Powerful onshore States and the FATF have exploited the fact that AML/CFTP soft law does not require broad international consensus for its authority,<sup>489</sup> as economic coercion may be used for its diffusion and institutionalisation. Thus, the “symbolic and tangible appeal of discipline,”<sup>490</sup> has provided a pretext for the powerful States to leverage control of access to the global financial system to ensure that less powerful States subject to transnational surveillance and comply with AML/CFTP standards. These disciplinary practices have been pursued by the OECD States and the FATF in conjunction with a multiplicity of institutional actors. Intermediary institutions within TLOs may act as “conduits, carriers, and ports of entry” for transnational norms.<sup>491</sup> Additionally, they may be both “collaborators” or “central actors” in the construction of normative processes and the transmission of transnational norms, and their legitimisation.<sup>492</sup> Institutional intermediaries encompass States, inter-governmental organisations, international non-governmental organisations, epistemic communities, think tanks, mainstream media. The TAMLO’s “disciplinary” character rests on the use of negative sanctions.<sup>493</sup>

#### 4.3.1. The Financial Action Task Force’s Blacklisting and Grey-Listing

The FATF’s disciplinary blacklisting has been the most compelling causal explanation for the transnational diffusion of AML/CFTP policy across developing countries.<sup>494</sup> These states have been induced into compliance even where their regulatory sovereignty and sustainable

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<sup>489</sup> Emmanuel Ebikake, ‘Money Laundering: An Assessment of Soft Law as a Technique for Repressive and Preventive Anti-Money Laundering Control’, *Journal of Money Laundering Control* 19, no. 4 (1 January 2016): 346–75, <https://doi.org/10.1108/JMLC-07-2015-0029>.

<sup>490</sup> Halliday, Levi, and Reuter, ‘Disciplinary Transnational Legal Order’, 23.

<sup>491</sup> Shaffer, ‘Theorizing Transnational Legal Ordering’, 241.

<sup>492</sup> Shaffer, ‘Theorizing Transnational Legal Ordering’.

<sup>493</sup> Halliday, Levi, and Reuter, ‘Disciplinary Transnational Legal Order’.

<sup>494</sup> Katrin Eggenberger, ‘When Is Blacklisting Effective? Stigma, Sanctions and Legitimacy: The Reputational and Financial Costs of Being Blacklisted’, *Review of International Political Economy* 25, no. 4 (4 July 2018): 483–504, <https://doi.org/10.1080/09692290.2018.1469529>; Hülse and Kerwer, ‘How International Organizations Rule the World: The Case of the Financial Action Task Force on Money Laundering’; Johnson, ‘Repairing Legitimacy after Blacklisting by the Financial Action Task Force’; Sharman, ‘Power and Discourse in Policy Diffusion’; Brigitte Unger and Joras Ferwerda, ‘Regulating Money Laundering and Tax Havens: The Role of Blacklisting’, vol. 08 (12) (European Consortium for Political Research (ECPR) conference ‘(Re)Regulation in the Wake of Neoliberalism, Consequences of Three Decades of Privatization and Market Liberalization,’ Panel: Naming and Shaming, Utrecht, The Netherlands: Tjalling C. Koopmans Research Institute, 2008).

development might be undermined by ‘blind compliance’. Prompted by the United States,<sup>495</sup> from 2000-2002, the FATF ’s published blacklists of Non-Cooperative Countries and Territories (NCCT). The NCCTs blacklist was a coercive discursive strategy intended to ‘name and shame’ jurisdictions into compliance with its FATF Forty Recommendations. The FATF recommended that NCCTs’ be subject to increased scrutiny and countermeasures by OECD countries, which should “condition, restrict, target, or even prohibit financial transactions with such jurisdictions.”<sup>496</sup> Incidentally, criteria such as banking secrecy, loopholes in financial regulation, and resources committed to fighting money laundering, resulted in The Bahamas, Cayman Islands, Dominica, St. Kitts and Nevis, and St. Vincent and the Grenadines being blacklisted. NCCTs blacklisting amounted to a questionable geopolitical ‘cherry picking’ on OFCs. The United Kingdom, United States, Denmark, Iceland, Portugal, Canary Islands (Spain) and Hungary, which are tax havens, were blacklisted.<sup>497</sup> In the FATF’s estimation, the NCCTs initiative had proved to be “a very useful and efficient tool to improve worldwide implementation of the FATF 40 Recommendations.”<sup>498</sup> To varying degrees, blacklisting disrupted financial flows,<sup>499</sup> undermined their regulatory sovereignty,<sup>500</sup> and poignantly underscored the discursive power of advanced industrialised economies within the TAMLO. Addressing the temporal significance of blacklisting of Commonwealth Caribbean jurisdictions, interviewee Calvin Wilson, former Executive Director of the CFATF, recalled that:

The FATF (NCCT), OECD (Tax havens and harmful tax regimes) and FSF (countries that posed a threat to global financial stability) seemed to be acting in

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<sup>495</sup> Hülse and Kerwer, ‘How International Organizations Rule the World: The Case of the Financial Action Task Force on Money Laundering’; Jesse S. Morgan, ‘Dirty Names, Dangerous Money: Alleged Unilateralism in U.S. Policy on Money Laundering between Empire and Community: The United States and Multilateralism 2001-2003: A Mid-Term Assessment: Minimum Public Order’, *Berkeley Journal of International Law* 21, no. 3 (2003): 771–803; Sharman, *Havens in a Storm*; Wechsler, ‘Follow the Money Essay’.

<sup>496</sup> Financial Action Task Force, ‘Review to Identify Non-Cooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures’, 8.

<sup>497</sup> Unger and Ferwerda, ‘Regulating Money Laundering and Tax Havens: The Role of Blacklisting’, 11.

<sup>498</sup> Financial Action Task Force, ‘Annual and Overall Review of Non-Cooperative Countries or Territories’ (Paris, France: FATF/OECD Secretariat, 10 June 2005), 2.

<sup>499</sup> Robert Thomas Kudrle, ‘Did Blacklisting Hurt the Tax Havens?’, *Journal of Money Laundering Control* 12, no. 1 (1 January 2009): 33–49, <https://doi.org/10.1108/13685200910922633>; Sharman, ‘Power and Discourse in Policy Diffusion’.

<sup>500</sup> Sharman, ‘Power and Discourse in Policy Diffusion’; Guy Stessens, *Money Laundering: A New International Law Enforcement Model*, Cambridge Studies in International and Comparative Law (Cambridge [England]; New York: Cambridge University Press, 2000); Guy Stessens, ‘The FATF “Black List” of Non-Cooperative Countries or Territories’, *Leiden Journal of International Law* 14, no. 1 (March 2001): 199–207, <https://doi.org/10.1017/S0922156501000097>.

concert through their respective initiatives and negative listings, which were deployed and published at the same time. The blacklistings exacerbated the feelings of them against us by small developing countries who were on the receiving end of this power, unchecked power, and the legitimacy of the FATF's status was publicly called into question as was the one size fits all implementation of the Standards by Caribbean countries.

Although the FATF suspended blacklisting new NCCTs in November 2002, it continued to monitor those backlisted until 2006. However, in 2007, the FATF's International Cooperation Review Group initiative resorted to making public statements 'naming and shaming' "Jurisdictions with strategic deficiencies,"<sup>501</sup> referred to as 'grey-listing'. Following Trinidad and Tobago's removal from the list of jurisdictions under increased monitoring in February 2020, The Bahamas, Barbados and Jamaica remain as of 18 August 2020. Ironically, the 'name and shame' disciplinary culture has also permeated the intra-regional AML/CFTP discursive practices. The CFATF issues 'Public Statements', a form of disciplinary speech act, naming Member States that have either not taken remedial measures to address identified shortcomings in their domestic AML/CFTP regimes during mutual evaluations or have been deemed to be taking too long to do so. Member countries of the CFATF are generally encouraged to take appropriate countermeasures to pressure the country named in the Public Statement to address the identified shortcomings. The FATF then notifies its Member States of the CFATF Public States to similarly take countermeasures. To be delisted from the Public Statement, the remedial measures taken must be assessed by the CFATF as adequate. Contextually, the absence of the asymmetrical power relations as well as deliberative and legitimacy challenges within the CFATF, have rendered this form of 'peer pressure' uncontentious from a sovereignty perspective. It has also challenged claims and continually reproduced perceptions of Caribbean States as lacking political will to engage as responsible members of the TAMLO.

Thus, it is the use of negative sanctions and disciplinary discursive practices underpinned by asymmetrical power relations along the Onshore/Offshore axis that is problematic from a sovereignty perspective. In this case, there is often a strong sense of hypocrisy and geopolitical bias. Illustratively in the context of counter-financing of terrorism and proliferation, the

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<sup>501</sup> Financial Action Task Force, 'High Risk and Other Monitored Jurisdictions- Improving Global AML/CFT Compliance: On-Going Process - 21 June 2019', June 2019, <http://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/fatf-compliance-june-2019.html>.

“undercurrent of geopolitical cherry-picking” has been manifestly apparent, in relation to countries sanctioned,<sup>502</sup> similar to NCCTs blacklisting of Commonwealth Caribbean OFCs. Despite poor compliance records, China and India have not been sanctioned whereas Iran and North Korea are blacklisted.<sup>503</sup> In essence, the international sanctions regime has largely been underpinned by the United States’ foreign policy interests aimed at financial transactions with Iran, Libya, North Korea, and Russia.<sup>504</sup> Notwithstanding its remoteness from the assessed risks within the region, all Commonwealth Caribbean States must bear the regulatory and compliance costs associated with combating the proliferation of weapons of mass destruction. Until the increasingly destabilising impact of de-risking, Commonwealth Caribbean States had displayed a defeatist attitude towards the diffusion of AML/CFTP policy, punctuated by sporadic protestations that AML/CFTP discursive practices violated their sovereignty. This has been attributable to a common acceptance that compliance with the FATF International Standards is simply necessary to prevent further reputation injury from blacklisting,<sup>505</sup> and the need to pragmatically preserve access to the global financial and payment systems.

#### **4.3.2. Conditioned Technical Assistance as ‘Disciplinary Power’**

It is not uncommon for transnational normative processes to be legitimised by empowering or, directly or indirectly building alliances with, intermediaries, which in turn contribute to embedding promulgated norms.<sup>506</sup> Commonwealth Caribbean States’ chronic resource and capacity constraints have made them extremely dependent on external technical assistance, which is often conditioned. This has been a pressure point for retaining regulatory sovereignty over AML/CFTP policymaking. Technical assistance to less powerful States has, arguably, functioned as a form of ‘disciplinary power’, creating the façade of the depoliticised diffusion of transnational legal norms that are intrinsically hegemonic and political.<sup>507</sup> By emphasising the need to strengthen developing States’ capacity, the “political contestability” of technical

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<sup>502</sup> Halliday, Levi, and Reuter, ‘Disciplinary Transnational Legal Order’, 15.

<sup>503</sup> Halliday, Levi, and Reuter, 15.

<sup>504</sup> Halliday, Levi, and Reuter, ‘Disciplinary Transnational Legal Order’.

<sup>505</sup> Sharman, ‘Power and Discourse in Policy Diffusion’.

<sup>506</sup> Shaffer, ‘Theorizing Transnational Legal Ordering’.

<sup>507</sup> Murphy, ‘Transnational Counter-Terrorism Law’.

assistance as a discursive mechanism to compel technical compliance with transnational norms is often overlooked.<sup>508</sup>

The IMF has been an important ‘collaborator’ in legitimising the TAMLO. Albeit short-lived, the IMF published the “first blacklist related to money laundering and tax havens” in 1999,<sup>509</sup> which included fifteen Commonwealth Caribbean OFCs. Since 2002, the FATF has partnered with the IMF, given its global membership and legitimacy, to establish an AML/CFTP country assessment programme as part of mutual evaluation processes, through which FATF non-members’ compliance with the International Standards has been monitored.<sup>510</sup> Since 2004, the IMF has also incorporated AML/CFTP surveillance and evaluations within its Financial Sector Assessment Programmes (FSAPs) and in 2014 established a dedicated Topical Trust Fund to delivery technical assistance for its Member States that require capacity building to implement the FATF’s recommendations. Not only has the IMF contributed to the diffusion of the International Standards but it has, arguably, contributed to hardening them as well.<sup>511</sup> The co-option of the IMF by the G7 and the OECD to participate in mutual evaluations processes to assess compliance with the FATF’s AML/CFTP standards has exposed the organisation to criticisms of discursively legitimising the geopolitical interests of the United States and other OECD countries.<sup>512</sup> The IMF is seen as complicit in discursively reproducing narratives of vulnerability of developing countries to disseminate ‘power knowledge’.<sup>513</sup> The AML/CFTP ‘knowledge’ it produces, especially of Commonwealth Caribbean OFCs, is often represented as ‘technocratic’, rather than as veiled attempts to normalise extraterritorial scrutiny and financial surveillance. The IMF’s policy papers have linguistically reinforced representations of Commonwealth Caribbean OFCs as ‘less regulated’ and ‘less cooperative with onshore regulators’. They have been labelled as more material to its surveillance work on promoting good governance, financial stability, and transparency in the misuse of complex corporate vehicles for money laundering.<sup>514</sup>

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<sup>508</sup> Murphy, 46.

<sup>509</sup> Unger and Ferwerda, ‘Regulating Money Laundering and Tax Havens: The Role of Blacklisting’, 3.

<sup>510</sup> Arnone and Borlini, ‘International Anti-Money Laundering Programs’; Gardella, ‘The Fight against the Financing of Terrorism between Judicial and Regulatory Cooperation Articles - General’; Gordon, ‘On the Use and Abuse of Standards for Law’; Vlcek, ‘Global Financial Governance and the Informal’.

<sup>511</sup> Gathii, ‘The Financial Action Task Force and Global Administrative Law FATF Symposium’.

<sup>512</sup> Jeffrey E. Popke, ‘Recasting Geopolitics: The Discursive Scripting of the International Monetary Fund’, *Political Geography* 13, no. 3 (1 May 1994): 255–69, [https://doi.org/10.1016/0962-6298\(94\)90030-2](https://doi.org/10.1016/0962-6298(94)90030-2).

<sup>513</sup> Popke.

<sup>514</sup> International Monetary Fund, ‘Offshore Financial Centres: IMF Background Paper’ (Washington, DC, USA: IMF Secretariat, 23 June 2000), <https://www.imf.org/external/np/mae/oshore/2000/eng/back.htm#table3>;

Consequently, the IMF has inadvertently reinforced the spatial Onshore/Offshore dichotomies in AML/CFTP surveillance,<sup>515</sup> while mutually constituting of onshore OECD jurisdictions as less worthy of international scrutiny.

#### **4.4. Critical Observations on Transnational AML/CFTP Policy Coherence, Effectiveness and Ownership: What Role for the 2030 Sustainable Development Agenda?**

The deliberative shortcomings, disciplinary discursive practices, and contested normalisation of the FATF's international authority, discussed above, have had enormous consequences for the coherence, effectiveness, and ownership of transnational AML/CFTP norms. Ultimately, they reflect the shrinkage in the regulatory sovereignty of Commonwealth Caribbean countries.

##### **4.4.1. Effectiveness**

There is little evidence of AML/CFTP policy effectiveness either onshore or offshore.<sup>516</sup> Proceeds of crime legislation have only managed to remove miniscule amounts of profit from crimes. This led to a shift to financial intelligence-led disruption measures. Still, costly reporting and compliance obligations have not prevented major money laundering scandals in large and highly regulated financial centres, whose government were integral to the promulgation of the FATF's International Standards.<sup>517</sup> Over the last two decades US banks have been misused by drug cartels;<sup>518</sup> while Russian money laundering operations have been

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International Monetary Fund, 'Offshore Financial Centres: The Role of the IMF' (Washington, DC, USA: IMF Secretariat, 23 June 2000), [https://www.imf.org/external/np/mae/oshore/2000/eng/role.htm#II\\_C](https://www.imf.org/external/np/mae/oshore/2000/eng/role.htm#II_C); International Monetary Fund, 'Concept of Offshore Financial Centres'.

<sup>515</sup> Popke, 'Recasting Geopolitics'.

<sup>516</sup> Geiger and Wuensch, 'The Fight against Money Laundering'; Lewisch, 'Money Laundering Laws as a Political Instrument'; Lanier Saperstein, Geoffrey Sant, and Michelle Ng, 'The Failure of Anti-Money Laundering Regulation: Where Is the Cost-Benefit Analysis Practitioner Comment', *Notre Dame Law Review Online* 91, no. 1 (2016 2015): 1–10; Sharman, 'Power and Discourse in Policy Diffusion'.

<sup>517</sup> Doyle, 'Cleaning up Anti-Money Laundering Strategies'.

<sup>518</sup> Doyle.

uncovered in US banks,<sup>519</sup> and continue to be exposed in the UK real estate sector.<sup>520</sup> Europe's biggest banks, including HSBC, Barclay's and BNP Paribas, have been repeatedly sanctioned for money laundering failures, while the National Crime Agency has reported that money laundering in the UK has risen to £150 billion per year.<sup>521</sup> Yet, as exemplified by the de-risking crisis in the Commonwealth Caribbean, as onshore financial intermediaries terminate correspondent banking relationships with the region's indigenous financial institutions, it has become empirically irrefutable that reputational injury has made compliance costs increasingly unsustainable.<sup>522</sup> Commonwealth Caribbean jurisdictions have struggled to keep pace with evolving AML/CFTP regulatory developments, which has resulted in poor effectiveness ratings. As highlighted in 2018 by Cassandra Nottage, National Identified Risk Coordinator in the Office of the Attorney General, "notwithstanding the continual program of enhancements being carried out, the Bahamas has noted that the goal post continues to shift."<sup>523</sup> These sentiments were echoed by officials interviewed in Jamaica. By discursively designating Commonwealth Caribbean States as 'non-cooperative', or 'of primary concern for money laundering', and as having 'strategic deficiencies in the domestic AML/CFTP regimes', their reputations have effectively been 'monetised'. Fear of further reputational harm from disciplinary labelling, and naming and shaming, have made them powerless to resist coercively diffused AML/CFTP standards even if these unintendedly undermine their sustainable development interests.

With respect to CFTP efforts, while over-regulation of the financial and professional services sectors continues to cost public sectors and financial institutions billions it has simply diverted terrorist financiers from using the formal banking sector and international financial system.<sup>524</sup> Innovations in financial technology and new payment products and services have

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<sup>519</sup> Kal Raustiala, 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law', *Virginia Journal of International Law* 43, no. 1 (2003 2002): 1–92.

<sup>520</sup> Oliver Bullough, 'How Britain Let Russia Hide Its Dirty Money', *The Guardian*, 25 May 2018, sec. News, <http://www.theguardian.com/news/2018/may/25/how-britain-let-russia-hide-its-dirty-money>.

<sup>521</sup> Editor (The), 'Europe's Biggest Banks Fined for Money Laundering', *The Week UK*, 10 October 2018, <http://www.theweek.co.uk/97000/europe-s-biggest-banks-fined-for-money-laundering>.

<sup>522</sup> Acosta et al., 'De-Risking in the Caribbean Region- A CFATF Perspective'; Boyce, 'Discussion Paper: Strategic Solutions to "de-Risking" and the Decline of Correspondent Banking Relationships in the Caribbean'; Leo-Rey Gordon, 'Impact of Correspondent Bank De-Risking on Money Service Businesses in Jamaica', *Journal of Financial Regulation and Compliance* 27, no. 4 (1 January 2019): 479–93, <https://doi.org/10.1108/JFRC-12-2018-0159>; McLean et al., 'Economic Impact of De-Risking on the Caribbean'.

<sup>523</sup> Central Bank of the Bahamas, 'The Bahamas 2018 Anti-Money Laundering and Countering the Financing of Terrorism Report', AML/CFT Annual Publication (Nassau, Bahamas: Central Bank of the Bahamas, 2018), 12.

<sup>524</sup> Neumann, 'Don't Follow the Money'; Salami, 'Terrorism Financing with Virtual Currencies'.

increased the risk of misusing virtual currencies for money laundering and terrorist financing as they facilitate speedy, anonymous international transfers, including in jurisdictions that have strong domestic regulatory, law enforcement and AML/CFTP regimes.<sup>525</sup> There is a growing body of evidence that transnational terrorist networks are increasingly using the Dark Web to solicit the secretive donation of cryptocurrencies, in campaigns, such as “*Fund the Islamic Struggle Without Leaving a Trace*” and “*Bitcoin and the Charity of Violent Physical Struggle*”, in order purchase weapons and explosives.<sup>526</sup> These observations may point to ulterior motives behind transnational AML/CFTP policy, rather than removing the profit from crime, such as policing tax-related capital flight.

#### 4.4.2. Ownership

The deliberative marginalisation of Commonwealth Caribbean States from substantive participation in transnational AML/CFTP policymaking and their subjection to compliance-inducing discursive practices have amplified the need to promote genuine policy ownership among these States. Indeed, as recalled by former CFATF Executive Director, Calvin Wilson, “calls were made for a United Nations Convention on Money Laundering, which are still being made at this time [by CFATF Member States].”<sup>527</sup> This would truly legitimise transnational AML/CFTP norms, strengthen the development dimension of global regulatory governance, and potentially resolve issues of AML/CFTP policy ownership and coherence in a manner consistent with the sovereignty of Commonwealth Caribbean States. Yet, it is precisely because such a Convention would rectify the democratic deficit in the TAMLO by disrupting asymmetrical power relations and providing small States with a counter-hegemonic platform, why this is unlikely to gain serious traction. Admittedly, the G7 has sought to be more inclusive in global financial agenda-setting by taking important decisions at the level of the G20.<sup>528</sup> This is promising since the G20 has committed to the global development agenda, facilitating

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<sup>525</sup> Salami, ‘Terrorism Financing with Virtual Currencies’.

<sup>526</sup> Gabriel Weimann, ‘Going Dark: Terrorism on the Dark Web’, *Studies in Conflict & Terrorism* 39, no. 3 (3 March 2016): 195–206, <https://doi.org/10.1080/1057610X.2015.1119546>.

<sup>527</sup> Cited from fieldwork transcript.

<sup>528</sup> Eric Helleiner, ‘The Contemporary Reform of Global Financial Governance: Implications of the and Lessons from the Past’, Intergovernmental Group of Twenty-Four (G-24) Discussion Paper Series, April 2009.

“country ownership” and mobilising resources for sustainable development financing.<sup>529</sup> There has been some indication that the inclusion of emerging economies in global regulatory governance may lead to developing countries’ issues being seriously considered. For instance, it was the G20 that expanded the FATF’s policy agenda to combat corruption within the AML/CFTP framework.

Although the relevant international treaties have expressly incorporated a development dimension and buttressed regulatory responsibilities on respect for state sovereignty, these considerations have been discursively neglected within the FATF International Standards that now provide the locus of AML/CFTP norms. Consequent to the hegemonic influence of the G7, OECD and affiliated institutions such as the FATF, the FSB, and the Basel Committee, there has been a lack of pragmatic engagement with the ‘anti-development’ consequences of asymmetrical power relations along the Onshore/Offshore axis. Scant regard has been paid by the FATF to the need for comprehensive cost-benefit analyses of developing countries’ compliance with its International Standards. Yet, lessons may be drawn from the global diffusion of neoliberal policies. They have demonstrated that, without genuine policy ownership by States of the Global South, they have unintendedly impaired economic growth, stymied the development of sound post-colonial institutions, caused corruption and facilitated the consolidation of organised crime and terrorist groups that challenge the legitimacy and sovereignty of the State.<sup>530</sup> As evidenced by the scale of de-risking and financial exclusion, the unintended development sustainability consequences of overregulation and disciplinary discursive practices targeted at securing regulatory compliance can be as destabilising as the risks posed by illicit financial activities in Commonwealth Caribbean jurisdictions.

In this regard, it is submitted that only through a genuine process of recursive ‘co-learning’ between dialectically spatialised Onshore/Offshore worlds, can the sovereignty, security and sustainable development of heavily regulated Commonwealth Caribbean States be reaffirmed within the TAMLO. It is further submitted that the United Nations 2030 Sustainable Development Agenda and SDGs may provide a principled framework for streamlining sustainability principles into transnational efforts to curb illicit finance and economic crimes. They have established the democratisation of decision-making processes; the delivery of more

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<sup>529</sup> Helleiner.

<sup>530</sup> Abbas J. Ali, ‘Global Capitalism and Developing Countries’, *Journal of Competitiveness Studies* 24, no. 3 (22 September 2016): 102.

effective, credible, accountable and legitimate institutional arrangements for global financial governance; capacity-building; and the promotion of policy ownership by developing countries as sustainable development imperatives. Pursuant to SDG 10, there is a direct link between the reducing inequities within and among States, and developing countries' policy ownership, including over curbing illicit financial flows. A politically acceptable balance must be struck between preserving their policy space to determine legislative, regulatory and law enforcement standards that are contingent on their respective ML/FTP threat contexts, on the one hand, and the responsibilities ascribed to them for combating ML/FTP on the other hand, without sacrificing the efficacy of the TAMLO.

#### 4.4.3. Coherence

It is becoming increasingly questionable as to whether the OECD's efforts to globally entrench AML/CFT norms is meant to safeguard the integrity of the global financial system by curbing money laundering and terrorist and proliferation financing. Gathering soft intelligence to suppress tax evasion,<sup>531</sup> and preventing 'harmful tax competition' and capital flight appear to have become core policy preoccupations of the TAMLO. Tax crimes were only included as predicate offences to money laundering under the revised 2012 FATF International Standards, at the insistence of the OECD. Furthermore, the plausibility of core policy assumptions underpinning the TAMLO have been undermined,<sup>532</sup> especially with respect to OFCs. It is uncontroversial that shell companies in offshore jurisdictions have been misused for money laundering.<sup>533</sup> However, the FATF and the OECD have long assumed that offshore activities and banking secrecy in small Commonwealth Caribbean 'tax haven' jurisdictions, such as the Bahamas, posed the greatest challenge to the integrity of the global financial system. Yet, the Financial Stability Board has now conceded that there was no empirical basis for attributing systemic global financial problems to OFCs, although it maintained that unsustainable capital

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<sup>531</sup> Powell, 'The Regulation of Offshore Financial Centres'.

<sup>532</sup> Alldridge, 'Money Laundering and Globalization'.

<sup>533</sup> Baradaran et al., 'Funding Terror'; Richard Gordon, 'Response- A Tale of Two Studies: The Real Story of Terrorism Finance', *University of Pennsylvania Law Review (Online)* 162 (2014): 269–81; Emile van der Does de Willebois et al., *The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It* (The World Bank, 2011), <https://doi.org/10.1596/978-0-8213-8894-5>.

flight offshore could have serious consequences for onshore financial markets.<sup>534</sup> Furthermore, empirical studies have shown that subjectively construed ‘harmful’ or ‘predatory’ tax competition does not signify lax financial regulation, nor is regulatory laxity factually more prevalent in OFCs than onshore jurisdictions.<sup>535</sup>

An IMF report found that OFCs’ compliance with transnational regulatory standards was generally better than that of onshore jurisdictions assessed under the Financial Sector Assessment Programme (FSAP).<sup>536</sup> An experimental study involving the setting up of anonymous shell companies, using reputable corporate service providers, without proof of identity and with bank accounts that permit untraceable transactions, found that ‘tax haven’ jurisdictions, on average, were more compliant with transparency and disclosure standards than their counterparts in OECD countries.<sup>537</sup> Although the sample size in the forgoing study was small, it could be cautiously inferred that the some of the most highly regulated onshore financial markets may be more attractive, and vulnerable to abuse, for money laundering and terrorism financing than offshore ‘tax haven’ jurisdictions. However, the lax enforcement of CDD standards in OECD countries has not gained the notoriety within AML/CFTP discourse as in relation to Commonwealth Caribbean OFCs. Similarly, a randomised field experiment was conducted involving an estimated 3,515 trust and corporate service providers (TCSPs), 1,722 of which were from the United States.<sup>538</sup> The study was aimed at testing compliance with international legal standards on customer identification and CDD related to the establishment of trust vehicles. It revealed that TCSPs in small offshore jurisdictions were more likely to comply with AML/CFT standards than their onshore counterparts in OECD countries. Despite the United States leadership within the TAMLO, the federal constitutional arrangements have obstructed the US Federal Government’s efforts to address the lax regulatory regimes for shell company services providers in Delaware, Nevada and Wyoming.<sup>539</sup> As one commentator has observed, “how ironic- no, how perverse that the United States, which has been sanctimonious

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<sup>534</sup> Financial Stability Forum, ‘Report of the Working Group on Offshore Centres’.

<sup>535</sup> Donato Masciandaro, ‘Offshore Centres Post 9/11: Economics and Politics’, *Journal of Money Laundering Control*; London 9, no. 4 (2006): 365–72, <http://dx.doi.org.ezp.lib.cam.ac.uk/10.1108/13685200610707617>.

<sup>536</sup> Powell, ‘The Regulation of Offshore Financial Centres’.

<sup>537</sup> Jason C. Sharman, ‘Shopping for Anonymous Shell Companies: An Audit Study of Anonymity and Crime in the International Financial System’, *Journal of Economic Perspectives* 24, no. 4 (December 2010): 127–40, <https://doi.org/10.1257/jep.24.4.127>.

<sup>538</sup> Findley, Nielson, and Sharman, ‘Causes of Noncompliance with International Law’.

<sup>539</sup> Baradaran et al., ‘Funding Terror’.

in its condemnation of ...[foreign] banks, has become the banking secrecy jurisdiction du jour?”<sup>540</sup>

Another problematic issue of policy coherence is that it is becoming increasingly clear, in the context of the emerging discourse on financial inclusion and de-risking within the TAMLO, that transnational regulatory standards to combat illicit financial activities are not necessarily prudent sustainable development policies. Asymmetrical power relations within deliberative processes for AML/CFTP agenda-setting, have reproduced conflicts in regulatory and financial interests. The marginalisation of economically powerless developing countries from transnational financial standard-setting processes, has challenged the legitimacy of the TAMLO.<sup>541</sup> While legislatively complying with AML/CFTP standards, heavily regulated offshore States have continued to contest the ‘veiled’ policy concerns of the TAMLO. It is viewed as inherently politicised, intrusive on their economic sovereignty, and premised more on interest-based public policy concerns such as relieving OECD economies of the competitive pressure of OFCs and subsidising counter-terrorism efforts of advanced Western States.<sup>542</sup>

The policy coherence of using of the transnational AML legislative and regulatory framework to combat terrorist financing post-9/11 is contested.<sup>543</sup> Whereas money laundering usually involves substantial criminal proceeds, terrorist financing might involve small licit sources of funds.<sup>544</sup> TF might involve the use of small amounts of funds that would go undetected using thresholds for reporting suspicious transactions related to money laundering,<sup>545</sup> which has hampered prevention, detection and ultimately confiscation by law enforcement. Additionally, the reported misuse of informal value transfer systems (IVTS) and underground banking networks for financing terrorism would be difficult to monitor and

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<sup>540</sup> Peter A. Cotorceanu, ‘Hiding in Plain Sight: How Non-US Persons Can Legally Avoid Reporting under Both FATCA and GATCA’, *Trusts & Trustees* 21, no. 10 (1 December 2015): 1054, <https://doi.org/10.1093/tandt/ttv178>.

<sup>541</sup> Alexander, Dhumale, and Eatwell, *Global Governance of Financial Systems*.

<sup>542</sup> Tsingou, ‘Global Financial Governance and the Developing Anti-Money Laundering Regime’.

<sup>543</sup> Atia, ‘In Whose Interest?’; Navin Beekarry, ed., *Combating Money Laundering and Terrorism Finance: Past and Current Challenges* (United Kingdom: Edward Elgar Publishing Limited, 2013); Gardella, ‘The Fight against the Financing of Terrorism between Judicial and Regulatory Cooperation Articles - General’; Kalyani Munshani, ‘The Impossibility of Regulating Terrorist Finance - A Critical Study of the Nine Special Recommendations Formulated by the Financial Action Task Force on Anti-Money Laundering’, *Journal of Islamic State Practices in International Law* 5, no. 1 (2009): [i]-80; Neumann, ‘Don’t Follow the Money’.

<sup>544</sup> Baradaran et al., ‘Funding Terror’; Gardella, ‘The Fight against the Financing of Terrorism between Judicial and Regulatory Cooperation Articles - General’; Hamed Tofangsaz, ‘A New Approach to the Criminalization of Terrorist Financing and Its Compatibility with Sharia Law’, *Journal of Money Laundering Control; London* 15, no. 4 (2012): 396–406, <http://dx.doi.org.ezp.lib.cam.ac.uk/10.1108/13685201211265980>.

<sup>545</sup> Baradaran et al., ‘Funding Terror’; Gardella, ‘The Fight against the Financing of Terrorism between Judicial and Regulatory Cooperation Articles - General’.

regulate within existing AML frameworks.<sup>546</sup> Moreover, these high-risk channels are more widespread in the Middle East and Asia,<sup>547</sup> especially the misuse of non-profit organisations (NPOs) and charities.<sup>548</sup> Poor technical compliance and effectiveness ratings, absent empirical evidence of their misuse in the Commonwealth Caribbean have brought into question the proportionality of compliance obligations imposed on these States with respect to regulating their formal banking and NPOs sectors for terrorist financing. Save for Trinidad and Tobago, they do not have significant Islamic populations. However, there are significant Saudi investments in the Bahamas,<sup>549</sup> which might expose the jurisdiction to some TF risks. As one interviewee observed, recent developments in TF typologies have shown that the transnational CFTP regulatory framework has lagged behind intelligence and law enforcement agencies' knowledge of the "changing modus operandi" of terrorist financiers and still grossly underestimates the appeal of terrorist groups and the adaptability of their fundraising.<sup>550</sup> For instance, the assumption that most terrorist attacks require significant capital has been shown to be empirically flawed in the face of widespread homegrown radicalisation, 'lone wolf' and 'guerrilla' attacks, by individuals without direct connection to transnational terrorist networks or organisations.<sup>551</sup> Thus, terrorist financing counter-measures targeted at banks, non-bank financial institutions and DNFBPs are only useful for defunding large terrorist organizations that threaten 'Western' interests, rather than preventing low scale terrorist attacks. Additionally, prominent members of the epistemic community have claimed that "one of the most dangerous and accessible financial tools used by terrorists today is the anonymous shell company."<sup>552</sup> Yet, this inaccurate generalisation was premised on unverified anecdotal accounts of shell companies being misused to finance terrorism.<sup>553</sup> Similarly, the discursive tendency to emphasise the risk that Commonwealth Caribbean offshore financial and corporate

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<sup>546</sup> Gardella, 'The Fight against the Financing of Terrorism between Judicial and Regulatory Cooperation Articles - General'.

<sup>547</sup> Baradaran et al., 'Funding Terror'.

<sup>548</sup> Baradaran et al.; Gardella, 'The Fight against the Financing of Terrorism between Judicial and Regulatory Cooperation Articles - General'.

<sup>549</sup> Umar F. Moghul and Arshad A. Ahmed, 'Contractual Forms in Islamic Finance Law and Islamic Inv. Co. of the Gulf (Bahamas) Ltd. v. Symphony Gems N.V. & (and) Ors.: A First Impression of Islamic Finance Fourteenth Annual Philip D. Reed Memorial Issue: Islam and the Law: Contemporary Views and Perspectives: Islamic Law and Finance', *Fordham International Law Journal* 27, no. 1 (2004 2003): 150–94.

<sup>550</sup> Interview conducted with Dr Nick Ridley, Lecturer, Centre for policing Studies, Liverpool John Moores University, and former Senior Analyst, Europol and the Metropolitan Police Service, UK.

<sup>551</sup> Neumann, 'Don't Follow the Money'.

<sup>552</sup> Baradaran et al., 'Funding Terror', 482.

<sup>553</sup> Gordon, 'Response- A Tale of Two Studies: The Real Story of Terrorism Finance'.

services sectors could be used for TF, has distanced their empirical ‘threat’ realities from the remoteness of their actual misuse. In turn, Commonwealth Caribbean States have had to divert scarce AML resources to combat TF, even if low risk in their respective jurisdictions.

## 5. Promoting Integrity and Accountability in Regulatory Governance of Politically Exposed Persons (PEPs) & ‘Suspect Wealth’: Problematising the Discursive Relationship among Money Laundering, Corruption & Commonwealth Caribbean Sovereignty

Corruption and money laundering are mutually reinforcing.<sup>554</sup> Combating ‘grand corruption’, in particular, which involves the abuse of high-level power by senior public officials for private gain, and the recovery and return of stolen assets,<sup>555</sup> have become institutionalised within the transnational anti-money laundering legal order (TAMLO). This institutionalisation was a transnational legal response to the need for “delocalized criminal law” to combat the emergence of multijurisdictional money laundering schemes designed to evade the state’s territorial criminal jurisdiction,<sup>556</sup> and safeguard ill-gotten gains from confiscation. The policy assumption is that corrupt senior public officials or politically exposed persons (PEPs) will exploit their public office and control of state institutions for private gain, or enrich their families or close associates.<sup>557</sup> PEPs have been taken to include heads of state or government; senior politicians; government, judicial or military officials; senior executives of state-owned corporations; and important political party officials.<sup>558</sup> PEPs may also use their local influence for ‘bank capture’ to disguise the proceeds of corruption, or to protect private corporate interests.<sup>559</sup> They may be assisted in third-party laundering by professional gatekeepers and nominees to conceal beneficial ownership of stolen assets, through secret corporate and trust vehicles offshore.<sup>560</sup> Revelations of such corrupt practices by the Panama

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<sup>554</sup> Financial Action Task Force, ‘Global Money Laundering & Terrorist Financing Threat Assessment: A View of How and Why Criminals and Terrorists Abuse Finances, the Effect of This Abuse and Steps to Mitigate These Threats’ (Paris, France: FATF/OECD Secretariat, July 2010); Financial Action Task Force, ‘Laundering the Proceeds of Corruption’ (Paris, France: FATF/OECD Secretariat, 2011).

<sup>555</sup> United Nations Office on Drugs and Crime, ‘United Nations Anti-Corruption Toolkit’ (UNODC Secretariat, Vienna, Austria, 2004), [https://www.unodc.org/documents/corruption/Toolkit\\_ed2.pdf](https://www.unodc.org/documents/corruption/Toolkit_ed2.pdf).

<sup>556</sup> Arnone and Borlini, ‘International Anti-Money Laundering Programs’, 239.

<sup>557</sup> Financial Action Task Force, ‘Laundering the Proceeds of Corruption’; Financial Action Task Force, ‘Global Money Laundering & Terrorist Financing Threat Assessment (2010)’.

<sup>558</sup> Financial Action Task Force, ‘International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations’.

<sup>559</sup> David A. Chaikin and Jason C. Sharman, *Corruption and Money Laundering: A Symbiotic Relationship*, 1st ed, Palgrave Series on Asian Governance (New York: Palgrave Macmillan, 2009).

<sup>560</sup> Adebola Adeyemi, ‘Slipping through the Net: The Financial Conduct Authority’s Approach in Lessening the Incidence of Money Laundering in the UK’, *Journal of Money Laundering Control* 21, no. 2 (1 January 2018): 203–14, <https://doi.org/10.1108/JMLC-06-2017-0025>; Chaikin and Sharman, *Corruption and Money Laundering*; Tayo Oke, ‘Money Laundering Regulation and the African PEP: Case for Tougher Civil Remedy Options’, *Journal of Money Laundering Control; London* 19, no. 1 (2016): 32–57,

and Paradise Papers Scandals,<sup>561</sup> have led to increased scrutiny of PEPs. There is undeniable evidence that PEPs have laundered proceeds of corruption through investments in real estate, precious metals and stones, art, and the transfer of currency and negotiable instruments to other jurisdictions.<sup>562</sup> Corrupt PEPs have, therefore, been discursively problematised as a serious threat to economic development, good governance, the rule of law,<sup>563</sup> and ultimately state sovereignty, due to greed.<sup>564</sup>

Another implicit assumption underpinning the pursuit of ‘suspect wealth’ has been that endemic corruption and other geographic and regulatory risks in the Global South, tend to generate more illicit financial flows (IFFs) and facilitate the laundering of the proceeds of ‘grand corruption’,<sup>565</sup> relative to onshore financial centres. PEPs from the Global South have, especially, been stigmatised as ‘high-risk’ for money laundering, even before they perpetrate any predicate offences. Indeed, it was in the context of curbing IFFs, as G20 countries scaled up capital flows to developing countries, that G20 leaders in 2009 called upon the FATF to:

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<http://dx.doi.org.ezp.lib.cam.ac.uk/10.1108/JMLC-01-2015-0001>; Barry A. K. Rider, ‘The Wages of Sin - Taking the Profit out of Corruption - A British Perspective Twelfth International Symposium on Economic Crime: Taking the Profit out of Crime: The Risks to Those Who Look after Other People’s Money’, *Dickinson Journal of International Law* 13, no. 3 (1995 1994): 391–422; Barry A. K. Rider, ‘Recovering the Proceeds of Corruption’, *Journal of Money Laundering Control*; London 10, no. 1 (2007): 5–32, <http://dx.doi.org/10.1108/13685200710721845>; Peter Sproat, ‘Unexplained Wealth Orders: An Explanation, Assessment and Set of Predictions’, *The Journal of Criminal Law* 82, no. 3 (1 June 2018): 232–44, <https://doi.org/10.1177/0022018318773210>; Caribbean Financial Action Task Force, ‘Money Laundering Using Trusts and Company Service Providers’, October 2010, <https://www.cfatf-gafic.org/documents/typologies/2185-money-laundering-using-trusts-and-company-service-providers>.

<sup>561</sup> Gerry Ferguson, *Global Corruption: Law, Theory & Practice- Legal Regulation of Global Corruption under International Conventions, US, UK and Canadian Law*, Third Edition (Canada: University of Victoria, 2018).

<sup>562</sup> Theodore S. Greenberg et al., eds., *Politically Exposed Persons: Preventive Measures for the Banking Sector* (Washington, D.C: World Bank, 2010).

<sup>563</sup> Chaikin and Sharman, *Corruption and Money Laundering*; International Monetary Fund, ‘Anti-Money Laundering and Combating the Financing of Terrorism Inclusion in Surveillance and Financial Stability Assessments- Guidance Note’ (Washington, DC, USA: IMF Secretariat, December 2012), <https://www.imf.org/en/Publications/Policy-Papers/Issues/2016/12/31/Anti-Money-Laundering-and-Combating-the-Financing-of-Terrorism-Inclusion-in-Surveillance-PP4726>; United Nations Development Programme, ‘Governance and Sustainable Development: Integrating Governance in the Post-2015 Development Framework’, Discussion Paper (New York: UNDP Secretariat, 2014), <http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Discussion-Paper--Governance-for-Sustainable-Development.pdf>.

<sup>564</sup> Raj C. Kumar, ‘Corruption, Human Rights, and Development: Sovereignty and State Capacity to Promote Good Governance’, *Proceedings of the Annual Meeting (American Society of International Law)* 99 (2005): 416–19; Barry A. K. Rider, ed., *Corruption: The Enemy Within* (London (UK): Kluwer Law International., 1997).

<sup>565</sup> Financial Action Task Force, ‘Global Money Laundering & Terrorist Financing Threat Assessment (2010)’.

Help detect and deter the proceeds of corruption by prioritizing work to strengthen standards on customer due diligence, beneficial ownership and transparency.<sup>566</sup>

Yet, by the FATF's own admission, the "sound financial sector" of well-regulated jurisdictions also appeal to corrupt money launderers intent on concealing their illicit gains or on appearing legitimate.<sup>567</sup> Still, assumptions about geographic and regulatory risks in the Global South have been amplified in the context of the Commonwealth Caribbean given the concentration of OFCs in the region. Commonwealth Caribbean jurisdictions have been notoriously labelled as centres for "shady international deals,"<sup>568</sup> and by the FATF and OECD as 'high-risk' for money laundering. Furthermore, the region has suffered from perceptions of endemic corruption, due to genuine governance challenges and developing post-colonial institutions.

This chapter will take a dualistic approach to investigating the regulatory nexus among money laundering, grand corruption, and state sovereignty, with reference to the Commonwealth Caribbean. Firstly, the theoretical assumptions about polycentric transnational regimes,<sup>569</sup> will be adapted to the TAMLO. This is intended to conceptually frame the problematisation of the accountability and legitimacy claims surrounding transnational regulatory governance of PEPs. The crucial distinction drawn is that TLOs, unlike regimes, prioritise legal norms as a response to collective problems and that tend to effect normative, legal and institutional changes at the national and local levels.<sup>570</sup> Polycentrism is typified by interdependence among States and non-state institutional actors, which are usually either regulators or 'objects of regulation'.<sup>571</sup> Additionally, there are usually multiple centres of authority; and unclearly defined jurisdictional boundaries among actors, some of which have

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<sup>566</sup> Group of Twenty, 'G20 Leaders Statement: The Pittsburgh Summit', (G20 Information Centre, 24 September 2009), <http://www.g20.utoronto.ca/2009/2009communique0925.html>.

<sup>567</sup> Financial Action Task Force, 'Global Money Laundering & Terrorist Financing Threat Assessment (2010)', 50.

<sup>568</sup> James R. Hines, 'Treasure Islands', *Journal of Economic Perspectives* 24, no. 4 (December 2010): 103, <https://doi.org/10.1257/jep.24.4.103>.

<sup>569</sup> Robert Baldwin, Martin Cave, and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice*, 2nd ed (New York: Oxford University Press, 2012); Julia Black, 'Regulatory Conversations', *Journal of Law and Society* 29, no. 1 (2002): 163–96, <https://doi.org/10.1111/1467-6478.00215>; Julia Black, 'Proceduralizing Regulation: Part I', *Oxford Journal of Legal Studies* 20, no. 4 (1 December 2000): 597–614, <https://doi.org/10.1093/ojls/20.4.597>; Julia Black, 'Proceduralizing Regulation: Part II', *Oxford Journal of Legal Studies* 21, no. 1 (1 January 2001): 33–58, <https://doi.org/10.1093/ojls/21.1.33>; Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes', *Regulation & Governance* 2, no. 2 (2008): 137–64, <https://doi.org/10.1111/j.1748-5991.2008.00034.x>.

<sup>570</sup> Halliday and Shaffer, 'Researching Transnational Legal Orders'; Machado, 'Similar in Their Differences'.

<sup>571</sup> Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes'.

no expressed legal mandates for their operations.<sup>572</sup> Furthermore, there is often an absence of institutionally embedded communicative processes through which transnational regulators can be compelled to ‘render account’,<sup>573</sup> especially if there are power inequalities. By accountability claims reference is being made to the extent to which institutions or networks of regulatory actors render account or have the authority or power to impose consequences or sanctions on other sets of scrutinised actors.<sup>574</sup> Legitimacy claims refer to the extent to which there is either acceptance of the policy objectives and accountability arrangements or congruence of the interests or expectations of participants,<sup>575</sup> within the polycentric TAMLO. As will be demonstrated, powerful regulators have tended to hegemonically construct and reproduce self-sustaining narratives about their legitimacy,<sup>576</sup> with the result of ‘regulatory capture’ and questionable discursive practices related to the transnational governance of money laundering by corrupt PEPs. Consequently, these legitimacy and accountability claims will be critically evaluated along the Onshore/Offshore axis. This departs from the conventional preoccupation of AML/anticorruption scholarship with IFFs into, and recovering laundered proceeds of corruption from, OFCs or tax havens.<sup>577</sup> Instead, the normative, democratic, systematic, and functional challenges plaguing transnational AML/anticorruption regulatory governance will be interrogated.

Secondly, the chapter will grapple with the interplay between the transnational and domestic domains of AML/anticorruption regulatory governance of PEPs. Specifically, whether the TAMLO is fit-for-purpose in addressing contextually specific, nationally assessed anticorruption/AML risks within Commonwealth Caribbean States. Undeniably, in financial services and economic crime regulation, there is a particularly startling tendency to presume that rules progressively developed in one context can be successfully transplanted to others

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<sup>572</sup> Black.

<sup>573</sup> Black.

<sup>574</sup> Mark Bovens, ‘Analysing and Assessing Accountability: A Conceptual Framework1’, *European Law Journal* 13, no. 4 (2007): 447–68, <https://doi.org/10.1111/j.1468-0386.2007.00378.x>; Richard Mulgan, ‘“Accountability”: An Ever-Expanding Concept?’, *Public Administration* 78, no. 3 (2000): 555–73, <https://doi.org/10.1111/1467-9299.00218>; Anne-Marie Slaughter, ‘The Accountability of Government Networks’, *Indiana Journal of Global Legal Studies* 8, no. 2 (2001): 347–67.

<sup>575</sup> Black, ‘Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes’, 149.

<sup>576</sup> Black, ‘Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes’.

<sup>577</sup> Hines, ‘Treasure Islands’; Naomi Fowler, ‘Illicit Financial Flows and the Tax Haven and Offshore Secrecy System’, 8 February 2018, <https://www.taxjustice.net/2018/02/08/illicit-financial-flows-tax-haven-offshore-secrecy-system/>, <https://www.taxjustice.net/2018/02/08/illicit-financial-flows-tax-haven-offshore-secrecy-system/>; van der Does de Willebois et al., *The Puppet Masters*.

with unique legal, political and economic circumstances.<sup>578</sup> Using the Bahamas, Jamaica and Trinidad and Tobago as sites of analysis, attempts will be made to resolve the question of whether the contested accountability and legitimacy claims, and their impact on state sovereignty, have undermined the quality and relevance of transnational normative standards, at the national level. At a glance, the FATF's recommended risk management and enhanced customer due diligence (EDD) standards related to PEPs are largely being complied with in the Bahamas, Jamaica and Trinidad and Tobago.<sup>579</sup> Most recently, States have sought to counter the procedural hurdles of investigating and prosecuting PEPs, their families, and close associates,<sup>580</sup> by adopting unexplained wealth orders (UWOs). These evidentiary tools have reversed the burden of proof by requiring natural persons or corporate entities to account for the origin of property or other assets held that appear disproportionate to legitimate income.<sup>581</sup> Legal officials interviewed in Jamaica confirmed that UWOs are expected to be introduced in future revisions of the Proceeds of Crime Act (POCA) 2007.<sup>582</sup> The Bahamas introduced UWOs under the Proceeds of Crime Act 2018 and Trinidad and Tobago under the Civil Asset Recovery and Management Agency Act (No.8 of 2019). However, historicising and contextualising the policy assumptions underpinning transnational AML/anticorruption norms is important since they have been mostly targeted at corrupt PEPs in post-communist Eastern European countries,<sup>583</sup> and despotic African regimes, who have sought to move and conceal looted funds to foreign jurisdictions. Seminal cases have involved UN Security Council Resolution 1970 and 1973 imposition of asset freezing sanctions on Libyan dictator, Muammar Ghaddafi; as well as reported bribe-taking or kickbacks, extortion, self-dealing and conflict of interest and embezzlement of public funds related to PEPs in Egypt, Malawi, and Zambia. These cases have shaped the FATF global AML/anticorruption threat assessments and

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<sup>578</sup> Rider, *Corruption: The Enemy Within*.

<sup>579</sup> Caribbean Financial Action Task Force, 'Fourth Round Mutual Evaluation Report: The Bahamas'; Caribbean Financial Action Task Force, 'Fourth Round Mutual Evaluation Report (MER): Jamaica'; Caribbean Financial Action Task Force, 'Anti-Money Laundering and Counter-Terrorist Financing Measures- Trinidad and Tobago's Mutual Evaluation Report' (Port-of-Spain, Trinidad & Tobago: CFATF Secretariat, June 2016), <https://www.cfatf-gafic.org/documents/4th-round-meval-reports/6841-trinidad-and-tobago-4th-round-mutual-evaluation-report/file>.

<sup>580</sup> Jeffrey R. Boles, 'Criminalizing the Problem of Unexplained Wealth: Illicit Enrichment Offenses and Human Rights Violations', *New York University Journal of Legislation and Public Policy* 17, no. 4 (2014 2013): 835–80.

<sup>581</sup> Sproat, 'Unexplained Wealth Orders'.

<sup>582</sup> Open-ended elite interviews were conducted with officials from the government legal services during fieldwork in March 2020 in Jamaica.

<sup>583</sup> Holger Moroff and Diana Schmidt-Pfister, 'Anti-Corruption Movements, Mechanisms, and Machines – an Introduction', *Global Crime* 11, no. 2 (28 April 2010): 89–98, <https://doi.org/10.1080/17440571003669118>.

typologies but bear little relation to the endemic corruption and governance risks within the Commonwealth Caribbean. The question of contextual relevance of the FATF's International Standards on combating money laundering by corrupt PEPs have been raised elsewhere. Scholarly debates have now centred around the appropriateness of prioritising civil law remedies to target PEPs, based on regionally specific socio-legal realities and cultural experiences with corruption, over stronger criminal sanctions.<sup>584</sup>

## 5.1. Normative Challenges

Normative challenges relate to the discursive construction of notions of the 'common good' and, by extension, the objectives, and operations<sup>585</sup> of the TAMLO. Discourses on the diffusion of transnational regulatory norms often paternalistically reproduce the 'othering' of countries of the Global South as beneficiaries of Western values.<sup>586</sup> Thus, Western liberal democracy, economic liberalisation, good governance, and rights, have been discursively represented as the antithesis of endemic corrupt practices in the Global South. This, it has been argued, is a vestige of the nineteenth century discursive division of the international legal order into civilized Western European States and uncivilized non-European societies that have been required to establish their international legitimacy by unquestionably complying with international norms despite their sovereignty and juridical equality.<sup>587</sup> Within the AML/Anticorruption discourse on PEPs, normative ideas of the 'common good' have been in flux and remain contested. Questions surround the self-ascribed legitimacy of the exclusive OECD and FATF as powerful regulators of sovereign non-member States. Furthermore, it is not clear whether the objectives of the TAMLO are related to amassing 'soft intelligence' to prevent capital flight from OECD countries due to offshore tax competition, avoidance and evasion, or transnational criminal justice cooperation to combat the money laundering by corrupt PEPs and recover and return confiscated proceeds. To assess the normative claims as

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<sup>584</sup> Oke, 'Money Laundering Regulation and the African PEP'.

<sup>585</sup> Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes'.

<sup>586</sup> Anghie, *Imperialism, Sovereignty and the Making of International Law*, 101–14.

<sup>587</sup> Anghie, *Imperialism, Sovereignty and the Making of International Law*.

to whose interests are being prioritised, promoted, and protected, it is important to trace the ideational values that permeate transnational AML/anticorruption regulatory governance.

### 5.1.1. Defining Corruption & Problematising ‘Foreign Corrupt Officials’

Corruption is not only endemic in societies of the Global South.<sup>588</sup> A notoriously complex phenomenon, scholars have struggled to identify and label corrupt relationships across cultural practices and socio-economic contexts.<sup>589</sup> Corruption evolved from a term of mere moral condemnation for perverting civic values to a more legalistic conception of kleptocracy in the 1960s, premised on the misuse of public office for ‘private rendering’.<sup>590</sup> Corruption was even theorised as efficiency enhancing,<sup>591</sup> and as a necessary feature of political and economic modernisation during the 1980s.<sup>592</sup> It is now popularly understood as “behaviour which deviates from the formal duties of a public role because of private rendering..., pecuniary or status gains.”<sup>593</sup> Criticised as overly legalistic, scholars have argued that it would be more appropriate to conceptualise corruption in terms of the exercise of undue influence in public

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<sup>588</sup> Pranab Bardhan, ‘Corruption and Development: A Review of Issues’, *Journal of Economic Literature* 35, no. 3 (1997): 1320–46; Bruce Buchan and Lisa Hill, *An Intellectual History of Political Corruption*, Political Corruption and Governance (Houndmills, Basingstoke, Hampshire ; New York, NY: Palgrave Macmillan, 2014); Daniel Kaufmann, ‘Corruption: The Facts’, *Foreign Policy* 107 (1997): 114–31; Anthony P. Maingot, ‘Confronting Corruption in the Hemisphere: A Sociological Perspective’, *Journal of Interamerican Studies and World Affairs* 36, no. 3 (1994): 49–74, <https://doi.org/10.2307/166526>; Anthony P. Maingot, ‘Threats to Social and National Security: The Internationalization of Corruption and Violence’, in *The United States and the Caribbean: Challenges of an Asymmetrical Relationship*, ed. Anthony Maingot (Boulder: Westview Press, 1994); Rider, *Corruption: The Enemy Within*.

<sup>589</sup> Michael Findley, ‘Corruption in Small States: Case Studies in Compromise’, in *Corruption: The Enemy Within*, ed. Barry Rider (London (UK): Kluwer Law International, 1997), 49–62.

<sup>590</sup> John Gardiner, ‘Defining Corruption’, in *Coping with Corruption in a Borderless World*, ed. Maurice Punch et al., Proceedings from the Fifth International Anti-Corruption Conference (Boston: Kluwer Law & Taxation Publishers, 1993), 21–38; Joseph S. Nye, ‘Corruption and Political Development: A Cost-Benefit Analysis’, *American Political Science Review* 61, no. 2 (June 1967): 417–27, <https://doi.org/10.2307/1953254>; Robert Williams, ‘New Concepts for Old?’, *Third World Quarterly* 20, no. 3 (1999): 503–13.

<sup>591</sup> Kaufmann, ‘Corruption: The Facts’.

<sup>592</sup> Stanislaw Andreski, *Parasitism and Subversion* (London (UK): Weidenfeld and Nicolson Publishers, 1996); Samuel P. Huntington, *Political Order in Changing Societies* (United States: Yale University Press, 1968); Samuel P. Huntington, ‘Modernization and Corruption’, in *Political Corruption: A Handbook*, ed. Arnold J. Heidenheimer, Michael Johnston, and Victor T. Levine (Somerset, New Jersey: Transaction Publishers, 1989), 253–64.

<sup>593</sup> Nye, ‘Corruption and Political Development’.

practices, which over time, would have lost their moral legitimacy.<sup>594</sup> The latter would be on account of their arbitrariness becoming perceived as inimical to public interest, government integrity and the legitimacy of political authority, despite not involving serious lawbreaking.<sup>595</sup> This would cast a wide net on corrupt practices. More recent attempts to develop a widely accepted definition, whether premised on economics, public opinion of wrongful abuse of power or public interest, have invariably failed.<sup>596</sup> Enduring patron-client explanations of corruption have often focused on clientelism as a vestige of ‘institutionalised colonial praxis’ of imperialist Western European States in the Global South, but which has become semantically labelled as ‘corruption’ in post-colonial societies.<sup>597</sup>

What has remained consistent, however, is that most definitions of corruption have been discursively developed with reference to the ‘foreign senior public official’ in the Global South.<sup>598</sup> They have been deemed high-risk launderers of the proceeds of corruption and a threat to the adoption and effective implementation of transnational AML/CFT regulatory standards.<sup>599</sup> For instance, central to the normative discourse on corruption has been the idea of rent-seeking.<sup>600</sup> It was derived from the Neoliberalist assumption that given any choice,

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<sup>594</sup> Jonathan Mendilow and Ilan Peleg, eds., ‘Edmund Burke’s Concept of Corruption and beyond’, in *Corruption in the Contemporary World: Theory, Practice, and Hotspots* (London (UK): Lexington Books, 2014).

<sup>595</sup> Mendilow and Peleg.

<sup>596</sup> John Sandage, ‘Global Corruption and the Universal Approach of the United Nations Convention Against Corruption’, *Osgoode Hall Law Journal* 53 (2015): 7–30, [https://doi.org/10.1007/978-3-319-04480-4\\_2](https://doi.org/10.1007/978-3-319-04480-4_2); World Bank Group, ‘Helping Countries Combat Corruption: The Role of the World Bank’ (Washington, DC, USA: World Bank, 1997), <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corruptn.pdf>.

<sup>597</sup> Robert S. Leiken, ‘Controlling the Global Corruption Epidemic’, *Foreign Policy*, no. 105 (1996): 55–73, <https://doi.org/10.2307/1148973>; Colin Newbury, ‘The Semantics of Corruption: Political Science Perspectives on Imperial and Post-Imperial Methods of State-Building’, *The Journal of Imperial and Commonwealth History* 44, no. 1 (2 January 2016): 163–94, <https://doi.org/10.1080/03086534.2015.1123544>.

<sup>598</sup> Robert Klitgaard, *Controlling Corruption*, Nachdr. (Berkeley: Univ. of California Press, 1991); Anton Moiseienko, ‘“No Safe Haven”: Denying Entry to the Corrupt as a New Anti-Corruption Policy’, *Journal of Money Laundering Control*; *London* 18, no. 4 (2015): 400–410, <http://dx.doi.org/10.1108/JMLC-01-2014-0004>; Susan Rose-Ackerman, *Corruption: A Study in Political Economy* (New York: Academic Press, 1978); Susan Rose-Ackerman, ‘The Political Economy of Corruption’, in *Corruption and the Global Economy*, ed. Kimberly Ann Elliott (Washington, DC: Institute for International Economics, 1996); Andrei Shleifer and Robert Vishny, ‘Corruption’, *Quarterly Journal of Economics* 108, no. 3 (1993): 599–617.

<sup>599</sup> Norman Mugarura, ‘The Effect of Corruption Factor in Harnessing Global Anti-money Laundering Regimes’, *Journal of Money Laundering Control* 13, no. 3 (1 January 2010): 272–81, <https://doi.org/10.1108/13685201011057145>; Chaikin and Sharman, *Corruption and Money Laundering*.

<sup>600</sup> Anne O. Krueger, ‘The Political Economy of the Rent-Seeking Society’, in *40 Years of Research on Rent Seeking* 2, ed. Roger D. Congleton, Kai A. Konrad, and Arye L. Hillman (Berlin, Heidelberg: Springer Berlin Heidelberg, 2008), 151–63, [https://doi.org/10.1007/978-3-540-79247-5\\_8](https://doi.org/10.1007/978-3-540-79247-5_8); Tara Polzer, ‘Corruption: Deconstructing the World Bank Discourse’, LSE Development Studies Institute Working Paper Series (London (UK): London School of Economics and Political Science, 2001); Susan Rose-Ackerman and Bonnie J. Palifka, *Corruption and Government: Causes, Consequences, and Reform*, Second edition (New York, NY:

Governments of developing countries would ‘maximise rents’ or, in other words, mismanage public resources to appease their urban constituencies.<sup>601</sup> This has provided a pretext for the International Monetary Fund (IMF) and World Bank, since the 1970s, prescribing a limited regulatory role for, and minimal market intervention by, the state in countries of the Global South, under multilateral development assistance programmes.<sup>602</sup> There is growing normative convergence that corruption generally involves the abuse of entrusted power for private gain or the abuse of public office for private gain.<sup>603</sup> To overcome the conceptual conundrum, rather than coining a definition, the United Nations Convention against Corruption (UNCAC 2003) pragmatically mandated State Parties to criminalise commonly accepted corrupt practices including bribery of national public officials (Art.15); bribery of foreign public officials and officials of public international organisations (Art.16); embezzlement, misappropriation or other diversions of property by public officials (Art.17); money laundering (Art.23); and obstruction of justice (Art.25). Furthermore, State Parties may ‘consider’ criminalising trading in influence (Art.18); abuse of function (Art.19); illicit enrichment (Art.20); and bribery (Art.21) and embezzlement of property (Art.22) in the private sector (Art.22). UNCAC has also left on a discretion basis, preventative measures related to enhancing transparency in the recruitment, hiring, retention, promotion, and retirement of public officials (Art.7.1); enhancing transparency in financing electoral campaigns and political parties (Art.7.3); and establishing asset declaration systems for public officials regarding their private interests (Art.8.5).

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Cambridge University Press, 2016); Gordon Tullock, *Rent Seeking*, The Shaftesbury Papers 2 (Aldershot, Hants, England ; Brookfield, Vt., USA: E. Elgar, 1993).

<sup>601</sup> Gerald J. Schmitz, ‘Democratization and Demystification: Deconstructing ‘governance as Development Paradigm’, in *Debating Development Discourse: Institutional and Popular Perspectives*, ed. David B. Moore and Gerald J. Schmitz, International Political Economy Series (New York: St. Martin’s Press, 1995).

<sup>602</sup> Robert Charlick, ‘Corruption in Political Transition: A Governance Perspective’, *Corruption and Reform* 7, no. 3 (1993): 177–87; Barbara Harriss-White and Gordon White, ‘Liberalisation and the New Corruption’, *Institute of Development Studies (IDS) Bulletin* 27, no. 2 (1996): 1–90; Leiken, ‘Controlling the Global Corruption Epidemic’; Schmitz, ‘Democratization and Demystification: Deconstructing ‘governance as Development Paradigm’.

<sup>603</sup> World Bank Group, ‘Strengthening World Bank Group Engagement on Governance and Anticorruption-World Bank Governance and Anticorruption Strategy (GAC)’ (Washington, DC, USA: World Bank Secretariat, 2007), <http://www1.worldbank.org/publicsector/anticorrupt/corecourse2007/GACMaster.pdf>.

### 5.1.2. Historicising the Crusade against Bribery of Foreign Senior Public Officials

Since the 1960s, political corruption has been ideologically theorised in terms of economic underdevelopment that could be remedied by neoliberal policies.<sup>604</sup> Indeed, the dominant discourse on corruption, reproduced by the IMF, World Bank, OECD and Transparency International, focused almost exclusively on the bribery of foreign senior public officials in developing countries by Western firms.<sup>605</sup> Discursively constructed narratives about a ‘global corruption epidemic’ were seemingly conditioned by the economic interests of advanced Western economies and donor governments.<sup>606</sup> The OECD, for instance, attributed corruption in developing countries to the “often excessive role of the state” and “bureaucratic approaches to resource allocation.”<sup>607</sup> The impunity of corrupt PEPs, transparency, accountability and sustainability risks were not prominent concerns within the anticorruption discourse. In fact, corruption was discursively represented as an ‘economic risk’ to, and source of uncertainty for, transnational economic exchanges and market penetration by mobile international capital and foreign investments from advanced industrialised States.<sup>608</sup> Problematising bribery of foreign public officials was essentially meant to remove strict bureaucratic regulatory and

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<sup>604</sup> Michael Collier, ‘The Effects of Political Corruption on Caribbean Development’ (Caribbean Studies Association Annual Conference, Nassau, Bahamas, 2002); Patrick Glynn, Stephen J. Kobrin, and Moisés Naím, ‘The Globalisation of Corruption’, in *Corruption and the Global Economy*, ed. Kimberly Ann Elliott (Washington, DC: Institute for International Economics, 1996); Kimberly Ann Elliott, ‘Corruption as an International Policy Problem: Overview and Recommendations’, in *Corruption and the Global Economy*, ed. Kimberly Ann Elliott (Washington, DC: Institute for International Economics, 1996); Margaret Beare and James W. Williams, ‘The Business of Bribery: Globalization, Economic Liberalization, and the “Problem” of Corruption’, in *Critical Reflections on Transnational Organized Crime, Money Laundering and Corruption*, ed. Margaret E. Beare (Toronto ; Buffalo: University of Toronto Press, 2003); International Monetary Fund, ‘World Economic Outlook: A Survey by the Staff of the International Monetary Fund’ (Washington, DC, USA: IMF Secretariat, 1997); World Bank Group, ‘Helping Countries Combat Corruption: The Role of the World Bank’.

<sup>605</sup> Beare and Williams, ‘The Business of Bribery: Globalization, Economic Liberalization, and the “Problem” of Corruption’.

<sup>606</sup> Ferguson, *Global Corruption: Law, Theory & Practice- Legal Regulation of Global Corruption under International Conventions, US, UK and Canadian Law*; Beare and Williams, ‘The Business of Bribery: Globalization, Economic Liberalization, and the “Problem” of Corruption’.

<sup>607</sup> Organisation for Economic Cooperation and Development, ‘Participatory Development and Good Governance’ (Paris, France: OECD Secretariat, 1995), 19–20, <https://www.oecd.org/dac/accountable-effective-institutions/31857685.pdf>.

<sup>608</sup> Margaret Beare, ‘Corruption and Organized Crime: Lessons from History’, in *Transnational Organised Crime: Historical Perspectives (Vol.1)*, ed. James Sheptycki (London (UK): Sage Publications, 1997), 193–209; Elliott, ‘Corruption as an International Policy Problem: Overview and Recommendations’; Glynn, Kobrin, and Naím, ‘The Globalisation of Corruption’; Beare and Williams, ‘The Business of Bribery: Globalization, Economic Liberalization, and the “Problem” of Corruption’.

administrative controls by foreign senior public officials in developing countries, whose markets OECD multinational corporations (MNCs) wanted access to.<sup>609</sup> Thus, rather than advocating for strengthened institutional capacities with genuine anticorruption and transparency enhancing programmes, it was the regulatory authority of developing States that was problematised. Privileging causative explanations premised exclusively on internal regulatory authority structures, levels of economic development, resource constraints and the enduring institutional and politico-sociological vestiges of colonialism,<sup>610</sup> mutually constituted corrupt business practices and bribery by OECD MNCs as less problematic. As a matter of fact, until 1996, bribery of foreign public officials was a tax-deductible business expense in several onshore jurisdictions.<sup>611</sup>

Corruption only became transnationally politicised following the adoption of Foreign Corrupt Practices Act (FCPA) 1977 by the United States' Congress. Still, this served to repair the United States' damaged reputation following the Watergate scandal. The Watergate investigations revealed that hundreds of American companies had systematically engaged in corrupt transactions abroad including having channelled illegal campaign contributions through offshore subsidiaries.<sup>612</sup> Furthermore, it was only after realising that the FCPA placed US MNCs at a competitive disadvantage relative to those of major trading competitors that Congress, in 1988, authorised foreign policy efforts to level the playing field.<sup>613</sup> Congress

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<sup>609</sup> Kaufmann, 'Corruption: The Facts', 116.

<sup>610</sup> John L. Campbell and John A. Hall, *The World of States* (London: Bloomsbury Publishing, 2015).

<sup>611</sup> Mlada Bukovansky, 'The Hollowness of Anti-Corruption Discourse', *Review of International Political Economy* 13, no. 2 (1 May 2006): 181–209, <https://doi.org/10.1080/09692290600625413>; Wade M Cole, 'Institutionalizing a Global Anti-Corruption Regime: Perverse Effects on Country Outcomes, 1984–2012', *International Journal of Comparative Sociology* 56, no. 1 (1 February 2015): 53–80, <https://doi.org/10.1177/0020715215578885>; David A. Gantz, 'Globalizing Sanctions against Foreign Bribery: The Emergence of a New International Legal Consensus Symposium: A Review of the Foreign Corrupt Practices Act on Its Twentieth...', *Northwestern Journal of International Law & Business* 18, no. 2 (1998 1997): 457–97; Carl Pacini, Judyth A. Swingen, and Hudson Rogers, 'The Role of the OECD and EU Conventions in Combating Bribery of Foreign Public Officials', *Journal of Business Ethics* 37, no. 4 (1 June 2002): 385–405, <https://doi.org/10.1023/A:1015235806969>.

<sup>612</sup> Mateo J. de la Torre, 'The Foreign Corrupt Practices Act: Imposing an American Definition of Corruption on Global Markets', *Cornell International Law Journal* 49 (2016): 469–95; Ferguson, *Global Corruption: Law, Theory & Practice- Legal Regulation of Global Corruption under International Conventions, US, UK and Canadian Law*; Peter M. German, 'To Bribe or Not to Bribe — A Less than Ethical Dilemma, Resolved?', *Journal of Financial Crime* 9, no. 3 (1 January 2002): 249–58, <https://doi.org/10.1108/eb026024>.

<sup>613</sup> de la Torre, 'The Foreign Corrupt Practices Act: Imposing an American Definition of Corruption on Global Markets'; Beverley Earle, 'The United States' Foreign Corrupt Practices Act and the OECD Anti-Bribery Recommendation: When Moral Suasion Won't Work, Try the Money Argument', *Dickinson Journal of International Law* 14 (1996 1995): 207–42; Ferguson, *Global Corruption: Law, Theory & Practice- Legal Regulation of Global Corruption under International Conventions, US, UK and Canadian Law*; German, 'To Bribe or Not to Bribe — A Less than Ethical Dilemma, Resolved?'

expressly authorised lobbying competitor-jurisdictions to criminalise bribery of foreign public officials.<sup>614</sup> Indeed, it was the United States' transnational campaign that encouraged the adoption of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Anti-Bribery Convention 1997) and eventually the UNCAC 2003.<sup>615</sup>

Many OECD countries initially resisted the United States' extraterritorial anticorruption campaigns.<sup>616</sup> Articles 2 and 3 of OECD's Anti-Bribery Convention 1997 require State Parties to establish corporate liability regimes for bribery of officials, including effective, proportionate, and dissuasive penalties. However, having left the precise nature of corporate liability to the discretion of State Parties, the approaches of OECD countries have been inconsistent, arguably reflecting diverging levels of political commitment. Illustratively, a recent mapping of legal persons liability in the OECD revealed marked variability over the last two decades since the adoption of the Anti-Bribery Convention.<sup>617</sup> Significant divergences in normative and philosophical approaches to holding legal persons liable for foreign bribery was revealed with 68% of OECD countries providing for criminal liability and 27% civil and administrative liability.<sup>618</sup> Similar divergences were noted with respect to the legal basis for liability, with 49% of OECD countries not incorporating liability under general criminal law and instead using competition law for example, while 24% used bribery specific legislation.<sup>619</sup> Discursively, therefore, corruption was never initially framed as a sustainable development issue for the Global South by OECD donor governments. Instead, it was steeped in particularistic Western politico-economic and regulatory interests.

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<sup>614</sup> de la Torre, 'The Foreign Corrupt Practices Act: Imposing an American Definition of Corruption on Global Markets'; Earle, 'The United States' Foreign Corrupt Practices Act and the OECD Anti-Bribery Recommendation'; Ferguson, *Global Corruption: Law, Theory & Practice- Legal Regulation of Global Corruption under International Conventions, US, UK and Canadian Law*; Leiken, 'Controlling the Global Corruption Epidemic'.

<sup>615</sup> de la Torre, 'The Foreign Corrupt Practices Act: Imposing an American Definition of Corruption on Global Markets'; Ferguson, *Global Corruption: Law, Theory & Practice- Legal Regulation of Global Corruption under International Conventions, US, UK and Canadian Law*; German, 'To Bribe or Not to Bribe — A Less than Ethical Dilemma, Resolved?'

<sup>616</sup> Leiken, 'Controlling the Global Corruption Epidemic'.

<sup>617</sup> Organisation for Economic Cooperation and Development, 'The Liability of Legal Persons for Foreign Bribery: A Stocktaking Report' (Paris, France: OECD Secretariat, 2016), <http://www.oecd.org/daf/anti-bribery/Liability-Legal-Persons-Foreign-Bribery-Stocktaking.pdf>.

<sup>618</sup> Organisation for Economic Cooperation and Development.

<sup>619</sup> Organisation for Economic Cooperation and Development.

### 5.1.3. The Discursive Constitution of Transnational Anticorruption Regulatory Governance as ‘Sustainable Development’ Discourse- The ‘Corruption Eruption’

Early United Nations’ efforts to curb foreign corruption,<sup>620</sup> succumbed to East/West, North/South struggles of the 1970s and 1980s.<sup>621</sup> The transnational securitisation of corruption and stigmatisation of normalised foreign corrupt practices only gained momentum in the mid-1990s.<sup>622</sup> This has been attributed to the emergence of a global civil society that engendered critical public attitudes in the United States and Europe towards autocratic African regimes whose corrupt practices were tolerated by Western allies during the Cold War.<sup>623</sup> Post-Cold War, the IMF, World Bank and OECD’s policy interests seemingly converged around a “singular and highly politicised account of corruption.”<sup>624</sup> This has manifested in exerting normative extraterritorial pressure on sovereign developing States under the pretext of bridging the Global North/South “development gap.”<sup>625</sup> Furthermore, rather than combating corruption as an end in and of itself, curbing its “anti-development effects,”<sup>626</sup> became prioritised. Yet, with little regard for policy ownership and sovereignty of developing countries, anticorruption policy prescriptions have invariably been ‘top-down’ neoliberalist strategies. Moreover, they

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<sup>620</sup> UN General Assembly Resolution 3514, adopted on December 15, 1975, denounced all forms of corrupt practices including bribery. In keeping with the ethos of the NIEO, it reflected the antagonism between the G77 (supported by the communist bloc) and developed States. Introduced by a group of developing countries, Resolution 3514 insisted on States’ right to take legal actions against transnational corporations and on the responsibility of developed home countries to cooperate with host governments to prevent bribery and to prosecute foreign corrupt practices on the basis of extraterritorial jurisdiction.

<sup>621</sup> Alejandro Posadas, ‘Combating Corruption under International Law’, *Duke Journal of Comparative & International Law* 10, no. 2 (2000 1999): 345–414.

<sup>622</sup> Cole, ‘Institutionalizing a Global Anti-Corruption Regime’; Alexander Cooley and Jason C. Sharman, ‘Transnational Corruption and the Globalized Individual’, *Perspectives on Politics* 15, no. 3 (September 2017): 732–53, <https://doi.org/10.1017/S1537592717000937>; Hun Joon Kim and Jason C. Sharman, ‘Accounts and Accountability: Corruption, Human Rights, and Individual Accountability Norms’, *International Organization* 68, no. 2 (ed 2014): 417–48, <https://doi.org/10.1017/S0020818313000428>; Wayne Sandholtz and Mark M. Gray, ‘International Integration and National Corruption’, *International Organization* 57, no. 4 (ed 2003): 761–800, <https://doi.org/10.1017/S0020818303574045>.

<sup>623</sup> Leiken, ‘Controlling the Global Corruption Epidemic’; Robin Theobald, ‘So What Really Is the Problem about Corruption?’, *Third World Quarterly* 20, no. 3 (1 June 1999): 491–502, <https://doi.org/10.1080/01436599913640>.

<sup>624</sup> Beare and Williams, ‘The Business of Bribery: Globalization, Economic Liberalization, and the “Problem” of Corruption’, 90.

<sup>625</sup> Bukovansky, ‘The Hollowness of Anti-Corruption Discourse’, 182.

<sup>626</sup> Alan Doig and Stephanie McIvor, ‘Corruption and Its Control in the Developmental Context: An Analysis and Selective Review of the Literature’, *Third World Quarterly* 20, no. 3 (1999): 660.

have struggled to effectively suppress the incentivisation of bribery and other corrupt practices by governments and multinational corporations of OECD countries.<sup>627</sup>

Transparency and accountability norms, within the AML/anticorruption normative discourse, emerged in tandem with discursive construction of corruption as a “social disease,”<sup>628</sup> endemic to the Global South. Corruption soon became securitised as a threat to sustainable development. An ‘information paradox’, characterised by the expanded conceptual scope of corruption, the proliferation of anticorruption regulatory and surveillance initiatives and scholarly writings, created the perception that corruption had worsened, although actual levels may have dwindled.<sup>629</sup> By the mid-1990s there was an escalation in anticorruption rhetoric by successive World Bank presidents, including James D. Wolfensohn 1995 reference to confronting the “cancer of corruption” in the Global South. In 2013, corruption was elevated to “public enemy number one in the developing world.”<sup>630</sup> However, framing the anticorruption discourse in ‘sustainable development’ terms did not resolve scepticism about the ‘development deficit in the TAMLO. The ideological history of ‘development discourse’ had long been criticised for naturalising the triad of Anglo-American capitalist values, namely equity, democracy and sustainability in furtherance of capitalism’s hegemony.<sup>631</sup> Consequently, it is suspiciously thought that the “neo-liberal consensus” that corruption undermines development, was only due to it having impeded investments from Western capitalist countries.<sup>632</sup> Nonetheless, the UN has since streamlined combating money laundering and corruption into the 2030 Sustainable Development Agenda and SDGs. Sustainable Development Goal 16, (Peace, justice, and strong institutions) has problematised IFFs from developing countries as a result of corruption, bribery, and tax evasion. Among its targets are substantially reducing corruption and bribery in all forms, significantly reducing IFFs by 2030,

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<sup>627</sup> Beare, ‘Corruption and Organized Crime: Lessons from History’; Beare and Williams, ‘The Business of Bribery: Globalization, Economic Liberalization, and the “Problem” of Corruption’.

<sup>628</sup> Pedro Nevado and Frederico Cavazzini, ‘Fighting Corruption with Strategy’, in *Corruption, Economic Growth and Globalization*, ed. Aurora Teixeira and Carlos Pimenta (New York, NY: Routledge, 2016), 223–38.

<sup>629</sup> Cole, ‘Institutionalizing a Global Anti-Corruption Regime’.

<sup>630</sup> ‘Corruption Is “Public Enemy Number One” in Developing Countries, Says World Bank Group President Kim’, Text/HTML, World Bank, accessed 3 May 2020, <https://www.worldbank.org/en/news/press-release/2013/12/19/corruption-developing-countries-world-bank-group-president-kim>.

<sup>631</sup> David B. Moore, ‘Development Discourse as Hegemony: Towards an Ideological History, 1945-1995’, in *Debating Development Discourse: Institutional and Popular Perspectives*, ed. David B. Moore and Gerald J. Schmitz (Britain: MacMillan Press Ltd., 1995), 1–53.

<sup>632</sup> Buchan and Hill, *An Intellectual History of Political Corruption*.

strengthening the recovery and return of stolen assets, and promoting appropriate capacity building.

More recently, corruption has increasingly become framed as a ‘good governance’ issue, and was streamlined into risk assessments for development assistance by the World Bank and IMF.<sup>633</sup> Good governance and sustainable development were discursively narrated as mutually constitutive.<sup>634</sup> For the World Bank, ‘good governance’ denoted compliance with a number of core principles in the practice of political leadership, namely, sound management of public resources, accountability, transparency, openness, predictability and the rule of law; and was considered to be a pre-requisite for “market-led economic growth.”<sup>635</sup> Corrupt PEPs, of course, were represented as the biggest threat to good governance. Yet, by prescribing harsh economic growth and regulatory strategies reinforced by domestic order, the notion of good governance is thought to reinforce the asymmetrical and undemocratic global power structures and subverting developing States’ sovereignty.<sup>636</sup> Strict regulation was thought to place significant ‘rents’ under the control of untrustworthy foreign PEPs in the Global South with regulatory authority for distributing public resources, and who were subject to varying degrees of accountability for their discretionary decision-making.<sup>637</sup> Corruption is also being discursively framed as a human rights issue, on the basis of both its direct and indirect derailing of economic and social rights, as well as because it offers the possibility for rights-based remedies against States before international human rights tribunals.<sup>638</sup>

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<sup>633</sup> World Bank Group, ‘Helping Countries Combat Corruption: The Role of the World Bank’.

<sup>634</sup> Schmitz, ‘Democratization and Demystification: Deconstructing ‘governance as Development Paradigm’.

<sup>635</sup> World Bank Group, ‘Helping Countries Combat Corruption: The Role of the World Bank’.

<sup>636</sup> Schmitz, ‘Democratization and Demystification: Deconstructing ‘governance as Development Paradigm’.

<sup>637</sup> World Bank Group, ‘Helping Countries Combat Corruption: The Role of the World Bank’.

<sup>638</sup> Ferguson, *Global Corruption: Law, Theory & Practice- Legal Regulation of Global Corruption under International Conventions, US, UK and Canadian Law*; Cecily Rose, ‘The Limitations of a Human Rights Approach to Corruption’, *International & Comparative Law Quarterly* 65, no. 2 (April 2016): 405–38, <https://doi.org/10.1017/S0020589316000038>; United Nations Secretariat, ‘In Message for International Anti-Corruption Day, UN Secretary-General Says Prevention Critical to Securing Rule of Law’, 2012; Jan Wouters, Cedric Ryngaert, and Ann Sofie Cloots, ‘The International Legal Framework against Corruption: Achievements and Challenges’ 14, no. 1 (2013): 271–73.

#### 5.1.4. The Transnational Institutionalisation of the Use of AML/CFT Standards to Combat Corruption

The prevailing view that there is a “symbiotic relationship” between money laundering and corruption,<sup>639</sup> was influenced by the realisation that, in some cases, transnational bribery and graft have generated more illicit proceeds than drug trafficking.<sup>640</sup> Consequently, the UNCAC 2003 has recognised the nexus among corruption, money laundering and sustainable development. In its preambular paragraphs, UNCAC establishes that corruption threatens sustainable development, the rule of law and democratic values and institutions. Article 14 has required State Parties to establish comprehensive domestic regulatory and supervisory regimes to which banks and non-bank financial institutions (BNFIs) should be subject. Article 14 has further required that such regimes include customer due diligence (CDD) requirements to prevent and detect the laundering of the proceeds of corruption, such as customer and beneficial owner identification, reporting of suspicious transactions and record-keeping. Article 23(a)(i) UNCAC has required State Parties to criminalise the laundering of the proceeds of crime, including any intentional conversion or transfer of illicit proceeds, for the purpose of concealing or disguising its illicit origins or helping any person involved in the commission of the predicate offence to evade detection or the legal consequences of their actions. This applies to the concealment or disguise of the true nature, source, location, disposition, ownership of or rights in property known to be the proceeds of crime (Art.23.a.ii) and any involvement in the acquisition or possession of the illicit proceeds (Art.23.b.i). It provides for the establishment of accessory liability and inchoate offences, including conspiracy or attempts, aiding, abetting, facilitating, and counselling the commission of any predicate offence (Art.23.b.ii). Article 52 has addressed the prevention and detection of transfers of the proceeds of crime to facilitate asset recovery and Article 58 for the establishment of financial intelligence units (FIUs) and their coordinated role in combating the laundering of the proceeds of corruption. The UNCAC

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<sup>639</sup> Chaikin and Sharman, *Corruption and Money Laundering*; Financial Action Task Force, ‘Laundering the Proceeds of Corruption’; Nadim Kyriakos-Saad, Gianluca Esposito, and Nadine Schwarz, ‘The Incestuous Relationship Between Corruption and Money Laundering’, *Revue internationale de droit pénal* 83, no. 1 (2012): 161, <https://doi.org/10.3917/ridp.831.0161>; Mugarura, ‘The Effect of Corruption Factor in Harnessing Global Anti-money Laundering Regimes’; World Bank Group, ‘Strengthening World Bank Group Engagement on Governance and Anticorruption’ (Washington, DC, USA: World Bank Secretariat, 2007), <http://www1.worldbank.org/publicsector/anticorrupt/corecourse2007/GACMaster.pdf>.

<sup>640</sup> Leiken, ‘Controlling the Global Corruption Epidemic’.

has been hailed as having achieved the broadest multilateral consensus on combating corruption, being the first globally binding instrument of its kind.<sup>641</sup> A cursory glance at the major UN policy documents, including UN General Assembly Resolutions, confirm that developing countries, including those of the Commonwealth Caribbean have been influential in negotiating and legitimising these transnationally binding anti-corruption norms.

The AML/Anticorruption nexus has also been streamlined into the Financial Action Task Force's International Standards. This integrated approach to combating money laundering and corruption has been reflected in Recommendation 3, which include corruption and bribery among the categories of serious wrongdoings that could found predicate offences for money laundering. Recommendation 15(b) has provided for enhanced CDD measures where ML risks are high, based on the geographic origin of the transactions, especially if the jurisdiction is believed to have significantly high levels of corruption. Recommendation 30 has envisaged an integrated investigative approach to ML offences arising from bribery and corruption, by anti-corruption agencies that have been conferred with enforcement powers to identify, trace and initiate freezing and seizing of assets. Recommendation 36 has required States to take 'immediate steps' to ratify or accede to and implement the UNCAC (2003) to enable international cooperation.

## 5.2. Systematic Challenges

Systematic challenges relate to existence of fragmented or plural normative orders.<sup>642</sup> The transnational framework for criminalisation of corruption and cooperation to combat the laundering, and ensure the recovery and return, of proceeds of corruption has evolved in a fragmented manner.<sup>643</sup> It is constituted of regional instruments including the 1996 Inter-American Convention against Corruption and the 1997 OECD Anti-Bribery Convention. Nonetheless, reflecting the consensus of 187 State Parties (as of 6 February 2020), the UNCAC has been locus of international 'hard law' AML/anticorruption standards. One of the most

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<sup>641</sup> Philippa Webb, 'The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?', *Journal of International Economic Law* 8, no. 1 (1 March 2005): 191–229.

<sup>642</sup> Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes'.

<sup>643</sup> Phil Mason, 'Twenty Years with Anti-Corruption. Part 3: The International Journey- From Ambition to Ambivalence' (U4 Anti-Corruption Resource Centre, 2020).

contentious systematic issue, however, has been the lack of harmonisation of the definition of PEPs and the regulation of corrupt PEPs, their families, and close associates,<sup>644</sup> to prevent grand corruption. The concept of PEP was introduced by the UNCAC 2003, albeit indirectly as the term was not expressly used. Nevertheless, for the purposes of preventing and detecting the laundering of the proceeds of corruption, Article 52(1) UNCAC targeted individuals who are or have been entrusted with “prominent public functions,” their families and close associates. UNCAC has prescribed that they be subject to enhanced due diligence (EDD) measures by financial institutions. To the extent that Article 52(1) made no distinction between domestic and foreign PEPs, it has been argued that this created an expectation, if not an international legal obligation, that State Parties include domestic public officials within their regulation of PEPs.<sup>645</sup> However, domestic PEPs were largely excluded from regulation of PEPs within regional normative orders constituted by advanced Western economies.<sup>646</sup> In fact, several OECD governments had expressly objected to the extension of AML laws to regulate domestic PEPs.<sup>647</sup>

Another important systematic normative challenge in transnational regulatory governance of PEPs is the new-found primacy of ‘transnational soft law’ within the TAMLO. Non-obligatory ‘soft law’ standards, such as recommendations of transnational NGOs, have functioned as effectively as formal legal norms in international regulatory practice, in affecting

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<sup>644</sup> Chaikin and Sharman, *Corruption and Money Laundering*; Kim-Kwang Raymond Choo, ‘Challenges in Dealing with Politically Exposed Persons’, *Trends & Issues in Crime and Criminal Justice*, no. 386 (2010), <https://aic.gov.au/publications/tandi/tandi386>; Kim-Kwang Raymond Choo, ‘Politically Exposed Persons (PEPs): Risks and Mitigation’, *Journal of Money Laundering Control* 11, no. 4 (1 January 2008): 371–87, <https://doi.org/10.1108/13685200810910439>; Cole, ‘Institutionalizing a Global Anti-Corruption Regime’; George Gilligan, ‘PEEPing at PEPs’, *Journal of Financial Crime* 16, no. 2 (1 January 2009): 137–43, <https://doi.org/10.1108/13590790910951812>; Jackie Johnson, ‘Little Enthusiasm for Enhanced CDD of the Politically Connected’, *Journal of Money Laundering Control* 11, no. 4 (1 January 2008): 291–302, <https://doi.org/10.1108/13685200810910376>. Chaikin and Sharman, *Corruption and Money Laundering*; Kim-Kwang R. Choo, ‘Challenges in Dealing with Politically Exposed Persons’, *Trends & Issues in Crime and Criminal Justice*, no. 386 (2010), <https://aic.gov.au/publications/tandi/tandi386>; Kim-Kwang Raymond Choo, ‘Politically Exposed Persons (PEPs): Risks and Mitigation’, *Journal of Money Laundering Control* 11, no. 4 (1 January 2008): 371–87, <https://doi.org/10.1108/13685200810910439>; Cole, ‘Institutionalizing a Global Anti-Corruption Regime’; George Gilligan, ‘PEEPing at PEPs’, *Journal of Financial Crime* 16, no. 2 (1 January 2009): 137–43, <https://doi.org/10.1108/13590790910951812>; Jackie Johnson, ‘Little Enthusiasm for Enhanced CDD of the Politically Connected’, *Journal of Money Laundering Control* 11, no. 4 (1 January 2008): 291–302, <https://doi.org/10.1108/13685200810910376>.

<sup>645</sup> Chaikin and Sharman, *Corruption and Money Laundering*.

<sup>646</sup> Richard Butler, ‘Mitigating Risk and Fighting Money Laundering and Corruption’, *InFinance* 2 (2009): 50–51.

<sup>647</sup> Chaikin and Sharman, *Corruption and Money Laundering*.

State conduct and compliance.<sup>648</sup> The FATF's transnational 'soft law' standards have permeated domestic legal and regulatory regimes,<sup>649</sup> and have ultimately begun to supplant the regulatory authority of sovereign Commonwealth Caribbean States that have been coerced into compliance with its rules. More significantly, in a curious departure from UNCAC 2003, the FATF in 2003 restrictively incorporated provisions into its Forty Recommendations only targeting foreign PEPs.<sup>650</sup> This reflected the regulatory dilemma within the OECD about extending AML measures to target domestic PEPs. To complicate the normative conundrum, the Basel Committee on Banking Supervision and the Wolfsberg Group had adopted their own diverging AML/anticorruption regulatory standards targeting PEPs.<sup>651</sup> Yet, despite the Basel Committee neither having legal personality,<sup>652</sup> it wields soft power over central banks of sovereign States around the world. The lack of harmonisation of AML/anticorruption regulatory standards on PEPs, it has been argued, was exploited by some States as an excuse to avoid the effective regulation of their domestic PEPs.<sup>653</sup>

In 2009, six years after the adoption of UNCAC and the selective incorporation of its provisions on PEPs in the FATF's Forty, the World Bank was lamenting the abject lack of political will to effectively implement these standards, particularly among FATF members.<sup>654</sup> The 2009 World Bank commissioned study found that an estimated sixty-one percent (61%) of countries assessed by the FATF and FATF-style regional bodies were non-compliant and twenty-three (23%) percent partially compliant, bringing to eighty-four percent (84%) countries with regulatory regimes below the set international standards.<sup>655</sup> In 2011, the FATF reported that of 162 jurisdictions assessed for compliance with Recommendation 6 on PEPs (now Rec. 12), only two were fully compliant, fifty-nine percent (59%) were not compliant

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<sup>648</sup> Lucia Quaglia, 'The Politics of State Compliance with International "Soft Law" in Finance', *Governance* 32, no. 1 (2019): 45–62, <https://doi.org/10.1111/gove.12344>; Blutman, 'In the Trap of a Legal Metaphor'.

<sup>649</sup> Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes'.

<sup>650</sup> Chaikin and Sharman, *Corruption and Money Laundering*; Raymond Choo, 'Politically Exposed Persons (PEPs)'; Cole, 'Institutionalizing a Global Anti-Corruption Regime'.

<sup>651</sup> Sungyong Kang, 'Rethinking the Global Anti-Money Laundering Regulations to Deter Corruption', *International and Comparative Law Quarterly* 67, no. 3 (July 2018): 695–720, <https://doi.org/10.1017/S0020589318000106>.

<sup>652</sup> David Zaring, 'International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations', *Texas International Law Journal* 33, no. 2 (1 April 1998): 281.

<sup>653</sup> Greenberg et al., *Politically Exposed Persons*; Kang, 'Rethinking the Global Anti-Money Laundering Regulations to Deter Corruption'.

<sup>654</sup> Greenberg et al., *Politically Exposed Persons*.

<sup>655</sup> Greenberg et al.

and twenty-five percent (25%) partially compliant.<sup>656</sup> This was a direct result of systematic challenges within the AML/Anticorruption regime.

It was not until 2012, that the FATF revised its International Standards to require FIs to take reasonable steps to determine whether a customer or beneficial owner is a domestic PEP. Recommendation 12 further requires that FIs apply relevant CDD measures to the family members or close associates of both domestic and foreign PEPs. This is in line with the EDD standards to be applied to PEPs under Article 52 UNCAC, given the presumed ‘high-risk’ nature of engaging in business relationships with PEPs and the potential reputational consequences for FIs that may arise from their misuse for laundering proceeds from corruption. Other risk-management measures include verifying source of funds or wealth, enhanced ongoing monitoring of the business relationship and the requirement of senior management approval for establishing or continuing business relationships with PEPs. While a significant policy development, it would not be unreasonable to infer from its lateness that the implicit values of the OECD’s regulatory posture has been outward-looking and paternalistic towards ‘othered’ States of the Global South.

The underlying policy for the application of enhanced scrutiny to family members and close associates of PEPs, under Article 52(1) UNCAC, is that corrupt PEPs may attempt to minimise their exposure to scrutiny and evade detection by using these personal contacts as intermediaries for money laundering.<sup>657</sup> Business relationships with family members and close associates have been presumed, therefore, to carry similar reputational risks for FIs as those with PEPs. However, UNCAC has not specified to which family members enhanced scrutiny should apply. While the FATF adopted this approach, the European Union has not.<sup>658</sup> Article 2 of the Fourth EU Anti-money Laundering (AML) Directive (2006/70/EC) sought to clarify the definition of family members and close associates of PEPs. Adopting a restrictive and legalistic approach,<sup>659</sup> it established that family members of PEPs refer to “immediate family members”, namely spouses, partners considered equivalent to spouses under domestic laws of Member States, children and their spouses and parents.

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<sup>656</sup> Ivan Rossi et al., ‘Using Asset Disclosure for Identifying Politically Exposed Persons’ (Washington, DC, USA: World Bank Group, 2012).

<sup>657</sup> Chaikin and Sharman, *Corruption and Money Laundering*; Kang, ‘Rethinking the Global Anti-Money Laundering Regulations to Deter Corruption’.

<sup>658</sup> Chaikin and Sharman, *Corruption and Money Laundering*; Greenberg et al., *Politically Exposed Persons*.

<sup>659</sup> Chaikin and Sharman, *Corruption and Money Laundering*.

With respect to close associates, while UNCAC envisaged natural or legal persons within the definition,<sup>660</sup> Article 3 of the Fourth EU AML Directive clarified that “persons known to be close associates” referred to individuals or natural persons known to have joint beneficial ownership of legal entities or legal arrangements, or any close business relations with PEPs. Additionally, it includes natural persons having sole beneficial ownership of legal entities or arrangements known to have been set up for the benefit *de facto* of PEPs. The Fifth EU AML Directive entered into force on 9<sup>th</sup> July 2018, with a deadline of 10<sup>th</sup> January 2020 for its transposition into the domestic laws of EU Member States. Article 13 requires EU Member States to draw up national lists of public offices and functions that qualify as politically exposed. This finally brings the EU’s regulatory regime on PEPs closer in line Article 52(2) (a) UNCAC, which requires State Parties to issue advisories in respect of the typologies of natural or legal persons that are politically exposed, and to whom enhanced EDD standards should apply, and the types of accounts and transactions that may be high-risk. A significant remaining divergence, nonetheless, is that whereas UNCAC and FATF do not delineate when a PEP ceases to be a PEP, the Fourth EU AML Directive specified one year of having ceased to be entrusted with a prominent public function. Another important development under the Fifth EU AML Directive is the stipulation that EDD measures will be required for financial transactions originating from high-risk third countries. The European Commission has responsibility for identifying high-risk jurisdiction and may have regard to assessments, reports and evaluations of international organisations and standard setters with AML/CFT competence (Article 5). Given the EU’s propensity for tying international development assistance to AML compliance, Article 5 could, expectedly, be used as a “carrot and stick” strategy to compel Commonwealth Caribbean jurisdictions into compliance with FATF standards in contravention of the regulatory sovereignty.

### 5.3. Democratic Challenges

Democratic challenges relate to the extent to which discursively constructed ‘objects of regulation’ are represented, included in participatory decision-making processes for

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<sup>660</sup> Greenberg et al., *Politically Exposed Persons*.

promulgation of legal norms and standards, or are provided with transparent avenues for ‘rendering account’.<sup>661</sup> In practice, however, legitimacy and accountability claims are often discursively made both by ‘objects of regulation’ and regulators.<sup>662</sup> Where these counterclaims are incompatible, a ‘legitimacy dilemma’ usually results or particular claims by one set of actors are simply disregarded where material risks of the loss of legitimacy are low.<sup>663</sup> These democratic challenges have arisen because of the capture of transnational AML/anticorruption regulatory governance by powerful OECD States. For present purposes, transnational regulatory capture denotes weaknesses and failures in regulatory oversight that arise from regulations being designed by, and in the interest of, objects of regulation.<sup>664</sup> Thus, the argument of ‘transnational regulatory capture’ recentres sovereign States as the objects of transnational AML/CFTP regulation, both under transnational criminal law and the FATF International Standards. Indeed, it is sovereign States that have been conferred with regulatory and supervisory responsibilities and are required to regulate their respective banking and DNFBP sectors under their domestic AML/CFTP regimes. Regulatory capture becomes visible where broader collective interests are supplanted by particularistic and vested interests.<sup>665</sup> It is submitted that this has been marked by the establishment of the FATF by powerful onshore States to steer the TAMLO in their interest. Moreover, in practice, the FATF has supplanted the primacy of the United Nations’ conventional role in transnational AML/anticorruption regulatory governance. It has been further marked by the shift in the locus of international AML/anticorruption rules from international treaty law to transnational ‘soft law standards’ promulgated by the FATF. In effect, Commonwealth Caribbean States, and developing countries generally, have been substantively ‘crowded out’ of transnational policymaking processes for the regulation of PEPs.

The transnational regulatory governance of PEPs within the TAMLO has been a ‘contested space’ between powerful OECD States and the transnational regulatory networks and institutions that they hegemonically dominate, on the one hand, and less powerful and

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<sup>661</sup> Black, ‘Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes’.

<sup>662</sup> Black.

<sup>663</sup> Black.

<sup>664</sup> Kevin L. Young, ‘Transnational Regulatory Capture? An Empirical Examination of the Transnational Lobbying of the Basel Committee on Banking Supervision’, *Review of International Political Economy* 19, no. 4 (1 October 2012): 663–88, <https://doi.org/10.1080/09692290.2011.624976>.

<sup>665</sup> Andrew Baker, ‘Restraining Regulatory Capture? Anglo-America, Crisis Politics and Trajectories of Change in Global Financial Governance’, *International Affairs* 86, no. 3 (1 May 2010): 647–63, <https://doi.org/10.1111/j.1468-2346.2010.00903.x>.

consequently heavily regulated States of the Global South, on the other hand. The capacity of the Commonwealth Caribbean States, for example, to exercise ‘effective sovereignty’ in shaping transnational AML/anticorruption rules or in substantively participating in decision-making processes for their promulgation has been severely abridged within the TAMLO. Their resultant “softened sovereignty,”<sup>666</sup> therefore, has become discursively reproduced and normalised due to asymmetrical power relations, notwithstanding their juridical sovereign equality with OECD countries. The notion of ‘ungoverned space’,<sup>667</sup> could appropriately characterise the marginalisation of sovereign Commonwealth Caribbean States from transnational AML/anticorruption regulatory governance of PEPs due to ‘regulatory capture’ by powerful onshore policy elites such as the G7, OECD and the FATF.

Indeed, demands for regulatory legitimacy and accountability in the polycentric AML/Anticorruption regulatory governance of PEPs, have derived from three main sources. Firstly, non-compliance with transnational ‘soft law’ standards, by selectively targeted and overregulated sovereign small States, has resulted in their exclusion from international capital markets and being subject to coercive extraterritorial pressure.<sup>668</sup> The ‘blacklisting’ and grey-listing of many Commonwealth Caribbean jurisdictions as ‘non-cooperative’ or ‘high-risk’ for the purposes of money laundering and corruption has had enduring sustainable development consequences. The continuing loss of correspondent banking relationships (CBRs) with intermediary North American banks, which disrupted value transfer services and remittance flows in the region,<sup>669</sup> is a case in point. Secondly, transnational ‘soft law’ standards have seemingly crystallised into ‘hard law’ due to States being coerced to legislatively incorporate them into their domestic regulatory regimes.<sup>670</sup> Thus, the G7 and OECD have effectively supplanted the legitimacy of the UNCAC and democratic representativeness of the United Nations as the locus of AML/anticorruption norms and deliberative forum within the TAMLO,

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<sup>666</sup> Clunan and Trinkunas, ‘Conceptualising Ungoverned Spaces: Territorial Statehood, Contested Authority and, Softened Sovereignty’.

<sup>667</sup> Clunan and Trinkunas.

<sup>668</sup> Julia Black and David Rouch, ‘The Development of the Global Markets as Rule-Makers: Engagement and Legitimacy’, *Law and Financial Markets Review* 2, no. 3 (May 2008): 218–33.

<sup>669</sup> Caribbean Policy Research Institute (CAPRI), ‘The Correspondent Banking Problem: Impact of de-Banking Practices on Caribbean Economies’; Caribbean Development Bank, ‘Decline in Correspondent Banking Relationships: Economic and Social Impacts on the Caribbean and Possible Solutions’, Caribbean Development Bank Policy Brief (Barbados: Caribbean Development Bank, 2016), [http://www.caribank.org/wp-content/uploads/2016/05/CorrespondentBanking\\_May6-1.pdf](http://www.caribank.org/wp-content/uploads/2016/05/CorrespondentBanking_May6-1.pdf).

<sup>670</sup> Julia Black and David Rouch, ‘The Development of the Global Markets as Rule-Makers: Engagement and Legitimacy’ (2008) 2 *Law and Financial Markets Review* 218.

respectively, with the Forty Recommendations and the FATF. Thirdly, the FATF's international 'soft law' standards have now been diffused globally,<sup>671</sup> while their promulgation and decision-making regarding their adoption have essentially been restricted to OECD policy elites and experts. This has directly resulted in a democratic deficit within the AML/anticorruption regulatory governance of PEPs regime. This democratic deficit raises the issue of "thick proceduralization,"<sup>672</sup> within the TAMLO.

"Thick proceduralization" implies that in plural and diverse regulatory environments, no one set of actors should be able to credibly claim a monopoly over discursive rights and knowledge. Instead, inclusive, and deliberative participation in regulatory decision-making and co-learning ought to be facilitated by procedural strategies and institutional design. Moreover, there are no embedded institutional processes within the TAMLO through which heavily regulated Commonwealth Caribbean States may hold powerful transnational regulators, such as the FATF and OECD to account. Moreover, the IMF has been criticised for its 'democratic deficit', uncurtailed power and unaccountability, and the Basel Committee on Banking Supervision and the Financial Stability Board for inequitable geographic representation among their respective memberships.<sup>673</sup> The resulting hegemonic influence of the G7 and OECD members States over the AML/anticorruption policy agenda has curtailed the regulatory authority and sovereignty of Commonwealth Caribbean jurisdictions. The view that the infringement of state sovereignty has become normalised in transnational AML, due to extraterritorial pressures on the legal and regulatory policy competences of less powerful developing States, is supported in the literature.<sup>674</sup>

It is accepted that the identification, construction, problematisation and prioritisation of ML risks posed by corrupt PEPs involves making complex normative and political choices. These choices have been dictated by ideological considerations, and the need to convey onshore regulatory elites' political and reputational legitimacy to their respective publics.<sup>675</sup> In particular, the OECD has not been constrained by encroachments on the sovereignty of States of the Global South, arising from their marginalisation from transnational AML/anticorruption

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<sup>671</sup> Black and Rouch, 'The Development of the Global Markets as Rule-Makers'.

<sup>672</sup> Black, 'Proceduralizing Regulation', 1 December 2000, 597.

<sup>673</sup> Jonathan G. S. Koppell, *World Rule: Accountability, Legitimacy, and the Design of Global Governance* (Chicago ; London: University of Chicago Press, 2010).

<sup>674</sup> Levi and Reuter, 'Money Laundering'; Sharman, 'Power and Discourse in Policy Diffusion'.

<sup>675</sup> Robert Baldwin and Julia Black, 'Driving Priorities in Risk-Based Regulation- What's the Problem?', *Journal of Law and Society* 43, no. 4 (2016): 565–95.

decision—making processes related to PEPs. Moreover, there is no policy space for highly scrutinised and monitored Commonwealth Caribbean countries to selectively prioritise the implementation of the FATF International Standards, in line with national risk assessments without unfavourable ratings and further reputational damage. Committing scarce resources to combating proliferation financing, that could target laundering by PEPs, would be a case in point.

The ‘top-down’ approach to AML/anticorruption regulatory governance is unsustainable. An inclusive and deliberative approach to democratising the decision-making procedures for the promulgation of regulatory norms must be prioritised if regulatory policies are to enjoy wide legitimacy and offer prospects for co-learning.<sup>676</sup> In fact, central to the notion of “thick proceduralization”, is the idea that regulatory decision-making, for the promulgation of pluralistic norms, ought to be mediated by institutions that are able to discourage discursive hegemony, resolve conflicts and promote inclusive approaches among deliberants in the definition of regulatory problems.<sup>677</sup> Regrettably, the United Nations has not had the expected impact on resolving the competing accountability and legitimacy claims between onshore and offshore States within the transnational AML/anticorruption regulatory governance of PEPs. Useful, nonetheless, is SDG No.16 that has provided for the broadening and strengthening of the participation of developing countries in institutions of global governance; and ensuring responsive, inclusive, and representative decision-making at all levels. Furthermore, SDG.17 has established that respect each country’s policy space and leadership to establish and implement policies, is critical for strengthening the means of implementation and revitalizing the global partnership for sustainable development. These targets, as a matter of international principle, should govern AML/anticorruption regulatory governance of PEPs.

There are inherent difficulties in meeting competing normative expectations in transnational contexts.<sup>678</sup> There is a view that norms of democratic legitimacy and equity in transnational decision-making have detracted from the practical need for effective and authoritative thought leadership and functionality.<sup>679</sup> This seems to have been the ideological approach adopted by the OECD and FATF in circumventing the United Nations. Indeed,

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<sup>676</sup> Black, ‘Proceduralizing Regulation’, 1 December 2000.

<sup>677</sup> Black, ‘Proceduralizing Regulation’, 1 January 2001.

<sup>678</sup> Ian Hurd, ‘Legitimacy and Authority in International Politics’, *International Organization* 53, no. 2 (1999): 379–408; Koppell, *World Rule*.

<sup>679</sup> Koppell, *World Rule*.

former UN Secretary General, Kofi Annan, recognised that the Convention was “the result of long and difficult negotiations.”<sup>680</sup> Undeniably, UNCAC has achieved the broadest multilateral consensus on combating corruption and regulating PEPs. Still, UNCAC has been criticised as a “missed opportunity” meaning regulation of PEPs, rather than a global achievement, as its text is replete with discretionary and non-committal language.<sup>681</sup> Linguistic analysis of UNCAC have revealed over eighty (80) qualifying references to ‘in conformity with domestic laws and/constitutions’. This reflected the difficulties in reconciling the recognised need for effective international normative standards with safeguarding state sovereignty, during the negotiation process.<sup>682</sup> Article 4(1) of the UNCAC has expressly committed States Parties to execute their obligations, in line with the principles of sovereign equality, territorial integrity and non-intervention in the domestic affairs of other States. Furthermore, Article 4(2) has prohibited the exercise of extra-territorial jurisdiction in another State, for purposes related to the Convention, with respect to functions that have been exclusively reserved for relevant national authorities, unless permitted by the local laws or acquiesced. Thus, where normative decision-making has occurred within democratic and accountable multilateral fora, developing States have ensured that their regulatory authority and sovereignty are protected.

The criticised weak system of accountability under UNCAC,<sup>683</sup> has been attributed to mutual suspicion and fear along the Global North/South axis,<sup>684</sup> and the considerable reluctance of developing States Parties during the negotiations to establish a FATF-styled peer review mechanism.<sup>685</sup> Article 63(7) of UNCAC authorised the Conference of State Parties (CoSPs) to “establish, if it deems it necessary, any appropriate mechanism or body to assist in the effective implementation of the Convention.” The negotiation of the Implementation Review Mechanism, however, took three CoSPs and twice as long to negotiate (2005- 2009) as UNCAC.<sup>686</sup> Beyond self-assessment, developing States rejected any intrusive peer-review process that would comparatively rate or rank state performance rather than assess capacity

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<sup>680</sup> See forward to the United Nations Convention against Corruption (2003).

<sup>681</sup> Webb, ‘The United Nations Convention Against Corruption’.

<sup>682</sup> Webb.

<sup>683</sup> Phil Mason, ‘Twenty Years with Anti- Corruption. Part 10- Keeping the Vision Alive: New Methods, New Ambitions’ (U4 Anti-Corruption Resource Centre, 2020).

<sup>684</sup> Mason, ‘Twenty Years with Anti- Corruption. Part 3: The International Journey- From Ambition to Ambivalence’.

<sup>685</sup> Webb, ‘The United Nations Convention Against Corruption’.

<sup>686</sup> Mason, ‘Twenty Years with Anti- Corruption. Part 10- Keeping the Vision Alive: New Methods, New Ambitions’; Mason, ‘Twenty Years with Anti- Corruption. Part 3: The International Journey- From Ambition to Ambivalence’.

gaps for the delivery of technical assistance.<sup>687</sup> Donor countries wanted maximum scrutiny that delivered value for money.<sup>688</sup> Eventually, a legalistic approach to assessing implementation of UNCAC was agreed; reports are neither subject to follow-up review nor scrutiny in plenary sessions of the CoSPs; and State Parties have the prerogative to permit civil society participation in their respective review processes.<sup>689</sup>

Furthermore, it has been argued that corrupt PEPs have been shielded by privileges and immunities from civil and criminal jurisdictional claims for ML offences under the Convention.<sup>690</sup> For instance, UNCAC's emphasis on the need to respect the domestic laws of States Parties, would mean that dual criminality issues are likely to arise in transnational criminal justice cooperation matters. Moreover, 'agency capture' by PEPs would put them in conflict their responsibility to effectively implement AML/anticorruption regulatory measures to combat grand corruption and self-policing their personal interests.<sup>691</sup> Article 30(2) UNCAC, has obliged State Parties to strike a balance between any immunities and jurisdictional privileges accorded to public officials for the performance of their functions with the obligation to ensure effective investigation, prosecution and adjudication of offences established under the Convention, but subject to their "legal system and constitutional principles." Consequently, this obligation is thought to be of little value as State Parties are not obliged to amend or strengthen their laws to effectively target corrupt PEPs.<sup>692</sup> Any attempt to incorporate such provisions would have likely been opposed on the principles of sovereignty and an unjustifiable interference in domestic public affairs. Nonetheless, UNCAC's provisions on identifying, tracing, seizing, and forfeiting the proceeds of grand corruption; on the bribery of public officials by private sector interests; and on the incorporation of a private right of action, have been lauded as major areas of success.<sup>693</sup>

Analysis of Commonwealth Caribbean States' signature and ratification of, or accession to, UNCAC has revealed rather interesting jurisdictional patterns related sovereign offshore interests.

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<sup>687</sup> Mason, 'Twenty Years with Anti- Corruption. Part 10- Keeping the Vision Alive: New Methods, New Ambitions'.

<sup>688</sup> Mason.

<sup>689</sup> Mason.

<sup>690</sup> Chaikin and Sharman, *Corruption and Money Laundering*.

<sup>691</sup> Chaikin and Sharman.

<sup>692</sup> Chaikin and Sharman.

<sup>693</sup> Webb, 'The United Nations Convention Against Corruption'.

*Table 1: A Survey of Signature or Ratification or Accession to the UNCAC by the Member States of the Caribbean Community (CARICOM)*

<b>CARICOM Member States</b>	<b>Date of Signature</b>	<b>Date of Ratification (r ) or Accession (a)</b>
Antigua & Barbuda	-	21 June 2006 (a)
The Bahamas	-	10 January 2008 (a)
Barbados	10-Dec-03	-
Belize	-	12 December 2016 (a)
Cuba	09-Dec-05	09-Feb-07
Dominica	-	28 May 2010 (a)
Grenada	-	1 April 2015 (a)
Guyana	-	16 April 2008 (a)
Haiti	10-Dec-03	14-Sep-09
Jamaica	16-Sep-05	05-Mar-08
Republic of Suriname	-	-
St. Kitts & Nevis	-	-
St. Lucia	-	25-Nov-11
St. Vincent and the Grenadines	-	-
Trinidad & Tobago	11-Dec-03	31-May-06

Twelve (12) of the fifteen Member States of the Caribbean Community (CARICOM) are State Parties to the UNCAC. Only four CARICOM countries initially signed, then ratified, the UNCAC. Barbados, an OFC, signed in 2003 but is yet to ratify the Convention. Eleven CARICOM Member States acceded to UNCAC, including Belize and Grenada which both took over a decade and are notable OFCs. Three CARICOM Member States are not State Parties to UNCAC, namely St. Kitts and Nevis and St. Vincent and the Grenadines- two OFCs and the Republic of Suriname. Of particular interest to Commonwealth Caribbean OFCs are Articles 31, 40 and 46 UNCAC. For the purpose of identifying, tracing, freezing, seizing, or confiscating the proceeds of crime, Article 31(7) has prohibited State Parties from invoking banking secrecy as a ground not to empower its courts or competent authorities to seize or make available bank, financial and commercial records, or refuse international cooperation. Article 40 has likewise mandated State Parties to ensure appropriate legal mechanisms to overcome obstacles presented by banking secrecy laws in relation to domestic criminal investigations, and Article 46(8) prohibits refusal to render mutual legal assistance on the grounds of banking secrecy.

The Bahamas, the region's largest OFC, did not sign but eventually ratified the UNCAC in 2008. Banking secrecy is not a ground for refusing requests for MLA in the Bahamas.

However, if such requests pertain exclusively to economic crimes then, pursuant to s.6(8) Criminal Justice (International Cooperation) Act of 2000, the Attorney-General shall not exercise relevant powers to provide evidence overseas unless the request is made under a treaty by which the Bahamas is bound.<sup>694</sup> Trinidad and Tobago and Jamaica, which are not OFCs, signed UNCAC in 2003 and 2005 respectively. By signing or acceding to, and ratifying UNCAC, the aforementioned twelve CARICOM countries have voluntarily rendered themselves accountable to the United Nations General Assembly for its implementation and have endorsed the democratically legitimate decision-making processes through which the Convention was promulgated.

#### **5.4. Functional Challenges- Naming, Shaming, Ranking and Ratings!**

Regulation is intended to promote behavioural change, in keeping with either a collective policy issue or subjectively identified end, using rules or norms and legal or non-legal modalities of enforcement.<sup>695</sup> However, functional challenges arise where there are fragmented structures for steering regulatory activities, multiple networks of interdependent regulatory actors, and consequently diverging centres of normative authority.<sup>696</sup> This, it has been argued, creates a “problem of many hands.”<sup>697</sup> In other words, regulatory roles and responsibilities such as identifying priorities, formulating standards, and monitoring and enforcing of transnational standards, are usually spread among several actors making accountability difficult.<sup>698</sup> Notable regulatory actors include the OECD, FATF, and the Caribbean Financial Action Task Force (CFATF). The Commonwealth Secretariat, United Nations Office on Drug and Crime, the International Anticorruption Coordination Centre (IACC), International Centre for Asset Recovery (ICAR), the Stolen Asset Recovery Initiative (StAR), and the Asset Recovery Inter-Agency Network for the Caribbean (ARIN-CARIB) also play an important role in coordinating

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<sup>694</sup> United Nations Office on Drug and Crime, ‘Review of Implementation of the United Nations Convention against Corruption- Seventh Session of the Conference of State Parties to UNCAC’ (Vienna, Austria: UNODC Secretariat, 2016), <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries/V1600187e.pdf>.

<sup>695</sup> Black, ‘Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes’.

<sup>696</sup> Black.

<sup>697</sup> Black.

<sup>698</sup> Black.

technical assistance and law enforcement cooperation. Additionally, external influencers and international donors have sought to strengthen systems of accountability, empower civil society and citizens, and use diplomatic and political levers (e.g., visa withdrawals from PEPs) to pressure governments in developing countries to comply with AML/anticorruption standards.<sup>699</sup>

However, with the ‘governance turn’, marked by a shift in regulatory governance from state-centric to flexible, polycentric regulatory techniques,<sup>700</sup> States have been increasingly regulated by transnational non-state actors, which have assumed ‘core governmental functions’ traditionally performed by States.<sup>701</sup> Moreover, rankings, ratings, and naming and shaming of sovereign States by regulators of varying legal statuses, using diverging metrics, have generated legitimacy and accountability concerns. Specifically, the right of some transnational regulators to credibly perform their governance functions within the prevailing normative order has been contested by discursively constituted ‘objects of regulation’ whose interests conflict with the principals on whose behalf the regulators purport to act.<sup>702</sup> While there is a general congruence of values, interests and expectations about the need to regulate money laundering by corrupt PEPs, the diverging discursive strategies deployed by powerful States and the institutions that they hegemonically dominate, as well as by unaccountable non-governmental organisations (NGOs), have amplified the functional challenges within the polycentric TAMLO.

Where regulatory interests of onshore and offshore States have conflicted within the TAMLO, the most powerful States have resorted to draconian discursive strategies. Whether enforced through institutionally embedded “communicative structures,”<sup>703</sup> such as the FATF mutual evaluation processes or International Cooperation Review Group (ICRG) ‘grey-listing’ of discursively constituted ‘high-risk jurisdictions’ with ‘strategic deficiencies’ in their domestic AML/CFT regimes, weaker States have been disproportionately coerced to ‘render

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<sup>699</sup> Mason, ‘Twenty Years with Anti- Corruption. Part 10- Keeping the Vision Alive: New Methods, New Ambitions’.

<sup>700</sup> Laurie Boussaguet, Renaud Dehousse, and Sophie Jacquot, ‘The “Governance Turn” Revisited!’, in *The ‘Community Method’*, ed. Renaud Dehousse (London: Palgrave Macmillan UK, 2011), <https://doi.org/10.1057/9780230305670>.

<sup>701</sup> Black, ‘Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes’; John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge [England] ; New York: Cambridge University Press, 2000); Slaughter, ‘The Accountability of Government Networks’.

<sup>702</sup> Black, ‘Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes’.

<sup>703</sup> Black, 151.

account’ for non-compliance. Moreover, sovereign States are expected to ‘render account’ to unaccountable institutions that have no regulatory legitimacy or that operate unilaterally outside of embedded communicative structures. Caribbean economist, Marla Dukharan, recently criticised the EU’s “decidedly discriminatory [tax and AML/CFT] stance against small (and already powerless) countries,” and condemned the Organisation as a “bully.”<sup>704</sup> While advocating for the United Nations Conference on Trade and Development’s (UNCTAD) intervention on EU AML/CFT blacklisting of Commonwealth Caribbean States, which is almost indistinguishable from its backlisting for ‘harmful tax competition’, she bemoaned the fact that:

Instead of addressing its domestic problems with appropriate domestic policies, the EU aims to export...[them] by ‘blacklisting’ non-EU countries which dare to exercise their (sovereign) right to set their own domestic corporate tax rates ‘too low’.<sup>705</sup>

The EU has unilaterally blacklisted the Bahamas, Jamaica and Trinidad and Tobago as ‘high-risk’ for ML/TF and as posing a ‘threat to the integrity of the EU’s financial system. Indeed, labelling and ‘reintegrative shaming’ are two of the most coercive compliance strategies employed against Commonwealth Caribbean States within the TAMLO for ‘rendering account’. Labelling has long been normalised in anticorruption regulatory governance.<sup>706</sup> Whereas labelling is based on stigmatisation, the theory of reintegrative shaming has presumed that stigmatisation does not automatically follow from the sanctionable deployment of social disapproval.<sup>707</sup> Thus, it has been held that reintegrative shaming, if done ‘respectfully’, or if educative, disciplinary, or based on moral suasion, rather than condemnation,<sup>708</sup> could positively result in compliance. Analogously, the argument being

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<sup>704</sup> Marla Dukharan, ‘J’Accuse...! The European Union’s Institutionalized Racism and Bullying’, Caribbean Monthly Economic Report (Bridgetown, Barbados, June 2020), 3, <https://marladukharan.com/wp-content/uploads/2020/06/2020-06-Caribbean-Monthly-Report.pdf>.

<sup>705</sup> Dukharan, 1.

<sup>706</sup> Michael Levi, ‘The Crime of Corruption’, in *Corruption: The Enemy Within*, ed. Barry A. K. Rider (London (UK): Kluwer Law International, 1997).

<sup>707</sup> Nathan Harris, ‘Shame in Regulatory Settings’, in *Regulatory Theory: Foundations and Applications*, ed. Peter Drahos, 1st ed. (Australia: ANU Press, 2017), <https://doi.org/10.22459/RT.02.2017>; Toni Makkai and John Braithwaite, ‘Reintegrative Shaming and Compliance with Regulatory Standards’, *Criminology* 32, no. 3 (1994): 361–85, <https://doi.org/10.1111/j.1745-9125.1994.tb01158.x>.

<sup>708</sup> John Braithwaite and Peter Drahos, ‘Zero Tolerance, Naming and Shaming: Is There a Case for It with Crimes of the Powerful?’, *Australian & New Zealand Journal of Criminology* 35, no. 3 (1 December 2002): 269–88, <https://doi.org/10.1375/acri.35.3.269>; Nathan Harris, ‘Reintegrative Shaming, Shame, and Criminal Justice’, *Journal of Social Issues* 62, no. 2 (2006): 327–46, <https://doi.org/10.1111/j.1540-4560.2006.00453.x>;

advanced here, in the context of the transnational regulation of PEPs using AML standards, is that the FATF, having abandoned its blacklisting strategy in favour of identifying countries with ‘strategic deficiencies’ that are required to demonstrate high-level political commitment to rectifying them, appears to have softened its approach from coercive labelling to ‘reintegrative shaming’. Instead, the FATF has now institutionalised more ‘respectful’ and ‘educative’ criticism of States that fail to effectively enforce EDD requirements for PEPs, especially those from jurisdictions with high levels of corruption, against banks and NBFIs/DNFBPs. Nonetheless, labelling as a non-embedded institutional communicative strategy for rendering account, whether for perceived or assessed inadequacies in AML/anticorruption, has continued to subsist with reintegrative shaming. The burgeoning international rankings and ratings culture has become a normalised form of labelling.

Some transnational non-governmental organisations (TNGOs) have sought to indirectly enforce transnational law, through investigations and monitoring of sovereign States.<sup>709</sup> TNGOs have demonstrated extraordinary normative pressure to compel States’ behavioural change, and effect legal, regulatory and institutional reform, including through rankings and ratings.<sup>710</sup> Although these discursive practices may positively drive transparency and accountability they, nonetheless, impinge on targeted States’ sovereignty and regulatory authority. Where deviant identities are ascribed to ranked and rated sovereign States, as a form of punitive sanction, these transnational actors engage in knowledge production, which may have deleterious material consequences.<sup>711</sup>

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Harris, ‘Shame in Regulatory Settings’; Makkai and Braithwaite, ‘Reintegrative Shaming and Compliance with Regulatory Standards’; Kristina Murphy and Nathan Harris, ‘Shaming, Shame and Recidivism: A Test of Reintegrative Shaming Theory in the White-Collar Crime Context’, *The British Journal of Criminology* 47, no. 6 (1 November 2007): 900–917, <https://doi.org/10.1093/bjc/azm037>.

<sup>709</sup> Mette Eilstrup-Sangiovanni and J.C. Sharman, ‘Enforcers beyond Borders: Transnational NGOs and the Enforcement of International Law’, *Perspectives on Politics*, 18 October 2019, 1–17, <https://doi.org/10.1017/S153759271900344X>; Margaret E. Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Ithaca, N.Y: Cornell University Press, 1998).

<sup>710</sup> Alexander Cooley, ‘The Emerging Politics of International Rankings and Ratings: A Framework for Analysis’, in *Ranking the World: Grading as a Tool of Global Governance*, ed. Alexander Cooley and Jack L. Snyder (Cambridge, United Kingdom: Cambridge University Press, 2015), 1–38; Cooley and Sharman, ‘Transnational Corruption and the Globalized Individual’.

<sup>711</sup> Cooley, ‘The Emerging Politics of International Rankings and Ratings: A Framework for Analysis’; Cooley and Sharman, ‘Transnational Corruption and the Globalized Individual’.

#### 5.4.1. Case Study of Transparency International and the Corruption Perception Index (CPI) Rankings

Transparency International (TI) has played an integral role in policing States' efforts to combat grand corruption and deny safe haven to corrupt PEPs seeking to hide ill-gotten funds. Indeed, TNGOs may act as independent sources of information and data and assist in regulatory management and compliance through assessments and evaluations of their "choice of targets."<sup>712</sup> However, empirical inadequacies in their assessment methodologies and perceived politicised selection of their 'choice of targets' have amplified questions about their legitimacy in policing sovereign States within the TAMLO. Contextually, TNGOs derived from Western civil societies have disproportionately targeted States from the Global South.<sup>713</sup> Some have used their influence to set global agendas and challenged the sovereignty and regulatory authority of targeted States through surveillance, ranking, rating and shaming strategies, often based on the ideological leanings of their financiers in OECD countries.<sup>714</sup> Despite its undisputed influence in promoting accountability and integrity in transnational regulatory governance of corruption, TI's legitimacy is contested especially among developing countries. Established in 1993 by former World Bank executives, TI has grown into a transnational advocacy network with over eighty-five offices world-wide, which have ranking and ratings to influence decision-makers and hold States to account for non-compliance with transnational anticorruption norms.<sup>715</sup> TI is even thought to have leveraged its 'close relationship' with the World Bank, to influence the Bank's strategy of designating corruption the "single greatest obstacle to social and economic development."<sup>716</sup> This oriented much of its surveillance work towards the Global South.

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<sup>712</sup> Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*, 1st ed. (Cambridge, Massachusetts: Harvard University Press, 1998), 251.

<sup>713</sup> Clapham, 'Degrees of Statehood'.

<sup>714</sup> Clapham; Ellen Gutterman, 'The Legitimacy of Transnational NGOs: Lessons from the Experience of Transparency International in Germany and France', *Review of International Studies* 40, no. 02 (April 2014): 391–418, <https://doi.org/10.1017/S0260210513000363>; Thomas Risse, 'Transnational Actors and World Politics', in *Handbook of International Relations*, ed. Walter Carlsnaes, Beth A. Simmons, and Thomas Risse (London, United Kingdom: SAGE Publications Ltd, 2002), 255–74, <https://doi.org/10.4135/9781848608290>; Hongying Wang and James N. Rosenau, 'Transparency International and Corruption as an Issue of Global Governance', *Global Governance: A Review of Multilateralism and International Organizations* 7, no. 1 (28 July 2001): 25–49, <https://doi.org/10.1163/19426720-00701005>.

<sup>715</sup> Cole, 'Institutionalizing a Global Anti-Corruption Regime'; Gutterman, 'The Legitimacy of Transnational NGOs'.

<sup>716</sup> Gutterman, 'The Legitimacy of Transnational NGOs', 401.

Of recent particular concern, however, has been attempts to indirectly legitimise TI in the regulations of PEPs. Paragraph 15(b), FATF Interpretive Note for Recommendation 10, has specified that FIs should be required in assessing higher-risks ML/TFP situations to apply EDD measures, based on customer risks, countries, or geographic origins of transactions. Furthermore, para.15(b) requires that FIs are authorised to have regard to whether the jurisdictions in question have been identified by “credible sources as having significant levels of corruption.” This has arguably provided a pretext for TI’s CPI, to be used as a ‘credible source’, given its notoriety. Indirectly, the FATF’s would misuse the authoritativeness of its International Standards to legitimise TI’s labelling practices as a source of normative pressure, which might have material and reputational consequences for Commonwealth Caribbean small States. This is problematic not because there are no institutionally embedded structures within the TAMLO to hold TI to account, despite serious methodological concerns about the CPI. TI’s rankings have invariably been assumed empirically accurate measures of corruption, despite inadequacies found by scholars in the content validity of its measurement practices.<sup>717</sup> It has been observed, for instance, that a research subject’s perception of corruption in a given country may not necessarily be informed by their actual perception or experience of corruption but rather their perception of other subjects.<sup>718</sup> Thus, perception-based measurements may generate reliable results that may not be valid.<sup>719</sup> For instance, reported corruption perception may be influenced by unfavourable views of politicians, or based on social class, level of economic marginalisation, or race. Indeed, to the extent that Commonwealth Caribbean post-colonial societies have displayed an inherent distrust of the state, this could conceivably amplify perceptions of corruption and in turn unduly victimised non-corrupt PEPs. Moreover, although perceptions of corruption may be divorced from country-specific realities,<sup>720</sup> they nonetheless have powerful normative and reputational consequences.

TI’s labelling of countries as corrupt, has been shown to foster negative views among foreign investors and may ‘lock’ those labelled into corrupt trajectories as missed economic

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<sup>717</sup> Derrick V. McKoy, ‘Known Knowns: Corruption in the Commonwealth Caribbean’, *Social and Economic Studies* 61, no. 1 (2012): 1–22.

<sup>718</sup> McKoy.

<sup>719</sup> Paul M. Heywood and Jonathan Rose, “‘Close but No Cigar’: The Measurement of Corruption”, *Journal of Public Policy* 34, no. 3 (December 2014): 507–29, <https://doi.org/10.1017/S0143814X14000099>.

<sup>720</sup> Cole, ‘Institutionalizing a Global Anti-Corruption Regime’.

opportunities could inadvertently incentivise more corrupt practices.<sup>721</sup> However, based on the most recent mutual evaluation reports of the Bahamas, Jamaica and Trinidad and Tobago,<sup>722</sup> which have been fairly positive, there is no indication that these Commonwealth Caribbean countries have shown any sign of recidivism. Nonetheless, insofar as rankings may reinforce countries' position on applicable scales, calls have been made for moving away from the "ranking-fuelled technocratic approach to corruption."<sup>723</sup> It is uncertain whether TI can effectively function as a 'transnational watchdog' if it were to be accountable to States it ranks and rates. Even ensuring high technocratic and empirical standards, might not resolve legitimate accountability concerns about its role in AML/anticorruption regulatory governance.

### **5.5. Critical Observations on Discursive Challenges within Polycentric AML/Anticorruption Regulatory Governance**

The polycentric nature of transnational AML/anticorruption regulatory governance of PEPs has given rise to competing legitimacy and accountability claims. These claims by States, IOs, and TNGOs have mostly been polarised along the Global North/South axis. These normative, systematic, democratic, and functional challenges have placed developing States' sovereignty and regulatory authority in an increasingly precarious position within the TAMLO. Commonwealth Caribbean States have disproportionately been labelled, ranked, rated, and stigmatised as corrupt and high-risk money laundering jurisdictions. As has been demonstrated, transnational AML/anticorruption governance has been fraught with hypocrisy. At least initially, it was rooted in commercial risks assessment to mobile international capital from OECD countries, due to regulatory bureaucratism in underdeveloped markets in the Global South. Its anti-bribery focus on corrupt foreign PEPs, has evidenced this origin. The subsequent "multilateralization of Foreign Corrupt Practices-styled legislation," was, therefore, criticised

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<sup>721</sup> Danielle E. Warren and William S. Laufer, 'Are Corruption Indices a Self-Fulfilling Prophecy? A Social Labelling Perspective of Corruption', *Journal of Business Ethics* 88, no. 4 (1 October 2009): 841–49, <https://doi.org/10.1007/s10551-009-0316-5>.

<sup>722</sup> Caribbean Financial Action Task Force, 'Fourth Round Mutual Evaluation Report: The Bahamas'; Caribbean Financial Action Task Force, 'Fourth Round Mutual Evaluation Report (MER): Jamaica'.

<sup>723</sup> Mlada Bukovansky, 'Corruption Rankings: Constructing and Contesting the Global Anti-Corruption Agenda', in *Ranking the World: Grading States as a Tool of Global Governance*, ed. Alexander Cooley and Jack L. Snyder (Cambridge, United Kingdom: Cambridge University Press, 2015), 61.

as “moral imperialism.”<sup>724</sup> To date, the discursive dichotomy of ‘rich clean’/ ‘poor dirty’ countries has not been abated. The sustainability of problematising corrupt individuals from the Global South seeking to launder ill-gotten gains in rich countries has been questioned,<sup>725</sup> as domestic PEPs, including those onshore, enjoy unfettered impunity. The argument advanced here is neither that countries of the Global South are beyond careful external scrutiny nor that a revisionist view should be taken of their endemic corruption challenges, but rather that greater integrity is needed in transnational AML/anticorruption regulatory governance and mutual accountability along the Global North/South axis.

The discursive construction of self-perpetuating perceptions of legitimacy, by selectively aligning with the normative claims of powerful legitimacy communities,<sup>726</sup> has typified the FATF’s regulatory approach. Backed by powerful G7 and OECD States, the FATF has discursively othered PEPs from “countries and regions where corruption is endemic, organised and systematic,”<sup>727</sup> as the greatest threat to the international financial integrity and sustainable development. This practice mutually constituted domestic PEPs from onshore jurisdictions, as well as professional intermediaries and entities that engage in foreign bribery, as less problematic. Yet, an analysis of 427 enforcement actions against individuals and entities from OECD jurisdictions for the bribery of foreign senior officials revealed that 57% of cases involved bribes to obtain public procurement contracts and that payments were made through intermediaries in 75% of cases.<sup>728</sup> Additionally, as at 31 December 2018, 818 individuals and entities were criminally sanctioned, and 194 received civil or administrative sanctions, for foreign bribery since the entry into force of the OECD Anti-Bribery Convention in 1999.<sup>729</sup> Furthermore, 149 were convicted or criminally sanctioned, and 235 received civil or administrative sanctions, for related money laundering and false accounting offences; while

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<sup>724</sup> Steven R. Salbu, ‘Battling Global Corruption in the New Millennium’, *Law and Policy in International Business* 31, no. 1 (2000 1999): 75–76.

<sup>725</sup> Cooley and Sharman, ‘Transnational Corruption and the Globalized Individual’, 734.

<sup>726</sup> Black, ‘Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes’.

<sup>727</sup> Financial Action Task Force, ‘Report on Money Laundering Typologies 2003- 2004’ (Paris, France: FATF/OECD Secretariat, 2004), 19, [http://www.fatf-gafi.org/media/fatf/documents/reports/2003\\_2004\\_ML\\_Typologies\\_ENG.pdf](http://www.fatf-gafi.org/media/fatf/documents/reports/2003_2004_ML_Typologies_ENG.pdf).

<sup>728</sup> Organisation for Economic Cooperation and Development, ‘OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials’ (Paris, France: OECD Secretariat, 2014), 8–9, <https://doi.org/10.1787/9789264226616-en>.

<sup>729</sup> OECD Working Group on Bribery, ‘2018 Enforcement of the Anti-Bribery Convention: Investigations, Proceedings, and Sanctions’, December 2019, <http://www.oecd.org/daf/anti-bribery/OECD-Anti-Bribery-Convention-Enforcement-Data-2019.pdf>.

528 investigations were ongoing.<sup>730</sup> Perhaps attributable to diverging approaches to its implementation, it is clear that the OECD Anti-Bribery Convention has proven insufficiently dissuasive for predatory onshore individuals and entities intent on systematically bribing foreign PEPs in the Global South. A Transparency International (TI) study found that 72 percent of major economic jurisdictions assessed, “conducted practically no enforcement of their foreign bribery laws.”<sup>731</sup> This is a clear shortcoming in their responsibility to prevent the export of corruption to developing countries and by extension, the laundering of proceeds of bribery. Addressing the decline in enforcement, Delia Ferreira Rubio, Chair of TI, scathingly observed that “[t]oo many governments choose to turn a blind eye when their companies use bribery to win business in foreign markets.”<sup>732</sup> Of the forty-three assessed signatories to the OECD Anti-Bribery Convention, only the United States, the United Kingdom, Switzerland, and Israel were considered “active enforcers.” Canada, Japan, the Netherlands, and South Korea were among the worst enforcers.<sup>733</sup>

It has been argued that, to the extent that accountability relationships are socially constructed and dialectic, it is incorrect to assume that power is unidirectional, exercised by “accountees” or regulators, since “accountors” or the regulated are autonomous.<sup>734</sup> However, when it comes to the deployment of coercive labelling and reintegrative shaming tactics against heavily regulated Commonwealth Caribbean States, the role of small size has taken on particular importance.<sup>735</sup> It is not unusual for normative discourses to be used to mask self-serving regulatory agendas, which mirror inequitable geopolitical power relations among sovereign States.<sup>736</sup> In such circumstances, State sovereignty, becomes discursively and bi-directionally delineated, rather than taken as a constitutive fact.<sup>737</sup> Also problematic is the facile moral tendency to presume that those of the Global South are ‘inherently corrupt’ and can be

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<sup>730</sup> OECD Working Group on Bribery.

<sup>731</sup> Transparency International, ‘World’s Largest Exporters Fail to Punish Bribery in Foreign Markets -...’, Transparency.org, 13 October 2020, <https://www.transparency.org/en/press/worlds-largest-exporters-fail-to-punish-bribery-in-foreign-markets>.

<sup>732</sup> Transparency International.

<sup>733</sup> Gillian Dell, ‘Exporting Corruption Progress Report 2020: Assessing Enforcement of the OECD Anti-Bribery Convention’ (London (UK): Transparency International, 13 October 2020), 12, <https://images.transparencycdn.org/images/a-short-version-of-the-report.pdf>.

<sup>734</sup> Black, ‘Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes’, 150.

<sup>735</sup> Jason C. Sharman, ‘Sovereignty at the Extremes: Micro-States in World Politics’, *Political Studies* 65, no. 3 (1 October 2017): 559–75, <https://doi.org/10.1177/0032321716665392>.

<sup>736</sup> Salbu, ‘Battling Global Corruption in the New Millennium’.

<sup>737</sup> Vlcek, ‘Behind an Offshore Mask’.

remedially coerced by “outsiders” to embrace standards of probity in public office, irrespective of cultural differences or policy ownership.<sup>738</sup> While substantively excluded from transnational AML/anticorruption policymaking, heavily regulated developing States and their financial institutions have been expected to unquestionably assume transnational obligations to identify, assess, monitor, manage and mitigate money laundering risks posed by PEPs. They have been held to account for non-compliance with international soft law standards developed by the unaccountable and juridically illegitimate FATF, powerful onshore States with conflicts of regulatory interest, and TNGOs, all with diverging ranking, rating, naming and shaming metrics. These regulatory actors have, arguably, illegitimately assumed an undemocratic authority to impose material or reputational sanctions on sovereign States. Even seemingly legitimate international institutional actors have reproduced the othering of developing countries, with deleterious consequences. World Bank President, Jim Yong Kim, at the 2016 UK Anti-Corruption Summit, advocated the “end of tax havens” as critical to strengthening the Bank’s work on curbing IFFs, preventing corruption, and achieving “radical transparency.”<sup>739</sup>

From the region’s experience with the FATF (2000) NCCT blacklisting, Caribbean small States were powerless to resist threats of withdrawal of development assistance by the EU donor governments if they failed to adhere to strict unilaterally imposed timetables for complying with FATF standards. Yet, despite the relentless campaign against offshore ‘tax havens’,<sup>740</sup> which are thought to be harbouring corrupt proceeds, the European Parliament expressed concern that the “United States is ... an emerging, leading tax and secrecy haven for rich foreigners... [and was] resisting new global disclosure standards,” especially states such as Delaware, Nevada, Wyoming, and South Dakota.<sup>741</sup> However, the United States has never been blacklisted by the EU or the FATF. Hypocritically, the European Parliament recently advocated a “differentiated EU approach for different groups of Member States and not a one size fits all approach” to AML and anti-tax evasion compliance.<sup>742</sup> The “relentless regulatory

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<sup>738</sup> Maingot, ‘Confronting Corruption in the Hemisphere’, 53.

<sup>739</sup> World Bank Group, ‘Combating Corruption’ (Washington, DC, USA: World Bank Secretariat, 2017), <http://www.worldbank.org/en/topic/governance/brief/anti-corruption>.

<sup>740</sup> Niels Johannesen and Gabriel Zucman, ‘The End of Bank Secrecy? An Evaluation of the G20 Tax Haven Crackdown’, *American Economic Journal: Economic Policy* 6, no. 1 (2014): 65–91.

<sup>741</sup> European Parliamentary Research Service, ‘EU-US Trade and Investment Relations: Effects on Tax Evasion, Money Laundering and Tax Transparency- Ex-Post Impact Assessment’.

<sup>742</sup> European Parliament, ‘Offshore Activities and Money Laundering: Recent Findings and Challenges’ (Policy Department on Economic and Scientific Policies for the Committee on Money Laundering, Tax Avoidance

response” to money laundering,<sup>743</sup> has now prioritised risks posed by PEPs and costly risk management CDD rather than actual law-breaking. Insufficient use of predictive intelligence, instead of backward-looking commercial databases or publicly available information gathered through ‘adverse media checking techniques’,<sup>744</sup> has been especially problematic for small States lagging in regulatory technology penetration. Cumulatively, these challenges have led to extraterritorial scrutiny and regulatory expectations of questionable proportionality, ‘compliance fatigue’, and de-risking by onshore financial intermediaries that have sought to avoid establishing and continuing business relationships FIs in stigmatised high-risk jurisdictions,<sup>745</sup> such as in the Commonwealth Caribbean.

## **5.6. Corrupt Domestic PEPs and their Facilitators as an Insidious Threat to State Sovereignty in the Commonwealth Caribbean- The Case of The Bahamas, Jamaica and Trinidad and Tobago**

Insofar as corruption undermines the rule of law, good governance, sustainable development, and human rights, it has been recognised as a serious internal threat to state sovereignty.<sup>746</sup> Similarly problematised as a security risk for FIs and markets,<sup>747</sup> corrupt domestic PEPs and their family members, close associates, and professional facilitators of third-party laundering, are seen as insidious threats to state sovereignty. However, the disconnect between the abstract definition of corruption within the transnational AML/anticorruption regulatory discourse and the restrictive approach of the UNCAC to labelling corrupt practices, has had implications for domestic enforcement of the FATF

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and Tax Evasion (PANA), 2017),

[http://www.europarl.europa.eu/RegData/etudes/STUD/2017/595371/IPOL\\_STU\(2017\)595371\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/595371/IPOL_STU(2017)595371_EN.pdf).

<sup>743</sup> Sue Turner and Jonathan Bainbridge, ‘An Anti-Money Laundering Timeline and the Relentless Regulatory Response’, *The Journal of Criminal Law*, 25 June 2018, 215, <https://doi.org/10.1177/0022018318773205>.

<sup>744</sup> Richard John Lowe, ‘Anti-Money Laundering – the Need for Intelligence’, *Journal of Financial Crime* 24, no. 3 (1 January 2017): 472–79, <https://doi.org/10.1108/JFC-04-2017-0030>.

<sup>745</sup> Jackie Harvey, ‘The Limitation of the Law in Relation to Financial Crime: Back to Basics’, *The Journal of Criminal Law* 82, no. 3 (25 June 2018): 194, <https://doi.org/10.1177/0022018318773231>.

<sup>746</sup> Kumar, ‘Corruption, Human Rights, and Development’; Levi, ‘The Crime of Corruption’; Rider, *Corruption: The Enemy Within*.

<sup>747</sup> Sorin Denca and Ajindra P. Singh, ‘The “Politically Exposed Person” as the New Public Enemy or How the Emergence of a New International Regime Can Be Explained’, in *American Political Science Association 2013 Annual Meeting* (Rochester, NY: Social Science Research Network, 2013), <https://papers.ssrn.com/abstract=2299784>.

International Standards. In effect, not all seemingly corrupt practices are illegal, and not all legal breaches by senior public officials constitute corruption offences.<sup>748</sup> Furthermore, whereas the FATF has prescribed enhanced due diligence measures for foreign PEPs, as cross-border transactions are deemed to carry higher-risk, only reasonable CDD measures are expected of FIs for domestic PEPs.<sup>749</sup> This lower threshold of scrutiny, coupled with close degrees of proximity between professional financial intermediaries, economic elites and politicians in small island contexts, have resulted in an especially complex regulatory environment for targeting money laundering by corrupt domestic PEPs. Indeed, experts interviewed in the Bahamas, Jamaica and Trinidad and Tobago highlighted prevailing perceptions that domestic PEPs have not been held as accountable as low-level economic criminals.

Nonetheless, suppressing corruption is one of the most contentious regulatory governance issues in the Commonwealth Caribbean.<sup>750</sup> Concerns about leakages of public funds have been magnified, given the acute scarcity of resources in the region and its dependence on international capital for debt-servicing.<sup>751</sup> Moreover, reported investigations and prosecutions of political and grand corruption and related money laundering within the Commonwealth Caribbean are low compared to its risk profile. Corrupt practices such as conferring actual or perceived preferences on close kin (nepotism) or friends and close associates (cronyism),<sup>752</sup> are endemic in the small Commonwealth Caribbean societies, but are not necessarily criminally sanctionable. Common cases have also involved the mismanagement and misappropriation of public resources particularly in public procurement. Cases of foreign bribery have not been common. Significant strides have been made by the Bahamas, Jamaica and Trinidad and

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<sup>748</sup> Stephen E. Hendrix, 'New Approaches to Addressing Corruption in the Context of U.S. Foreign Assistance with Examples from Latin America and the Caribbean', *Southwestern Journal of Law and Trade in the Americas* 12, no. 1 (2006 2005): 1–24.

<sup>749</sup> Financial Action Task Force, 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations'.

<sup>750</sup> McKoy, 'Known Knowns'; Trevor Munroe, 'Get Cracking in Curbing Corruption', *The Gleaner, Jamaica, W.I.*, 30 April 2017.

<sup>751</sup> Collier, 'The Effects of Political Corruption on Caribbean Development'; Michael W. Collier, *Political Corruption in the Caribbean Basin: Constructing a Theory to Combat Corruption*, Studies in International Relations (New York: Routledge, 2005); Maingot, 'Confronting Corruption in the Hemisphere'; Maingot, 'Threats to Social and National Security: The Internationalization of Corruption and Violence'.

<sup>752</sup> Robert G. Jones and Tracy Stout, 'Policing Nepotism and Cronyism Without Losing the Value of Social Connection', *Industrial and Organizational Psychology* 8, no. 1 (March 2015): 2–12, <https://doi.org/10.1017/iop.2014.3>.

Tobago in promoting transparency and accountability in the public sector and regulating the laundering of proceeds of corruption by domestic PEPs, albeit with varying degrees of success.

### 5.6.1. The Corruption Landscape in the Bahamas

The Bahamas was ranked 29<sup>th</sup> among the 180 countries on Transparency International's Corruption Perception Index (2019), the least corrupt in the Commonwealth Caribbean. The Bahamas was rated less corrupt than fifteen OECD countries, including Portugal (30/180), Spain (30/180), Israel (35/180), Lithuania (35/180), Slovenia (35/180), South Korea (39/180), Poland (41/180), Latvia (44/180), Czech Republic (44/180) and Italy (51/180), Slovakia (59/180), and Greece (60/180). Other high-ranking Commonwealth Caribbean OFCs include Barbados (30/180) and St. Vincent and the Grenadines (39/180). These rankings are consistent with observations that contrary to the labelling of offshore jurisdictions as corrupt facilitators of money laundering, 'tax havens' invariably score well on the World Bank's cross-country measures of governance quality.<sup>753</sup> These empirical observations were the product of regression analyses using indicators such as levels of accountability, political stability, rule of law and corruption control.<sup>754</sup> However, the Bahamian financial intelligence unit (FIU) identified corruption as a major threat and top ML predicate offence.<sup>755</sup> During the Fourth Round of Mutual Evaluations, the CFATF found that the Bahamas had no anticorruption enforcement authorities designated to investigate ML/TF offences either arising from or related to corruption.<sup>756</sup> An anticorruption expert interviewed, described the Bahamian anticorruption legislative framework as "very archaic", noting that few developments have occurred since the 1970s. It was also pointed out that the Public Disclosure Act 1976 is rarely enforced against domestic PEPs, and parliamentarians often do not comply statutory declaration obligations assets with impunity. The adoption of the Integrity Commission Bill has been pending since

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<sup>753</sup> Dhammika Dharmapala and James R. Hines Jr., 'Which Countries Become Tax Havens?', SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 1 May 2009), <https://doi.org/10.2139/ssrn.952721>; Daniel Kaufmann, Aart Kraay, and Massimo Mastruzzi, 'Governance Matters IV: Governance Indicators for 1996-2004', SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 1 May 2005), <https://doi.org/10.2139/ssrn.718081>.

<sup>754</sup> Hines, 'Treasure Islands'.

<sup>755</sup> Caribbean Financial Action Task Force, 'Fourth Round Mutual Evaluation Report: The Bahamas'.

<sup>756</sup> Caribbean Financial Action Task Force, 132.

2017. It proposes to replace the Public Disclosure Committee with an Integrity Commission with powers to investigate corruption. Policy work is reportedly being undertaken to develop an Integrity Commission in the Bahamas. Recently reported statements from high level public officials have suggested that the Bahamas could be losing at least \$200 million annually from corruption, and that legislative measures were being taken to strengthen procurement practices in particular.<sup>757</sup> A source interviewed reported that since the last general elections in 2017, members of the former political Administration have been pursued for corruption offences. Of note, Michelle Reckley, former Deputy Director, Urban Renewal, and several alleged accomplices were arrested and charged for money laundering, attempted money laundering and assisting to conceal the proceeds of criminal conduct, for allegedly diverting funds for a Government initiative for private gain.

### 5.6.2. The Corruption Landscape in Jamaica

Jamaica was ranked 74<sup>th</sup> among the 180 countries on TI's CPI (2019), one of the most corrupt countries in the Commonwealth Caribbean and only above Guyana and Trinidad and Tobago (both ranked 85/180). High perceptions of political corruption and lack of confidence in the integrity and authority of the Jamaican state, both domestically and internationally,<sup>758</sup> is rooted in the historical relationship between electoral politics and violent criminal gangs.<sup>759</sup> Successive national security policies (NSPs) have committed to 'aggressively eradicate' "endemic corruption."<sup>760</sup> Corruption and money laundering have been designated as Tier 1 threats to national security, involving high probability and impact and requiring active measures.<sup>761</sup> Consequently, the Government of Jamaica has committed to the strategy of

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<sup>757</sup> Nassau Guardian (The), 'Lloyd Says Corruption in The Bahamas Is "Incalculable"', *Nassau Guardian*, 18 April 2018, <https://thenassauguardian.com/2018/04/18/lloyd-says-corruption-in-the-bahamas-incalculable/>.

<sup>758</sup> Greg Christie, 'Jamaica's Corruption Problem with Emphasis on the Main Mechanisms That Are Likely to Facilitate Grand Corruption in Public Procurement and Recommendations to Address Them and to Simplify the Procurement Red-Tape to Improve the Efficiency of the Process Strengthen Its Effectiveness' (National Integrity Action/DFID, UK, 2014); Munroe, 'Get Cracking in Curbing Corruption'.

<sup>759</sup> Amanda Sives, 'A Calculated Assault on the Authority of the State? Crime, Politics and Extradition in 21st Century Jamaica', *Crime, Law and Social Change* 58, no. 4 (1 November 2012): 415–35, <https://doi.org/10.1007/s10611-012-9391-0>.

<sup>760</sup> Ministry of National Security of Jamaica, 'National Security Policy for Jamaica: Towards a Secure and Prosperous Nation' (Government of Jamaica, 2005), 14; Ministry of National Security of Jamaica, 'A New Approach: National Security Policy for Jamaica' (Government of Jamaica, 2012).

<sup>761</sup> Ministry of National Security of Jamaica, 'A New Approach: National Security Policy for Jamaica'.

removing the profit from crimes, including through ensuring an effective legislative, regulatory and supervisory framework for the financial sector. The NSP has further prioritised targeting corrupt domestic PEPs suspected of complicity in “serious irregularity, impropriety or corruption” related to the award of public work contracts.<sup>762</sup> Recipients have included font companies for known powerful and dangerous organised criminal groups, from which domestic PEPs could be receiving kick-backs or campaign financing donations.<sup>763</sup> The NSP has also emphasised the need to strategically target corrupt professional facilitators of the laundering of the proceeds of corruption, including attorneys-at-law and real estate brokers.

Between 2010 and August 2020, at least 32 current and former parliamentarians breached the Parliament (Integrity of Members) Act (1975) by failing to file statutory declarations of their income, assets and liabilities by the prescribed reporting deadlines or to comply with information requests, and were consequently referred for prosecution.<sup>764</sup> However, parliamentarians have not been required to make declarations of contracts with the Government; directorships or beneficial interest in corporate bodies, interests in land; whether they are a trustee or beneficiary of a trust; and any other substantial interest that may result in a potential conflict of interest.<sup>765</sup> Prime Minister Andrew Holness’ statutory declaration had not been “cleared” in May 2019.<sup>766</sup> These matters have generally been treated as administrative breaches, rather than prosecuted as corruption offences.

In recent years, Jamaica has been plagued by repeated corruption scandals involving domestic PEPs. In 2018, the Minister of Science, Energy and Technology Andrew Wheatley was relieved of his energy portfolio, and subsequently resigned, amidst allegations of mismanagement of public funds, breach of procurement rules and cronyism at the state-owned oil refinery (Petrojam) and the National Energy Solutions Limited (NESOL). In the Petrojam case, the Auditor-General found egregious breaches of public procurement and management

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<sup>762</sup> Ministry of National Security of Jamaica, 24.

<sup>763</sup> Ministry of National Security of Jamaica, ‘A New Approach: National Security Policy for Jamaica’.

<sup>764</sup> Livern Barrett, ‘Corruption Charges Likely for Five Politicians’, *The Gleaner, Jamaica, W.I.*, 2 August 2020, <http://jamaica-gleaner.com/article/lead-stories/20200802/corruption-charges-likely-five-politicians>; Trevor Munroe, ‘Trevor Munroe | Strengthening Transparency to Catch the Corrupt’, *Gleaner (The), Jamaica, W.I.*, 4 August 2020, <http://jamaica-gleaner.com/article/commentary/20200804/trevor-munroe-strengthening-transparency-catch-corrupt>.

<sup>765</sup> Munroe, ‘Trevor Munroe | Strengthening Transparency to Catch the Corrupt’.

<sup>766</sup> Edmond Campbell, ‘Corruption Stench Rising - Perception of Malfeasance in Jamaica Increases on Watchdog Index’, *Gleaner (The), Jamaica, W.I.*, 24 January 2020, <http://jamaica-gleaner.com/article/lead-stories/20200124/corruption-stench-rising-perception-malfeasance-jamaica-increases>.

practices that could increase the risk of corruption.<sup>767</sup> Additionally, the Director of Investigation of the Integrity Commission questioned “whether strategic placement of certain individuals in key positions at Petrojam Limited served as a corruption enabling mechanism.”<sup>768</sup> No prosecutions have resulted. As observed by Executive Director of the National Integrity Action, Professor Trevor Munroe, the scandal has highlighted the tendency for PEPs to simply resign in such circumstances of “lawless behaviour and abuse of public funds.”<sup>769</sup> Calls have, therefore, been made for the criminalisation of breaches of the Political Code of Conduct.<sup>770</sup> In 2019, the Caribbean Maritime University (CMU) scandal resulted in CMU President Fritz Pinnock and Education Minister Ruel Reid being arrested and charged for corruption related offences. In *Fritz Pinnock and Ruel Reid v Financial Investigations Division (FID)* [2020] JMFC Full 2, related to the CMU scandal, the sacked Minister sought permission from the Supreme Court to apply for judicial review of the decision and power of the FID, or its agents, to institute criminal charges. He further sought to have the charges quashed for the offences arising from the FID’s investigations- namely conspiracy to defraud, corruption, misconduct in public office and engaging in a transaction that involves criminal property. The application was unsuccessful, but the matter is still before the courts.

At the institutional level, the Government of Jamaica established the Major Organised Crime and Anti-corruption Agency (MOCA) in August 2014, to combat corruption in the public sector and bring high-value criminals to justice. Most of the corruption charges brought by MOCA to date, have involved low level individuals in the public sector, including from the police force. To further promote probity and accountability in public affairs, the Government of Jamaica established an Integrity Commission in October 2018, by consolidating the Corruption Prevention Commission, the Integrity Commission, and the Office of the Contractor General, into a single anti-corruption agency with prosecutorial powers.

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<sup>767</sup> Pamela Monroe Ellis, ‘A Review of Aspects of Petroleum Corporation of Jamaica and a Comprehensive Audit of Petrojam Limited-Compendium Audit Report’ (Auditor-General Department of Jamaica, December 2018), [https://auditorgeneral.gov.jm/wp-content/uploads/2018/12/AuGD\\_Compendium\\_Report\\_on\\_PCJ\\_and\\_Petrojam\\_Limited.pdf](https://auditorgeneral.gov.jm/wp-content/uploads/2018/12/AuGD_Compendium_Report_on_PCJ_and_Petrojam_Limited.pdf).

<sup>768</sup> David Grey, ‘Integrity Commission Special Report of Investigation Conducted into Allegation Concerning Certain Donations Which Were Made by Petrojam Limited to Organisations and Causes for the Period April 2016 to March 2018’ (Kingston, Jamaica: Integrity Commission of Jamaica, October 2019).

<sup>769</sup> Gleaner (The), Jamaica, WI, ‘Munroe: Over to You Now, MOCA, Integrity Commission’, December 2018, <http://jamaica-gleaner.com/article/lead-stories/20181206/munroe-over-you-now-moca-integrity-commission>.

<sup>770</sup> K Churchill Neita, ‘Taking Corruption to Another Level’, *Jamaica Observer*, accessed 14 September 2020, [http://www.jamaicaobserver.com/opinion/taking-corruption-to-another-level\\_199862?profile=1096](http://www.jamaicaobserver.com/opinion/taking-corruption-to-another-level_199862?profile=1096).

### 5.6.3. The Corruption Landscape in Trinidad and Tobago

Trinidad and Tobago was ranked 85<sup>th</sup> of 180 in TI's 2019 CPI, rating it and Guyana (85/180) as the two most corrupt countries in the Commonwealth Caribbean. Interestingly, despite the historically high perception of political corruption in Trinidad and Tobago, in a 2010 Latin American Public Opinion Project survey, ninety-six (96%) percent of the 1,503 respondents indicated that they have never been asked to pay bribes by members of the police force or state bureaucracy.<sup>771</sup> In addition to socio-culturally normalisation of corrupt practices (i.e. 'bobol'),<sup>772</sup> political patronage, nepotism and cronyism have historically occurred along polarised ethnic lines. There have been repeated political corruption scandals typically involving irregularities in public procurement and tendering procedures,<sup>773</sup> despite no shortage in anti-corruption legislation.<sup>774</sup> Competent regulatory authorities have considered corruption as a medium to high money laundering risk factor.<sup>775</sup> There is a recognised need to prioritise efforts to address the link between corruption and money laundering and streamlining an anticorruption plan of action within the national AML/CFT policy.<sup>776</sup> Particular concerns were raised in relation to reports of unlawful award of government contracts and other procurement improprieties by domestic PEPs.<sup>777</sup>

Notable instances of corruption include the conviction and sentencing of former Prime Minister Basdeo Panday in 2006 for failure to declare monies held jointly with his wife in a London bank account, in breach of the Integrity in Public Life Act.<sup>778</sup> The conviction was subsequently quashed by the Court of Appeal on the basis of judicial bias at the magisterial

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<sup>771</sup> Raymond M. Kirton and Marlon A. Niki, *The Political Culture of Democracy in Trinidad and Tobago: 2010* (Trinidad & Tobago: Institute of International Relations, University of the West Indies, St. Augustine Campus, 2010), 74.

<sup>772</sup> Dylan Kerrigan, 'Bobol as a Transhistorical Cultural Logic: The Coloniality of Corruption in Trinidad', *Caribbean Quarterly* 66, no. 2 (2 April 2020): 195–216, <https://doi.org/10.1080/00086495.2020.1759231>.

<sup>773</sup> Kirton and Niki, *The Political Culture of Democracy in Trinidad and Tobago: 2010*.

<sup>774</sup> Frederick Stapenhurst et al., 'Parliamentary Oversight and Corruption in the Caribbean: Comparing Trinidad & Tobago and Grenada', *Commonwealth & Comparative Politics* 56, no. 4 (2 October 2018): 493–522, <https://doi.org/10.1080/14662043.2018.1444933>.

<sup>775</sup> Caribbean Financial Action Task Force, 'Fourth Round Mutual Evaluation Report (MER): Trinidad and Tobago', 53.

<sup>776</sup> Caribbean Financial Action Task Force, 'Fourth Round Mutual Evaluation Report (MER): Trinidad and Tobago'.

<sup>777</sup> Caribbean Financial Action Task Force.

<sup>778</sup> Michael Hylton and Gladys Young, 'Anti-Corruption Efforts in the Caribbean: Are We Doing Enough?', *Journal of Financial Crime; London* 14, no. 3 (2007): 250–63, <http://dx.doi.org.ezp.lib.cam.ac.uk/10.1108/13590790710758477>.

level. Another scandal is the alleged acceptance of bribes by Executive Chairman of the Urban Development Corporation of Trinidad and Tobago in the award of contracts to Chinese construction firms in 2009. There was also a scandal surrounding irregularities in the tendering processes of Trinidad and Tobago Electricity Commission for jobs under the Street Lighting Programme, which costed the then incumbent government the parliamentary elections in 2010.<sup>779</sup> In 2019, the incumbent Minister for Public Administration Marlene McDonald and her husband were arrested and charged for conspiracy to defraud the Government and money laundering. At the institutional level, despite the presence of the 1987 Prevention of Corruption Act (No.11), Trinidad and Tobago did not establish an Anti-corruption Commission until 2000.<sup>780</sup> Scholarly explanations of weaknesses in parliamentary oversight as a determinant of corruption, based largely on the experiences of advanced Western States, have been challenged when applied to Trinidad and Tobago and other Caribbean countries, which generally have effective institutional arrangements for parliamentary oversight and other well-functioning anticorruption agencies, including Integrity Commissions and Financial Intelligence Units.<sup>781</sup>

### **5.7. Comparative Analysis of Technical Compliance with Selected FATF Standards Related to PEPs**

The heatmap below has been constructed based on the technical compliance ratings of compliance with selected FATF International Standards related to PEPs, during the Fourth Round of Mutual Evaluations. Ratings from available follow up reports (FUR) for the Bahamas (2018) and Trinidad (2019) were included, but the latest results for Jamaica are those from its 4<sup>th</sup> MER (2017). Jamaica is seeking to address the strategic deficiencies in its domestic AML/CFT regime identified in its 4<sup>th</sup> MER, under the International Co-operation Review Group (ICRG) process for high-risk jurisdictions subject to increased monitoring. The time lag among the assessments requires a cautious approach to comparability. Moreover, there have been significant legislative, regulatory and institutional developments across all three

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<sup>779</sup> Kirton and Niki, *The Political Culture of Democracy in Trinidad and Tobago: 2010*; Stapenhurst et al., 'Parliamentary Oversight and Corruption in the Caribbean'.

<sup>780</sup> Kirton and Niki, *The Political Culture of Democracy in Trinidad and Tobago: 2010*.

<sup>781</sup> Stapenhurst et al., 'Parliamentary Oversight and Corruption in the Caribbean'.

jurisdictions since their respective MERs were published. The four possible ratings for technical compliance under the FATF Methodology (2013) were assigned numerical values, as follows, to generate the heatmap- compliant (C=3), largely compliant (LC=2), partially compliant (PC=1) and non-compliant (NC=0).<sup>782</sup>

As illustrated in the heatmap, Trinidad and Tobago has the highest level of technical compliance with eight C ratings. The Bahamas showed marginal improvements since its 4<sup>th</sup> MER increasing from four C ratings in 2017 to six in 2018. All three countries are fully compliant with R.9 on financial institution secrecy and R.20 on reporting of suspicious transactions. This suggests they have robust regulatory regimes for FIs. The weakest areas of performance are R.28 concerning the regulation and supervision of designated non-financial businesses and professions (DNFBPs), for which they all have NC ratings and, to a lesser extent R.12 (PEPs). The regulatory experiences of all three jurisdictions with R.12 (PEPs) and R.28 (Regulation and supervision of DNFBPs) will be contextualised having regard to the money laundering risks posed by domestic PEPs.

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<sup>782</sup> Financial Action Task Force, 'Financial Action Task Force Methodology (2013-2019)' (FATF Secretariat, 2019 2013), <http://www.fatf-gafi.org/media/fatf/documents/methodology/FATF%20Methodology%2022%20Feb%202013.pdf>.

Table 2: Comparative Analysis of Technical Compliance with FATF Recommendations Applicable to PEPs- Bahamas, Jamaica and Trinidad and Tobago

FATF Recommendations	The Bahamas		Jamaica	Trinidad and Tobago	
	MER August 2017	MER+FUR December 2018	MER January 2017	MER June 2016	MER+ FUR June 2019
R.3- Money Laundering Offence	Green	Green	Yellow	Yellow	Yellow
R.4- Confiscation	Green	Green	Yellow	Yellow	Yellow
R.9- Financial Institution Secrecy	Green	Green	Green	Green	Green
R.10- Customer Due Diligence	Red	Green	Red	Yellow	Green
R.12- Politically Exposed Persons	Red	Green	Red	Green	Green
R.19- Higher-Risk Countries	Red	Red	Red	Red	Green
R.20- Reporting of Suspicious Transactions	Green	Green	Green	Green	Green
R.22- DNFBPs: CDD	Red	Red	Red	Yellow	Green
R.23- DNFBPs: Other Measures	Red	Yellow	Red	Yellow	Green
R.24- Transparency and Beneficial Ownership of Legal Persons	Red	Red	Red	Red	Green
R.25- Transparency and Beneficial Ownerships of Legal Arrangements	Red	Yellow	Red	Red	Red
R.28- Regulation and Supervision of DNFBPs	Red	Red	Red	Red	Red

Table Scale	
Compliant	3
Largely Compliant	2
Partially Compliant	1
Non-Compliant	0

### 5.7.1. Comparative Case Study of Technical Compliance with FATF Recommendation 12 on Politically Exposed Persons (PEPs)

The Bahamas, Jamaica and Trinidad and Tobago have reasonably robust domestic regulatory frameworks targeting the criminal use of their respective financial sectors by corrupt domestic and foreign PEPs. FATF Recommendation R.12 prescribes that FIs, when entering relationships, should be required to apply both regular customer due diligence (CDD) measures and appropriate risk-management procedures to determine whether the customer or beneficial owner (BO) is a foreign PEP. These enhanced due diligence measures (EDD) include obtaining senior management approval for the establishment or continuation of an existing business relationship (R.12.b), taking reasonable steps to establish source of wealth and source of funds (R.12.c) and conducting enhanced ongoing monitoring of the business relationship (R.12.d). However, FIs are only required to take reasonable measures to determine whether a customer or beneficial owner is a domestic PEP.

At the time of the 4<sup>th</sup> MER, Jamaica and the Bahamas had NC ratings with R. 12 (formerly R.6), while Trinidad had a C rating. The Bahamas has since been rated C. It is contextually appropriate to highlight that roughly two years before onsite visits in Jamaica, Bahamas and Trinidad, 56% of assessed OECD countries were non-compliant with FATF R.6 on PEPs (now R.12) and 0% had received a compliant rating.<sup>783</sup> Given capacity constraints faced by small Commonwealth Caribbean States, the question arises as to whether they ought, reasonably, to be expected to implement FATF International Standards at the same pace as their well-resourced onshore counterparts that have struggled to comply. Moreover, the enforcement challenges experienced in developed countries with respect to PEPs are well-recognised.<sup>784</sup> It might not be fair, therefore, to uncritically attribute delays and compliance failings in small jurisdictions to a lack of

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<sup>783</sup> Organisation for Economic Cooperation and Development, 'Illicit Financial Flows from Developing Countries: Measuring OECD Responses' (Paris, France: OECD Secretariat, 2014), [http://www.oecd.org/corruption/Illicit\\_Financial\\_Flows\\_from\\_Developing\\_Countries.pdf](http://www.oecd.org/corruption/Illicit_Financial_Flows_from_Developing_Countries.pdf).

<sup>784</sup> Transparency International, 'Closing Banks to the Corrupt: The Role of Due Diligence and PEPs', 2014, 2, [https://images.transparencycdn.org/images/2014\\_PolicyBrief5\\_DueDiligenceBanks\\_EN.pdf](https://images.transparencycdn.org/images/2014_PolicyBrief5_DueDiligenceBanks_EN.pdf); Greenberg et al., *Politically Exposed Persons*, 13.

political will. Interestingly, under the 3<sup>rd</sup> MER in 2005, Jamaica had been rated ‘LC’ with R.6 (PEPs) and has therefore regressed. However, Jamaica has gone beyond the regulatory requirements prescribed by the FATF, having designated both domestic and foreign PEPs as high-risk, under the Proceeds of Crime Regulations and the Terrorism Prevention Regulations, thereby requiring FIs to apply EDD measures.<sup>785</sup> A key deficiency found in Jamaica’s PEPs regime was that the risk profiles developed to assess risk-sensitive business relationships with PEPs had not been extended to beneficial owners.<sup>786</sup> Additionally, FIs had been permitted to discretionarily apply either source of funds or source of wealth verification although both were prescribed by the FATF.<sup>787</sup> There were no applicable PEPs requirements for beneficiaries of life insurance policies, senior management approval, or enhanced scrutiny, where a higher risk was found,<sup>788</sup> although such products are vulnerable to misuse by corrupt PEPs to conceal illicitly derived assets.

Based on onsite visits conducted between November 30 and December 11, 2015 in the Bahamas, the assessors found that FIs were applying CDD and EDD requirements to PEPs.<sup>789</sup> Notable gaps, however, included little applicable CDD requirements for PEP who might be licensees and registrants of the Insurance Commission of the Bahamas (ICB) and the Securities Commission of the Bahamas.<sup>790</sup> Credit unions were regulated, but had not been required to implement risk management systems for determining whether a customer or beneficial owner is a PEP or to take reasonable steps to establish source of wealth and source of funds.<sup>791</sup> These technical deficiencies were addressed through s.3 of the Financial Transactions Reporting Act (FTRA) 2018, which brought credit unions, DNFPs and ICB and SCB licensees and registrants within the definition of FIs. The Bahamas was, therefore, re-rated from ‘PC’ to ‘C’ with R.12. in the 1<sup>st</sup> Follow-up Report (FUR).<sup>792</sup> Section 14 of FTRA 2018 does not distinguish between the different typologies of PEPs for the purpose of applying CDD and EDD measures.

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<sup>785</sup> Caribbean Financial Action Task Force, ‘Fourth Round Mutual Evaluation Report (MER): Jamaica’.

<sup>786</sup> Caribbean Financial Action Task Force.

<sup>787</sup> Caribbean Financial Action Task Force.

<sup>788</sup> Caribbean Financial Action Task Force.

<sup>789</sup> Caribbean Financial Action Task Force, ‘Fourth Round Mutual Evaluation Report: The Bahamas’.

<sup>790</sup> Caribbean Financial Action Task Force.

<sup>791</sup> Caribbean Financial Action Task Force.

<sup>792</sup> Caribbean Financial Action Task Force, ‘Anti-Money Laundering and Counter-Terrorist Financing Measures-The Bahamas 1st Enhanced Follow-up Report & Technical Compliance Re-Rating (FUR)’.

Trinidad and Tobago was rated compliant with R.12 during the Fourth Round, based on onsite visits conducted between 12-23 January 2015. This followed a previous ‘NC’ rating in 2005, as there were no enforceable legislative and regulatory PEP measures in place save for a few requirements for large FIs supervised by the Central Bank of Trinidad and Tobago (CBTT).<sup>793</sup> However, the 2010 Financial Obligations Regulations (FOR) and the 2011 Financial Obligations (Financing of Terrorism) Regulations in 2011, largely brought its domestic regime largely in line with R.12. During the Fourth Round, assessors reported that there was still no requirement for senior management approval for the continuation of business relationships when a customer or beneficial owner becomes a PEP, subsequent to the establishment of the business relationship.<sup>794</sup> In view of the ML risks posed by corruption and the reported weaknesses in the operations and effectiveness of the Integrity Commission, it was recommended that FIs and their supervisors strengthen coordination to enhance the identification of PEPs and especially domestic PEPs.<sup>795</sup> The Integrity Commission maintains information and documentation on domestic PEPs but had not yet drawn up a ‘PEPs List’ to support risk assessment and deny entry of corrupt PEPs to the financial sector.<sup>796</sup>

### **5.7.2. Comparative Case Study of Technical Compliance with FATF Recommendation 28 on the Regulation and Supervision of Designated Non-Financial Businesses and Professions (DNFBPs)**

Corrupt PEPs may use professional facilitators to launder illicit derived proceeds, by setting up opaque legal persons, legal arrangements or trusts to conceal beneficial ownership or control of assets.<sup>797</sup> In keeping with the policy of removing the profit from

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CFATF FUR (Port-of-Spain, Trinidad & Tobago: CFATF, December 2018), <https://www.cfatf-gafic.org/documents/4th-round-follow-up-reports/the-bahamas-2/10985-the-bahamas-1st-fur/file>.

<sup>793</sup> Caribbean Financial Action Task Force, ‘Fourth Round Mutual Evaluation Report (MER): Trinidad and Tobago’.

<sup>794</sup> Caribbean Financial Action Task Force.

<sup>795</sup> Caribbean Financial Action Task Force.

<sup>796</sup> Caribbean Financial Action Task Force.

<sup>797</sup> Greenberg et al., *Politically Exposed Persons*.

crime, by tracing, seizing, and confiscating illicit proceeds,<sup>798</sup> professional facilitators must be subject to domestic AML/CFT regimes. Attorneys, trust and company service providers (TCSPs) and other DNFBPs are gatekeepers for financial systems and often facilitate economic crimes, wittingly or not.<sup>799</sup> TCSPs specialise in the creation or provision of administrative services for corporate or trust vehicles, including International Business Companies (IBCs)/shell companies.<sup>800</sup> Some lawyers also function as TCSPs. The FATF Forty Recommendations have assigned gatekeeping responsibilities on DNFBPs, particularly when servicing customers identified as PEPs.

The FATF has prescribed that countries should ensure that either a supervisor or competent self-regulatory body subjects DNFBPs to an effective system of monitoring and compliance with AML/CFT requirements, which should be ‘risk-sensitive’ (R.28). The system should include effective, proportional, and dissuasive sanctions for non-compliance with AML/CFT requirements (R.28). Pursuant to R.22 (DNFBPs: CDD), lawyers, other independent legal professional, accountants and trust and company service providers (TCSPs) and other DNFBPs would need to apply the CDD, and record-keeping requirements set out in Recommendations 10, 11, 12, 15 and 17. These measures are expected of lawyers where they prepare for and conduct transactions on clients’ behalf in buying and selling real estate; managing clients’ money, securities, or other assets and related accounts. They are also required in relation to setting up or managing legal persons or arrangements; or buying and selling businesses. Where they engage in such transactions for or on behalf of clients, pursuant to R.23 (DNFBPs: Other Measures), then they should be required to report suspicious transactions. The CDD and record-keeping requirements set out in Recommendations 10, 11, 12, 15 and 17 are to be applied by TCSPs where they prepare or conduct transactions for clients involving activities such as

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<sup>798</sup> Naylor, ‘Wash-Out’; Naylor, ‘Follow-the-Money Methods in Crime Control Policy’; Rider, ‘The Wages of Sin - Taking the Profit out of Corruption - A British Perspective Twelfth International Symposium on Economic Crime’; Rider, ‘Recovering the Proceeds of Corruption’.

<sup>799</sup> Chaikin, ‘The Law Enforcement Implications of the Panama Papers’; Financial Action Task Force, ‘The Misuse of Corporate Vehicles, Including Trust and Company Service Providers’ (Paris, France: FATF/OECD Secretariat, 2006), <http://www.fatf-gafi.org/media/fatf/documents/reports/Misuse%20of%20Corporate%20Vehicles%20including%20Trusts%20and%20Company%20Services%20Providers.pdf>; Financial Action Task Force, ‘Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals’, 2013, 148; Charles T. Goredema, ‘Not above the Law? The Role of Lawyers in Combating Money Laundering and Illicit Financial Flows- Policy Note’ (Geneva, Switzerland: The Global Initiative against Transnational Organized Crime, 2018).

<sup>800</sup> van der Does de Willebois et al., *The Puppet Masters*.

acting as a formation agent of legal persons, providing registered office or business, correspondence, or administrative address for a company or any other legal person or arrangement. Similarly, they should be applied where acting as (or arranging for another person to act as) a director, partner of a partnership, or similar positions related to a legal person; or a trustee of an express trust or similar functions related to a legal arrangement; or nominee shareholder for another person. Where they engage in such transactions for or on behalf of clients, then R.23 (DNFBPs: Other Measures). As illustrated by the poor technical compliance ratings of The Bahamas, Jamaica and Trinidad and Tobago for R.28, regulating DNFBPs and lawyers in particular has been fraught with difficulties. This deficiency might have permitted corrupt PEPs to launder ill-gotten gains with impunity.

#### **5.7.2.1. Jamaica**

The DNFI/DNFBPs sector in Jamaica consists primarily of lawyers and real estate agents. Only a small number of accountants qualify as DNFI/DNFBPs based on the services they perform. TCSP services are primarily provided by lawyers and accountants. Although Jamaica does not have an independent TCSP sector, a policy decision has been taken to develop and promote the jurisdiction as an International Financial Centre.<sup>801</sup> Legislation has been passed to specifically regulate providers of international corporate and trust services. Jamaica's NSP has identified lawyers as high-risk facilitators of money laundering, insofar as criminal intelligence has revealed that they provide company services and execute other business transactions for individuals connected to organised crime.<sup>802</sup> Serious concerns have been raised about the upward trend in the use of both shell companies, incorporated both domestically and offshore, in bidding or tendering for Government contracts, licences or to acquire state-owned assets being divested.<sup>803</sup> This

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<sup>801</sup> Caribbean Financial Action Task Force, 'Fourth Round Mutual Evaluation Report (MER): Jamaica', 92.

<sup>802</sup> Ministry of National Security of Jamaica, 'A New Approach: National Security Policy for Jamaica-Towards a Secure and Prosperous Nation' (Cabinet Office, Government of Jamaica, 2014), <http://cabinet.jis.gov.jm/wp-content/uploads/2017/05/NATSEC-March-25-2014-1-1.pdf>.

<sup>803</sup> Greg Christie, 'Jamaica's Corruption Problem with Emphasis on the Main Mechanisms That Are Likely to Facilitate Grand Corruption in Public Procurement and Recommendations to Address Them

is seen to threaten AML/Anticorruption efforts since there is no legal requirement for shareholders of these private companies to present certified particulars of beneficial interest.<sup>804</sup> The Government of Jamaica has been criticised from dragging its feet in addressing the matter despite repeated appeals from the Office of the Contractor General before Parliament.<sup>805</sup>

Given their designation as a Tier 1 threat to national security, the regulation of the legal sector has been considered to be crucial to determining the effectiveness of Jamaica's AML/CFTP regime.<sup>806</sup> This has been the major challenge for Jamaica's full compliance with R.28, especially since it has impinged on the traditionally viewed sacrosanct principle of legal professional privilege. During the 4<sup>th</sup> Round of Mutual Evaluations, the CFATF had urged that the "AML/CFT regime for lawyers should be enforced as swiftly as possible."<sup>807</sup> The Proceeds of Crime (Designated Non-Financial Institutions) (Attorneys-at-Law) Order ("POCA Order") 2013, designated attorneys as DNFIs for the purpose of the Proceeds of Crime Act 2007. However, regulatory and supervisory efforts to subject attorneys to the domestic AML/CFT regime under the Proceeds of Crime Act 2007 (POCA) were foiled by an interlocutory injunction awarded to the Jamaica Bar Association (JBA) by the Supreme Court in November 2014, against the General Legal Council (GLC). This barred the Jamaican Government from subjecting lawyers to POCA, pending the hearing of the constitutional motion. Hence lawyers were under no obligation to file STRs or adhere to any other AML/CFT obligations until the matter was resolved by the courts.

The JBA contended that designating attorneys as DNFIs/DNFbps is unconstitutional insofar as information required to be reported would breach confidentiality, attorney-client privilege and legal professional privilege. Furthermore, the Proceeds of Crime Act (POCA) and Terrorism Prevention Act (TPA) Regulations would have required DNFIs/DNFbps to establish risk profiles for clients, business relationships and services; apply EDD measures to high-risk categories, and obtain consent from the Financial Investigation Division in order to proceed with transactions suspected to involve money

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and to Simplify the Procurement Red-Tape to Improve the Efficiency of the Process and Strengthen Its Effectiveness' (National Integrity Action/DFID, UK, 2014), 40–47.

<sup>804</sup> Christie, 'Jamaica's Corruption Problem'.

<sup>805</sup> Christie.

<sup>806</sup> Caribbean Financial Action Task Force, 'Fourth Round Mutual Evaluation Report (MER): Jamaica'.

<sup>807</sup> Caribbean Financial Action Task Force, 66.

laundering.<sup>808</sup> These measures would have naturally applied for domestic PEPs, their family members and close associates as well as for trustees and legal persons having nominee shareholders or shares in bearer form. The ruling has confirmed what has been observed by a source, as “considerable judicial reticence in applying the Proceeds of Crime Act.” Chief Justice (then Supreme Court judge), Brian Sykes’ highly politicised rhetoric in the case of *Jamaica Bar Association (JBA) v Attorney General and General Legal Council* [2014] JMSC Civ 179, which concerns the JBA’s challenge of the application of POCA to attorneys, revealed judicial scepticism about the subjecting lawyers to the domestic AML/CFTP regime. Chief Justice Sykes stated *orbiter*, that:

There is a risk of becoming a police state if lawyers were compelled to be a part of the system of information gathering commonly found in totalitarian societies. It is money laundering today. It may be some other offence tomorrow... The Bar...is not a covert operator for the state.<sup>809</sup>

More recently, the Government of Jamaica has sought to impose DNFI/DNFBPs reporting obligations on attorneys under the Terrorism Prevention Order (Designated Reporting Entity) (Attorneys-at-Law) Order Resolution, 2019 (“TPA Order”). The JBA has maintained that the substance of these reporting obligations is similar to those sought to be imposed on under POCA Order (2013) and is, therefore, equally unconstitutional and subject to challenge on the same grounds advanced in the POCA proceedings. Moreover, the JBA took the view that the TPA Order would, in effect, undercut the injunction awarded in the POCA proceedings. On 31 July 2020, the Court of Appeal returned the long-awaited judgment in the matter of *the Jamaica Bar Association (JBA) v Attorney General (The) and the General Legal Council (GLC)* [2020] JMCA Civ 37, upholding the JBA’s challenge in part. The Court of Appeal declared that the Proceeds of Crime (Designated Non-Financial Institutions) (Attorneys-at-Law) Order, 2013 designating attorneys as DNFI for the purposes of the POCA 2007 is not unconstitutional and is, therefore, valid and lawful. However, the Honourable Mrs Justice McDonald-Bishop declared that insofar as several core statutory instruments apply to attorneys, they are unconstitutional, null and void and of no legal effect, as they

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<sup>808</sup> Caribbean Financial Action Task Force, ‘Fourth Round Mutual Evaluation Report (MER): Jamaica’.

<sup>809</sup> See *Jamaica Bar Association (JBA) v Attorney General and General Legal Council* [2014] JMSC Civ 179, paras.61-65.

contravene s.13(3)(j) and 13(3)(a) of the Charter of Fundamental Rights and Freedoms (Amendment) Act, 2011. Firstly, the POCA 2007 (as amended by the Proceeds of Crime (Amendment) Act, 2013, s.91A(2), in so far as it requires attorneys to report suspicious transactions directly to the designated authority, namely, the Chief Technical Director of the Financial Investigations Division (FID). Secondly, the provisions of the Proceeds of Crime (Money Laundering Prevention) Regulations, 2007 and relevant amendments that concern the enforcement of the provisions of the regime related to reporting of suspicious transactions. Thirdly, the Legal Profession (Canons of Professional Ethics) (Amendment) Rules, 2014 that permit attorneys to reveal client confidences or secrets in compliance with the POCA and the related regulations. Fourthly, the provisions of the General Legal Council of Jamaica: Anti-Money Laundering Guidance for the Legal Profession, 2014, that are designed to enforce the annual declaration of activities by attorneys. In this regard, it was ordered that the GLC shall not make any disclosure of any information contained in declarations filed pursuant to s.5(3C), Legal Profession Act.

In effect, the substance of the AML/CFT regime as sought to be applied to attorneys, is unconstitutional. Given the importance of the matter, an appeal to the Judicial Committee of the Privy Council could be expected. This, however, raises two fundamental questions. Firstly, will the CFATF respect the findings of the Jamaica courts or will it continue to negatively rate the country for technical compliance and effectiveness of its domestic AML/anticorruption regime? The non-regulation of attorneys under POCA is now clearly not a matter of governmental failure or a lack of political will but an unresolved constitutional matter. Disregarding the ruling of the Court Appeal would effectively supplant the integrity of Jamaica's judicial processes and state sovereignty with the FATF's international 'soft law' standards. Continued adverse ratings would further reproduce reputational damage for Jamaica. Secondly, without pre-empting the opinion of the Judicial Committee of the Privy Council, the question arises as to whether the liberal regulatory posture of the United Kingdom's judiciary towards AML/CFT matters might have a bearing on its findings, if or when the matter is further appealed. These questions remain to be answered.

### 5.7.2.2. *The Bahamas*

The Bahamas has been consistently rated ‘PC’ with R.28 in the 3<sup>rd</sup> MER (2005), the 4<sup>th</sup> MER (2017) and again in the 1<sup>st</sup> FUR (2018),<sup>810</sup> particularly due to the challenges of regulating the attorneys. The Bahamian DNFBP sector is disproportionately constituted of lawyers (an estimated 1,160 lawyers), accountants (441), real estate brokers (329), private trust companies (105) and 310 financial corporate service providers (FCSPs).<sup>811</sup> FIs and lawyers can provide trust formation and management services. Consistent with The Bahamas’ reputation as a company formation centre, there were approximately 173,907 registered international business companies (IBCs) and an estimated 34,977 were active.<sup>812</sup> Products and services offered by attorneys generally bring them under the regulation of Financial Corporate Service Providers Act (FCSPA) and the Banks and Trust Companies Regulation Act (BTCRA).<sup>813</sup> Attorneys who provide conveyancing services under s.3(1)(k) Financial Transactions Reporting Act (FTRA) involving the handling and transfer of funds are required to register with the Compliance Commission and adhere to the FTRA and other AML/CFT legislation.<sup>814</sup> Other services they offer that qualify them as DNFBPs fall within the supervisory purview of the Inspector of Financial Corporate Services (IFCS).<sup>815</sup> Given its significant offshore financial and corporate services sector, the CFATF has assessed attorneys and TCSPs in the Bahamas to be high-risk facilitators of ML/TF, especially for foreign corrupt PEPs. These risks stem from the private banking services that provide to high-net-worth clients who are PEPs and their handling a high volume of cross-border transactions that could involve illicit proceeds from tax evasion and corruption.<sup>816</sup>

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<sup>810</sup> Caribbean Financial Action Task Force, ‘Fourth Round Mutual Evaluation Report: The Bahamas’; Caribbean Financial Action Task Force, ‘The Bahamas 1st FUR- 4th Round MEVAL’.

<sup>811</sup> Caribbean Financial Action Task Force, ‘Fourth Round Mutual Evaluation Report: The Bahamas’.

<sup>812</sup> Caribbean Financial Action Task Force.

<sup>813</sup> Caribbean Financial Action Task Force.

<sup>814</sup> Caribbean Financial Action Task Force.

<sup>815</sup> Caribbean Financial Action Task Force.

<sup>816</sup> Caribbean Financial Action Task Force, 14.

On account of a court challenge by the Bahamian Bar Association in 2003, the Office of the Attorney General (OAG) had instructed the Compliance Commission to suspend on-site examinations of law firms and assessment of the financial and corporate service activities of law firms.<sup>817</sup> This policy decision was reversed in August of 2006. The Bahamian legal sector was prioritised for onsite examinations during the 4<sup>th</sup> Round of Mutual Evaluations.<sup>818</sup> The CFATF found that a majority of attorneys had not been complying with AML/CFT measures since they do not perform the designated activities.<sup>819</sup> Non-compliance was also attributed to concerns about breaching legal professional privilege.<sup>820</sup> Attorneys were of the view that they are not high risk for ML/TF since they generally do not accept funds from clients.<sup>821</sup> Attorneys who accept funds from clients were of the view that sufficient safeguards are in place, as banks through which funds are channelled were conducting CDD, and funds remitted out of the country are subject to exchange controls.<sup>822</sup> Bahamian Authorities have reported that lawyers and real estate brokers and developers were less compliant with AML/CFT obligations and requirements for registration with the Compliance Commission, than accountants, and which undermined the effectiveness of the domestic AML/CFT regime.<sup>823</sup> Its effectiveness was also being undermined by the inability of the Compliance Commission to obtain and access information on the beneficial ownership and control of legal arrangements for which lawyers provide trust services.<sup>824</sup>

### **5.7.2.3. *Trinidad and Tobago***

At the time of the Fourth Round of Mutual Evaluation, Trinidad and Tobago had not finalised its National Risk Assessment, to provide a clear picture of the ML/TF risks posed by TCSPs and other DNFBPs and was rated ‘PC’.<sup>825</sup> The country had been rated

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<sup>817</sup> Caribbean Financial Action Task Force, ‘Fourth Round Mutual Evaluation Report: The Bahamas’.

<sup>818</sup> Caribbean Financial Action Task Force.

<sup>819</sup> Caribbean Financial Action Task Force.

<sup>820</sup> Caribbean Financial Action Task Force.

<sup>821</sup> Caribbean Financial Action Task Force.

<sup>822</sup> Caribbean Financial Action Task Force.

<sup>823</sup> Caribbean Financial Action Task Force.

<sup>824</sup> Caribbean Financial Action Task Force.

<sup>825</sup> Caribbean Financial Action Task Force, ‘Fourth Round Mutual Evaluation Report (MER): Trinidad and Tobago’.

‘NC’ in the 3<sup>rd</sup> MER. Trinidad and Tobago refers to DNFBPs as listed businesses (LBs). The Financial Intelligence Unit of Trinidad and Tobago (FIUTT) has assessed the ML risks posed by lawyers as high.<sup>826</sup> Lawyers have been designated as DNFBPs, under the First Schedule of the Proceeds of Crime Act (POCA) of 2000 (as amended). Under the 2010 Financial Obligations Regulations (FOR), supervisors are obliged to ensure that attorneys and other LBs implement EDD measures for high-risk transactions and customers identified as PEPs. During the Fourth Round of Mutual Evaluations, assessors took the view that lawyers were undermining Trinidad and Tobago’s AML/CFT regime, as there was no indication that they were complying with required regulatory measures despite their important gatekeeping function.<sup>827</sup> FIs have raised particular concerns about doing business with lawyers that buy and sell real estate, given their seemingly inadequate application of the AML/CFT and CDD requirements.<sup>828</sup> Moreover, lawyers and real estate entities had not been registering with the FIUTT.<sup>829</sup> The legal sector was of the view that the majority of its members did not qualify as DNFBPs/LBs as they do not conduct the designated services.<sup>830</sup> There was a clear disconnect between lawyers understanding of their AML obligations and the regulatory expectations of the FIUTT. For instance, assessors found that the regulatory regime undertaken by FIUTT for lawyers was not sufficiently robust to identify who should be registered so high-risk activities were likely being carried out by unregistered lawyers.<sup>831</sup> Interestingly, ML/TF risks posed particularly by domestic PEPs had not been prioritised within the domestic AML/CFT regime.<sup>832</sup> Consequently, a major technical deficiency found was that many lawyers and other LBs were not applying risk management systems to adequately determine whether a customer or beneficial owner was a PEP either at the establishment of a business relationship or where a customer subsequently became a PEP.<sup>833</sup> Moreover, sanction were not deemed dissuasive for breaches observed among LBs/DNFBPs.

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<sup>826</sup> Caribbean Financial Action Task Force.

<sup>827</sup> Caribbean Financial Action Task Force, 26.

<sup>828</sup> Caribbean Financial Action Task Force, 82.

<sup>829</sup> Caribbean Financial Action Task Force, ‘Fourth Round Mutual Evaluation Report (MER): Trinidad and Tobago’.

<sup>830</sup> Caribbean Financial Action Task Force.

<sup>831</sup> Caribbean Financial Action Task Force.

<sup>832</sup> Caribbean Financial Action Task Force.

<sup>833</sup> Caribbean Financial Action Task Force.

### 5.7.3. Critical Observations on the Regulation of Domestic PEPs and their Facilitators in The Bahamas, Jamaica and Trinidad and Tobago

Analysis of the modalities and channels through which corrupt PEPs might be laundering illicit proceeds, including with the assistance of professional facilitators, has been constrained by a lack of successful prosecutions in the Bahamas, Jamaica and Trinidad and Tobago. For instance, since gaining political independence in 1962, only one minister has reportedly been convicted and jailed for grand corruption in Jamaica.<sup>834</sup> The Director of Public Prosecutions of Jamaica, in a statement, has sought to “disabuse the public of the unfortunate perception ... that the DPP and its officers have some sort of entrenched inertia in the prosecution of corruption cases.”<sup>835</sup> Given the unavailability of anecdotal evidence of the laundering proceeds of corruption, a risk-based analysis of the AML/anticorruption regulatory regimes across all three jurisdictions was conducted, having regard to assessed country-specific threats posed by corrupt PEPs. Of the professional gatekeepers to financial systems in all three countries, lawyers and TCSPs appear to pose the highest money laundering risks. Insofar as domestic PEPs and professional facilitators of ML undermine the rule of law and facilitate the leakage of public funds, they represent an insidious internal threat to the state sovereignty and sustainable development.

It could be reasonably inferred from the technical compliance ratings, that the Bahamas, Jamaica and Trinidad and Tobago have sought to bring their respective domestic AML/CFT regimes on PEPs in line with international AML/CFT best practices, albeit with varying degrees of success. Powerful States that influence the development of international soft law standards in their national interests tend to have a lower ‘adjustment

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<sup>834</sup> Imani Duncan-Price, ‘State Capture and Corruption: Where Is Jamaica Going?’, *Gleaner (The), Jamaica, W.I.*, 7 December 2018, <http://jamaica-gleaner.com/article/focus/20181209/imani-duncan-price-state-capture-and-corruption-where-jamaica-going>; Munroe, ‘Trevor Munroe | Strengthening Transparency to Catch the Corrupt’.

<sup>835</sup> Paula V. Llewellyn, ‘Media Release: Re: Allegations by Certain Entities of Failure of the Office of the Director of Public Prosecutions (ODPP) to Prosecute Forty Referrals Sent from the Office of the Contractor General (OCG)’ (Office of the Director of Public Prosecutions, Jamaica, 1 June 2017), 2.

cost’ and, therefore, higher rates of compliance.<sup>836</sup> While it is clear that Commonwealth Caribbean States lag behind some OECD States in terms of the regulation and supervision of DNFBPs technical compliance, Caribbean countries have generally outperformed many developed countries in terms of AML/anticorruption efforts notwithstanding resources constraints. At the sub-national level, analyses of technical compliance of DNFBPs with FATF Recommendations in more developed countries of Asia Pacific, the Middle East and Europe,<sup>837</sup> have suggested from the disproportionate ‘NC’ ratings that there is a higher degree of compliance within Caribbean jurisdictions. Furthermore, an experimental study revealed that TCSPs in OECD countries had lower compliance with CDD requirements than non-OECD countries.<sup>838</sup> In fact, 89% of sampled TCSPs from non-OECD jurisdictions had effective CDD requirements in place in contrast to 26% of sampled OECD TCSPs.<sup>839</sup> Despite the labelling of OFCs as banking secrecy “black holes” or ‘tax havens’,<sup>840</sup> TCSPs from those jurisdictions were found to have higher corporate transparency standards, especially at the point of company formation, than those from other jurisdictions.<sup>841</sup> Interestingly, the United States was found to be the most delinquent in ensuring regulatory compliance of TCSPs, as of twenty-seven TCSPs sampled from its jurisdiction, three indicated that identity documents would be required while twenty-four were willing to form companies without conducting CDD.<sup>842</sup> To make matters worse, the United States accounts for the formation of disproportionately more legal persons and arrangements than all forty-one ‘tax havens’ collectively.<sup>843</sup> Yet, due

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<sup>836</sup> Drezner, *All Politics Is Global*; Quaglia, ‘The Politics of State Compliance with International “Soft Law” in Finance’.

<sup>837</sup> Kim-Kwang Raymond Choo, ‘Designated Non-Financial Businesses and Professionals: A Review and Analysis of Recent Financial Action Task Force on Money Laundering Mutual Evaluation Reports’, *Security Journal* 27, no. 1 (1 February 2014): 1–26, <https://doi.org/10.1057/sj.2012.9>; Michael Newbury, ‘Designated Non-Financial Businesses and Professions: The Weak Link in Australia’s AML/CTF Regime’, *Journal of Money Laundering Control* 20, no. 3 (1 January 2017): 247–61, <https://doi.org/10.1108/JMLC-08-2016-0038>; Normah Omar and Zulaikha Amirah Johari, ‘An International Analysis of FATF Recommendations and Compliance by DNFBPS’, *Procedia Economics and Finance* 28 (1 January 2015): 14–23, [https://doi.org/10.1016/S2212-5671\(15\)01076-X](https://doi.org/10.1016/S2212-5671(15)01076-X).

<sup>838</sup> van der Does de Willebois et al., *The Puppet Masters*.

<sup>839</sup> van der Does de Willebois et al., 91.

<sup>840</sup> Laurence Cockcroft, *Global Corruption: Money, Power and Ethics in the Modern World* (Philadelphia: University of Pennsylvania Press, 2012); Johannesen and Zucman, ‘The End of Bank Secrecy?’

<sup>841</sup> van der Does de Willebois et al., *The Puppet Masters*, 91.

<sup>842</sup> van der Does de Willebois et al., 92.

<sup>843</sup> van der Does de Willebois et al., *The Puppet Masters*.

to asymmetries of power, costs of delayed compliance have been way higher and more damaging for small jurisdictions.

Indeed, these Commonwealth Caribbean countries have been caught between external ‘regulatory capture’ of AML/anticorruption governance by powerful G7 and OECD States and the FATF, on the one hand, and internal risks of ‘state capture’ by corrupt PEPs on the other hand. Unresolved, therefore, is the question of whether genuine domestic AML/anticorruption policy ownership has been hampered by the compliance-inducing discursive practices used by powerful actors to diffuse FATF across developing countries in the Global South. The unidirectional rendering of account by heavily scrutinised and monitored Commonwealth Caribbean small States to undemocratic and unaccountable transnational regulatory networks and institutions has amplified concerns about the legitimacy of the TAMLO. As small, yet mature, democracies with fairly strong institutional and governance frameworks, Commonwealth Caribbean States have not had major grand corruption and money laundering challenges related to the foreign bribery as countries of other geographic regions in the Global South. Given the transnational AML/anticorruption regime’s antecedence in combating foreign bribery, the question arises as to whether it is fit-for-purpose in suppressing endemic mismanagement and procurement improprieties by PEPs that may not always reach the evidentiary threshold of corruption offences. Commonwealth Caribbean State Parties to UNCAC 2003, have adhered to their international legal obligation to take steps, in accordance with fundamental principles of their legal systems, to establish transparent and competitive procurement systems that use objective decision-making, to effectively prevent corruption (Art.9). However, in practice, domestic PEPs have flouted public procurement laws and procedures. The FATF International Standards have not addressed the issue of procurement.

Beyond the external pressures to comply with the FATF International Standards to avoid further reputation damage, it is not immediately clear at the sub-national level, whether there has been enough buy-in among the judiciary, law enforcement agencies and regulatory and supervisory authorities, with respect to AML/CFT ethos. Indeed, fostering a culture of probity, transparency and accountability using AML/CFT standards to combat corruption involving domestic PEPs, requires socialisation of all relevant stakeholders rather than just technical compliance with rules. Political will is extremely

important in tackling corruption.<sup>844</sup> Understandably, corrupt PEPs are often presumed to lack the political will to enact and effectively enforce AML legislation and international standards to identify, trace, freeze or confiscate suspect wealth, to protect their economic and political interests or those of close business associates.<sup>845</sup> However, Commonwealth Caribbean States have been “serial ratifiers” of international AML/Anti-corruption instruments but have had a less impressive track record in effectively implementing the relevant obligations assumed.<sup>846</sup> Relevant, in this regard, is the crisis faced by many Commonwealth Caribbean islands mobilising sufficient resources to strengthen domestic AML/anticorruption regimes and equipping investigative, prosecutorial and regulatory authorities while resources are being drained by self-serving corrupt PEPs.

In the final analysis, there has been no concrete evidence that domestic PEPs in the Bahamas, Jamaica and Trinidad and Tobago have deliberately sought to frustrate efforts to curb corruption using AML standards. It would appear, nonetheless, that national policy formulation has been driven reactionarily to risks of external sanctions and reputational injury from stigmatisation,<sup>847</sup> rather than by strong internal leadership. High-level political rhetoric condemning corruption has, invariably, featured prominently in political campaigns. Still, rhetoric may be deployed by public officials for purposes other than criminal justice or regulatory control.<sup>848</sup> Anticorruption rhetoric just simply has not translated into decisive prosecutorial action against PEPs,<sup>849</sup> despite having fairly robust regulatory frameworks. As Professor Trevor Munroe has aptly pointed out, “too often, those who consider themselves ‘untouchable’ are indeed left untouched by the criminal justice system.”<sup>850</sup>

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<sup>844</sup> Michel Dion, ‘What Is Corruption Corrupting? A Philosophical Viewpoint’, *Journal of Money Laundering Control* 13, no. 1 (1 January 2010): 45–54, <https://doi.org/10.1108/13685201011010209>; Stapenhurst et al., ‘Parliamentary Oversight and Corruption in the Caribbean’.

<sup>845</sup> Chaikin and Sharman, *Corruption and Money Laundering*.

<sup>846</sup> McKoy, ‘Known Knowns’, 2.

<sup>847</sup> Shazeeda Ali, ‘Controlling Serious Financial Crime: A Jamaican Perspective’, *Economic Affairs* 27 (1 March 2007): 14–17, <https://doi.org/10.1111/j.1468-0270.2007.00703.x>.

<sup>848</sup> Beare, ‘Corruption and Organized Crime: Lessons from History’.

<sup>849</sup> Canute Thompson, ‘Leading from the Front in Combating Corruption’, *Jamaica Observer (The)*, 27 May 2018, [http://www.jamaicaobserver.com/the-agenda/leading-from-the-front-in-combating\\_corruption\\_131378?profile=1444](http://www.jamaicaobserver.com/the-agenda/leading-from-the-front-in-combating_corruption_131378?profile=1444).

<sup>850</sup> Munroe, ‘Get Cracking in Curbing Corruption’.

## 6. The Trade in Offshore Internet Gambling Services- Implications of Extraterritorial AML/CFT Regulatory Strategies for Commonwealth Caribbean Sovereignty & Sustainable Development

Questions of normative legitimacy within transnational legal orders (TLOs) become particularly acute where self-serving law-making in one jurisdiction is used to unilaterally regulate transboundary security risks in other sovereign States or influence their domestic laws.<sup>851</sup> The United States has always had a predilection for aggressive unilateralism.<sup>852</sup> Especially post-9/11, the United States has used long-arm statutes to extraterritorially combat money laundering and terrorist financing (ML/TF).<sup>853</sup> Against this background, this chapter problematises the United States' leveraging of its superpower status and extraterritorial prescriptive jurisdiction, outside of institutionally embedded processes within the TAMLO, to regulate the Commonwealth Caribbean's Internet gambling sector. Specifically, the United States has sought to criminalise the cross-border supply of remote betting and gambling services to American residents, which essentially renders the related financial transactions as money laundering. Such unilateralism has been exercised under the pretext of sovereign 'police powers' to protect prescribed national security interests and public morality. Rather than a question of transnational "regulatory leakage,"<sup>854</sup> it will be argued that the United States has deliberately sought to protect its domestic land-based and online gambling sector by misusing federal AML/CFT legislation. Such unilateralism has threatened the

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<sup>851</sup> Gregory Shaffer and Daniel Bodansky, 'Transnationalism, Unilateralism and International Law', *Transnational Environmental Law* 1, no. 1 (2012): 31–42; Leonard J. Theberge, 'Unilateralism: The Direct Challenge to International Law Contemporary International Relations: The Challenge to International Law', *California Western International Law Journal* 9, no. 3 (1979): 553–62.

<sup>852</sup> Maggie Gardner, 'Channeling Unilateralism', *Harvard International Law Journal* 56, no. 2 (2015): 297–352; Madeline Morris, 'Terrorism and Unilateralism: Criminal Jurisdiction and International Relations', *Cornell International Law Journal* 36, no. 3 (2004 2003): 473–90; Austen L. Parrish, 'Kiobel, Unilateralism, and the Retreat from Extraterritoriality Symposium: Extraterritorial Post-Kiobel: International and Comparative Legal Perspectives', *Maryland Journal of International Law* 28 (2013): 208–40.

<sup>853</sup> Herbert V. Morais, 'Fighting International Crime and Its Financing: The Importance of Following a Coherent Global Strategy Based on the Rule of Law Symposium: Brave New World: U.S. Responses to the Rise in International Crime', *Villanova Law Review* 50, no. 3 (2005): 583–644; Morgan, 'Dirty Names, Dangerous Money'.

<sup>854</sup> Dan L. Burk, 'Jurisdiction in a World without Borders', *Virginia Journal of Law & Technology* 1 (1997): 1–27; Jack Goldsmith, 'Unilateral Regulation of the Internet: A Modest Defence', *European Journal of International Law* 11, no. 1 (1 January 2000): 135–48, <https://doi.org/10.1093/ejil/11.1.135>.

sovereignty of Commonwealth Caribbean States and their right to license offshore Internet gambling operators, to legitimately exploit global e-commerce value chains in recreational services, as an economic development strategy. Ironically, gambling was legalised in the United States as an economic recovery strategy after the Great Depression, to offset dwindling tax revenues.<sup>855</sup>

The juridical sovereignty of under-resourced and powerless States has been touted as their most “potent asset.”<sup>856</sup> The *Antigua and Barbuda- United States Remote Gambling* case, successfully challenging the United States’ unilateral efforts to defund the region’s Internet gambling sector before the World Trade Organisation (WTO) Dispute Settlement Mechanism (DSM), it will be shown, highlighted the limits of juridical equality within the TAMLO. Indeed, formal sovereign equality has not translated into the capability of Commonwealth Caribbean small States to make onshore States render account for transnational misconduct. Where small offshore jurisdictions have exercised regulatory self-determination, in conflict with the national security, sovereign and fiscal interests of onshore States, the international rule of law is often supplanted by power politics. Several normative and empirical issues are raised by the United States’ extraterritorial regulatory posture towards offshore Internet gambling operators.

Firstly, there is no clear normative solution to resolving the United States’ sovereign prerogative to ban the cross-border supply of remoting gambling services to Americans, with Commonwealth Caribbean States’ sovereign authority to facilitate regulated Internet gambling operations within their jurisdictions. The matter, however, turns on the appropriateness and proportionality of the United States’ use of long-arm AML statutes as a counter-measure for the legitimate trade in recreational services. Indeed, the United States has had legitimate reasons to be concerned about corruption in Antigua and Barbuda. In 1990, Vere Bird Jr, the Prime Minister’s eldest son, who had portfolio for national security, was implicated in the diversion of a shipment of Israeli arms to a Colombian drug lord.<sup>857</sup> Regulatory improprieties within the banking sector were also uncovered. Antigua and Barbuda’s reputation was further tainted by the scandalous

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<sup>855</sup> Larry Smith, ‘Gambling in the Bahamas- Tough Call’, *The Tribune*, 8 August 2012, <http://www.tribune242.com/news/2012/aug/08/gambling-bahamas/>.

<sup>856</sup> Stephen Krasner, ‘Sovereignty: An Institutional Perspective’, *Comparative Political Studies* 21, no. 1 (1 April 1988): 89, <https://doi.org/10.1177/0010414088021001004>.

<sup>857</sup> Stephen Clarke, ‘Antigua and Barbuda: History of Corruption and the Stanford Case’, Legal Reports (Washington, DC, USA: Law Library of Congress, January 2011).

collapse of the \$7 billion Robert Allan Stanford Ponzi scheme that operated in the jurisdiction, and defrauded investors.<sup>858</sup> This led to the indictment in 2009 of Leroy King, former head of Antigua's Financial Services Regulatory Commission, on charges for accepting bribes to ignore the Ponzi scheme's irregularities and conspiracy to commit money laundering.<sup>859</sup> The Stanford scandal appears to have overshadowed Antigua and Barbuda's progress in AML/CFTP and anticorruption regulatory governance.<sup>860</sup> Illustratively, it has been observed that there is "little hard evidence of corruption to cite in support of Antigua's reputation as an island that has long tolerated official misconduct for financial gain."<sup>861</sup> However, there has been no empirical cause for concern about ML/FTP threats associated with the Internet gambling sector. Indeed, Antigua currently has one of the highest levels of technical compliance with FATF International Standards in the region.

Secondly, there is no harmonised framework for transnational regulatory governance of Internet gambling. Thus, the United States has seemingly used its domestic AML/CFT regime to 'securitise' its fiscal interests in its domestic land-based gambling sector. This aligns with the observed 'securitisation' of the financial services regulatory discourse post-9/11.<sup>862</sup> This must be located within the coercive diffusion of AML/CFT risk management standards across the Global South, using intrusive fiscal surveillance, compliance monitoring and rating strategies.<sup>863</sup> The United States' criminalisation of the cross-border supply of Internet gambling services to Americans has effectively expanded the predicate offences for money laundering beyond international law and the FATF's Recommendations. Internet gambling operators in Caribbean jurisdictions would become criminally liable under US "long-arm" anti-gambling and racketeering statutes if they offer betting and gambling services to US residents, or if parts of their activities are deemed to have occurred in the United States.<sup>864</sup> Any transactions by those operators

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<sup>858</sup> Edward L. Schnitzer and Joseph Orbach, 'Can Trade Creditors Provide "Value" in a Ponzi Scheme?', *American Bankruptcy Institute Journal* XXXIV, no. 6 (2015): 1–3.

<sup>859</sup> Clarke, 'Antigua and Barbuda: History of Corruption and the Stanford Case'.

<sup>860</sup> After a decade of legally contesting his requested extradition to the United States, King lost his appeal before the Judicial Committee of the UK Privy Council in 2019 and was extradited.

<sup>861</sup> Clarke, 'Antigua and Barbuda: History of Corruption and the Stanford Case', 1.

<sup>862</sup> William Vlcek, *Offshore Finance and Small States: Sovereignty, Size and Money*, International Political Economy Series (Basingstoke [England] ; New York: Palgrave Macmillan, 2008).

<sup>863</sup> Vlcek.

<sup>864</sup> Anurag Bana, 'Online Gambling: An Appreciation of Legal Issues' 12, no. 3 (2011): 11.

involving earnings from the US gambling market would technically qualify as money laundering, for the purposes of freezing or confiscation proceedings in the United States.

Thirdly, and particularly concerning, is what appears to be the politicisation and weaponization of discursively constructed ML/FTP threats for self-serving purposes.<sup>865</sup> An anonymously authored article in *The OECD Observer* reported that “Internet casinos are proving an attractive bet for criminals needing to launder their ill-gotten proceeds,” due to investigative and jurisdictional challenges inherent in tracing cyber transactions.<sup>866</sup> This has implied money laundering using Internet casinos, or online gambling generally, at a scale which does not appear to be empirically supported. Although Europol has reported instances of infiltration of the online gambling sector by organised groups, confirmed cases of money laundering are infrequent.<sup>867</sup> Globally, there are conflicting perceptions of whether the sector is high-risk for ML/TF. An EU 2019 supranational assessment considered online gambling high-risk for ML owing to the non-face-to-face nature of the business relationships, huge and complex volumes of transactions, and the potential use of anonymous or difficult to trace payment methods.<sup>868</sup> Yet a previous comprehensive assessment of the EU Internet gambling sector found its potential for abuse relatively low.<sup>869</sup> The United Kingdom, whose online gambling sector generates the most revenue globally, has consistently assessed the associated ML/FT risks as low.<sup>870</sup> Furthermore, online casino gambling has been claimed to be “highly susceptible to money laundering” as cash-intensive land-based casinos,<sup>871</sup> without substantiating evidence. Offshore jurisdictions that license Internet gambling operators have been labelled as having substandard AML/CFT regimes. Such discursive framing of offshore

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<sup>865</sup> Peter Alldridge, *What Went Wrong with Money Laundering Law?*, Palgrave Pivot (London: Palgrave Macmillan, 2016).

<sup>866</sup> Anonymous, ‘Money Laundering Online’, *OECD Observer*, 2001.

<sup>867</sup> Anton Moiseienko, ‘Play Your Cards Right: Preventing Criminal Abuse of Online Gambling’, RUSI Occasional Paper (London (UK): Royal United Service Institute for Defence and Security Studies (RUSI), November 2019), [https://rusi.org/sites/default/files/201911\\_op\\_rusi\\_playyourcardsright\\_moiseienko\\_web.pdf](https://rusi.org/sites/default/files/201911_op_rusi_playyourcardsright_moiseienko_web.pdf).

<sup>868</sup> European Commission, ‘Commission Staff Working Document Accompanying the Document Report from the Commission to the European Parliament and the Council on the Assessment of the Risk of Money Laundering and Terrorist Financing Affecting the Internal Market and Relating to Cross-Border Activities’, 24 July 2019, 223, [https://ec.europa.eu/info/sites/info/files/supranational\\_risk\\_assessment\\_of\\_the\\_money\\_laundering\\_and\\_terrorist\\_financing\\_risks\\_affecting\\_the\\_union\\_-\\_annex.pdf](https://ec.europa.eu/info/sites/info/files/supranational_risk_assessment_of_the_money_laundering_and_terrorist_financing_risks_affecting_the_union_-_annex.pdf).

<sup>869</sup> Michael Levi, ‘E-Gaming and Money Laundering Risks: A European Overview’, *ERA Forum* 10, no. 4 (December 2009): 533–46, <https://doi.org/10.1007/s12027-009-0143-2>.

<sup>870</sup> Moiseienko, ‘Play Your Cards Right’.

<sup>871</sup> Bana, ‘Online Gambling: An Appreciation of Legal Issues’, 339.

Internet gambling operators mutually constitutes those in advanced financial centres as presumably more regulated and less susceptible to criminal infiltration. On the contrary, the “serious nature” of findings from AML/CFT compliance assessments in the UK remote gambling sector has been a cause for concern. In 2018, the UK Gambling Commission reported that it had commenced investigations into seventeen licensed remote gambling operators.<sup>872</sup> Regulatory breaches found include inadequate AML/CFT risk assessments by operators in relation to new products, technologies and payment methods, and a lack of evidence of ongoing monitoring of customer accounts.<sup>873</sup> Very little evidence was found of customer due diligence (CDD) on establishing business relationships with gambling customers or enhanced due diligence (EDD) for high risk clients.<sup>874</sup> Moreover, some Money Laundering Reporting Officers (MLRO) lacked either formal qualifications or basic knowledge of the Proceeds of Crime Act.<sup>875</sup> Othering jurisdictions that license Internet gambling operators as high-risk for ML has productive power in justifying disproportionate transnational or extraterritorial AML/CFT surveillance. Illustratively, at its High-Level Risk Forum in March 2017, the OECD singled out ML vulnerabilities arising from Free Trade Zones (FTZs) and Special Economic Zones (SEZs) that are allegedly being used as sites for the “poorly regulated, multi-billion dollar, global betting and gambling industry” and which are reportedly being exploited by “criminal syndicates and corrupt government representatives.”<sup>876</sup>

Fourthly, asymmetrical power and discursive politics have overshadowed the use of institutionally embedded multilateral processes to reconcile the United States’ sovereign prerogative to proscribe the cross-border supply of online betting and gambling services to its residents with the sovereign prerogative of small Commonwealth Caribbean jurisdictions to facilitate the supply of remote gambling services as a development strategy. The AML/CFT discourse has often unjustifiably used pejorative terms to represent offshore commercial activities such as ‘tax havens’ and ‘dirty money’ to veil

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<sup>872</sup> United Kingdom Gambling Commission, ‘Letter to Online Casino Operators- Customer Interaction and Anti-Money Laundering: Compliance Assessment Activity’ (United Kingdom Gambling Commission, 4 January 2018), <https://www.gamblingcommission.gov.uk/PDF/Letter-to-remote-casino-operators-January-2018.pdf>.

<sup>873</sup> United Kingdom Gambling Commission.

<sup>874</sup> United Kingdom Gambling Commission.

<sup>875</sup> United Kingdom Gambling Commission.

<sup>876</sup> Organisation for Economic Cooperation and Development, ‘Free for All Zone’- Free Trade & Special Economic Zones, International Online Betting Operators & Gambling- Report of 5th OECD Task Force for Countering Illicit Trade’ (Paris, France: OECD Secretariat, 2017), 1.

latent policy interests underpinning discursively constructed targets of extraterritorial AML/CFT regulation.<sup>877</sup> This politicisation and negative discursive representation of OFCs as spaces for ‘shadowy’ business practices has not gone unnoticed.<sup>878</sup> Yet powerful onshore financial centres have embraced financial liberalisation and de-regulation but have hypocritically insisted on regulatory discipline in the Global South.<sup>879</sup> Similar politically charged “martial imagery” such as the ‘war on drugs’ and ‘war on terror’ have been conventionally used to justify extreme transnational law enforcement and regulatory responses,<sup>880</sup> by powerful OECD States. Such discursive practices have brought into question the legitimacy of extraterritorial AML/CFT regulatory practices.

Unsurprisingly, therefore, is the emerging tendency among scholars to stigmatise offshore jurisdictions as either “lightly regulated” or “unregulated” venues for Internet gambling operators.<sup>881</sup> By assuming that Internet gambling websites can be created and licensed in offshore jurisdictions, without sufficient regulatory oversight of beneficial ownership, or subjecting operators to ‘fit and proper tests’,<sup>882</sup> the permissibility of Internet Gambling is portrayed as a result of state inaction rather than a deliberate exercise of economic sovereignty. In fact, the Internet gambling sector in the region was the product of a deliberate development strategy, premised on leveraging economic sovereignty, to minimise historical dependence on agriculture in the context of dwindling

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<sup>877</sup> Alldridge, *What Went Wrong with Money Laundering Law?*

<sup>878</sup> Andrew Fenton Cooper, *Internet Gambling Offshore: Caribbean Struggles over Casino Capitalism*, International Political Economy Series (Houndmills, Basingstoke, Hampshire ; New York: Palgrave Macmillan, 2011); Palan, Murphy, and Chavagneux, *Tax Havens*; Palan, *The Offshore World*; Sharman, *Havens in a Storm*; William Vlcek, ‘A Leviathan Rejuvenated: Surveillance, Money Laundering, and the War on Terror’, *International Journal of Politics, Culture, and Society* 20, no. 1/4 (2008): 21–40.

<sup>879</sup> Cooper, *Internet Gambling Offshore*; Palan, *The Offshore World*; Palan, Murphy, and Chavagneux, *Tax Havens*; Sharman, *Havens in a Storm*; Vlcek, ‘A Leviathan Rejuvenated’.

<sup>880</sup> Alldridge, *What Went Wrong with Money Laundering Law?*

<sup>881</sup> Ian Abovitz, ‘Why the United States Should Rethink Its Legal Approach to Internet Gambling: A Comparative Analysis of Regulatory Models That Have Been Successfully Implemented in Foreign Jurisdictions Notes & Comments’, *Temple International & Comparative Law Journal* 22 (2008): 437–70; William R. Eadington, ‘The Future of Online Gambling in the United States and Elsewhere’, *Journal of Public Policy & Marketing* 23, no. 2 (September 2004): 215, <https://doi.org/10.1509/jppm.23.2.214.51399>; Mugarura, ‘Has Globalisation Rendered the State Paradigm in Controlling Crimes, Anachronistic?’; Mark D. Schopper, ‘Internet Gambling, Electronic Cash & (and) Money Laundering: The Unintended Consequences of a Monetary Control Scheme Comment’, *Chapman Law Review* 5 (2002): 303–30.

<sup>882</sup> Pim Verschuuren, ‘Money Laundering, Sports Betting and Gambling’, in *The Money Laundering Market: Regulating the Criminal Economy*, ed. Killian J. McCarthy (Newcastle upon Tyne, UK: Agenda Publishing, 2018), 113–38.

terms of trade, the less of preferential European market access and changes in the international division of labour.<sup>883</sup>

Fifthly, and related to stigmatisation of the Caribbean offshore sectors, is that gaining a reputation for financial probity now has inflated political ‘currency’. This is primarily a consequence of the region’s blacklisting experience under the FATF NCCTs initiative and its economic fallout. Negative perceptions of offshore spaces as high risk for ML/TF continue to be reproduced by linking past blacklisting experiences with the currently well-regulated Internet gambling sector.<sup>884</sup> It has further been suggested that Caribbean jurisdictions have been ‘uncooperative’ with foreign law enforcement authorities conducting financial investigations in the region and that they lack the professional competence and political will to effectively regulate Internet betting and gaming.<sup>885</sup> This uncritical assertion failed to acknowledge that Internet gambling is a legalised and legitimately regulated sector in the region. Such discursive practices have overshadowed the online gambling sectors in Antigua and Barbuda, Dominica, Grenada and St. Kitts and Nevis, which were backlisted, notwithstanding the significant strides they made to strengthen their AML/CFT regulatory regimes over the last two decades, in line with international standards.<sup>886</sup> There is also the matter of the lingering development costs of compliance and blacklisting.

Pressure to comply with FATF’s AML/CFT standards after being blacklisted have been politically and financially costly to Caribbean OFCs.<sup>887</sup> Illustratively, it was recounted how politically divisive legislative steps to bring the Bahamas into compliance with FATF Recommendations were.<sup>888</sup> The prospects of the consequent reduction in licensing fees and employment led, in 2002, to the ruling party being removed from office after ten years. Moreover, the newly elected government questioned the constitutionality

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<sup>883</sup> Cooper, *Internet Gambling Offshore*.

<sup>884</sup> Verschuuren, ‘Money Laundering, Sports Betting and Gambling’.

<sup>885</sup> Verschuuren.

<sup>886</sup> Mark Wilson, ‘Chips, Bits, and the Law: An Economic Geography of Internet Gambling’, *Environment and Planning A: Economy and Space* 35, no. 7 (July 2003): 1245–60, <https://doi.org/10.1068/a35106>.

<sup>887</sup> Jason Campbell Sharman and Percy S Mistry, *Considering the Consequences: The Development Implications of Initiatives on Taxation, Anti-Money Laundering and Combating the Financing of Terrorism* (Commonwealth Secretariat 2008); Vlcek, ‘Money Laundering Prevention and Small State Development’ (n 79).

<sup>888</sup> Vlcek, ‘Money Laundering Prevention and Small State Development’.

of the regularising legislative steps that had been taken to get the Bahamas delisted.<sup>889</sup> In 2003 the Bahamian Attorney General reported that the Government incurred an estimated US\$45 million to implement legislative reform, with similar expenditures expected in the ensuing years.<sup>890</sup> The introduced requirements for physical presence forced a significant number of licensed offshore banks to relocate their operations outside the Bahamas.<sup>891</sup>

To date, compliance with international AML/CFT has not assuaged the fears of foreign financial institutions about perceived ML/TF risks based on country-specific factors in maintaining correspondent banking relationships with regional banks.<sup>892</sup> Blacklisting, therefore, has had demonstrable sustainable development costs, and has marginalised some Caribbean jurisdictions from the international banking system. In consequence, all financial transactions emanating from banks and non-bank financial institutions in the region were effectively flagged as potentially illicit,<sup>893</sup> including from the Internet gambling sector. Within the region, therefore, there is an acute awareness of need to manage international perceptions of their offshore financial and corporate services sectors, irrespective of the hefty compliance and reputational costs to both the public and private sectors.<sup>894</sup> It is conceivable that this constitutive reality may impinge on the ability and willingness of Caribbean small States to assert their economic sovereignty and resist US extraterritoriality. The technical operations of Internet gambling also have implications for question of the territoriality of its regulation.

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<sup>889</sup> Vlcek.

<sup>890</sup> Vlcek, 384.

<sup>891</sup> Vlcek, 'Money Laundering Prevention and Small State Development'.

<sup>892</sup> Juan Schmid, 'How Much Anti-Money Laundering Effort Is Enough? The Jamaican Experience', Inter-American Development Bank Policy Brief (Washington, DC, USA: Inter-American Development Bank, April 2015).

<sup>893</sup> Vlcek, 'Money Laundering Prevention and Small State Development'.

<sup>894</sup> Vlcek; Sharman, 'The Bark Is the Bite'.

## 6.1. Typologies and Mechanics of Internet Gambling

Internet gambling refers to all forms of betting or wagering on events of chance, for a prize of monetary value, over the Internet whether using computers, mobile phones or wireless devices.<sup>895</sup> ‘Online’, ‘interactive’ and ‘remote’ gambling are often used interchangeably.<sup>896</sup> The main typologies of Internet gambling include remote wagering on horseraces, remote lottery betting, online telephone sports books and online casinos rooms for games such as poker and blackjack.<sup>897</sup> Often, online gambling websites assume names of countries or locations with legalised gambling albeit unconnected to the actual geographic place.<sup>898</sup> Furthermore, their domain names may have been registered in one country and their technical and financial operations based in another.<sup>899</sup> For instance, VegasLand Casino had its domain name registered in United Kingdom, its technical contact at Yahoo in the United States and its financial base in Antigua and Barbuda.<sup>900</sup> This multijurisdictional structuring of Internet gambling operations has often led to jurisdictional regulatory conflicts.

With respect to the financial aspects of Internet gambling, the movement of funds between Internet gambling operators and gamblers as wagers or winnings, whether directly or through intermediaries is central to Internet gambling operations.<sup>901</sup> A prospective Internet gambler would need to download the gambling software, create a

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<sup>895</sup> Sally M. Gainsbury et al., ‘The Impact of Internet Gambling on Gambling Problems: A Comparison of Moderate-Risk and Problem Internet and Non-Internet Gamblers.’, *Psychology of Addictive Behaviors* 27, no. 4 (2013): 1092, <https://doi.org/10.1037/a0031475>.

<sup>896</sup> Sally M. Gainsbury et al., ‘A Taxonomy of Gambling and Casino Games via Social Media and Online Technologies’, *International Gambling Studies* 14, no. 2 (4 May 2014): 196–213, <https://doi.org/10.1080/14459795.2014.890634>.

<sup>897</sup> Christopher Grohman, ‘Reconsidering Regulation: A Historical View of the Legality of Internet Poker and Discussion of the Internet Gambling Ban of 2006’, *Journal of Legal Technology Risk Management* 1 (2007): 34–74; Levi, ‘E-Gaming and Money Laundering Risks’; Jon Mills, ‘Internet Casinos: A Sure Bet for Money Laundering The 18th Cambridge International Symposium on Economic Crime’, *Dickinson Journal of International Law* 19 (2001 2000): 77–116; Bunnam Srephichet, ‘Pirates of the Carribean: Offshore Internet Gambling Sites Cursed by Unlawful Internet Gambling Enforcement Act Note’, *Hastings Communications and Entertainment Law Journal (Comm/Ent)* 30 (2008 2007): 139–78; Wilson, ‘Chips, Bits, and the Law’.

<sup>898</sup> Wilson, ‘Chips, Bits, and the Law’.

<sup>899</sup> Wilson.

<sup>900</sup> Wilson.

<sup>901</sup> Wilson.

profile and set up an e-wallet with funds.<sup>902</sup> Traditionally, advance deposits were usually placed using credit cards, mail orders or electronic funds transfer from banks or online financial services intermediaries.<sup>903</sup> However, cryptocurrencies are being increasingly tendered in the sector,<sup>904</sup> as legislative efforts in the United to disrupt the funding of offshore Internet gambling operations have targeted US banks and associated financial intermediaries by making it illegal for them to facilitate remote gambling and betting transactions.

## 6.2. Overview of the Internet Gambling Industry & Offshore Licensing in the Commonwealth Caribbean

Internet gambling is both scholarly understudied and a relatively recent economic transformation strategy in the Commonwealth Caribbean. The industry's prominence must be viewed in the context of the progressive normalisation, liberalisation and deregulation of gambling since the 1970s.<sup>905</sup> These neoliberalist policies progressively transformed gambling from an activity of unquestionable “dubious morality” to a mainstream recreational and commercial enterprise.<sup>906</sup> This was further accompanied by the convergence of information and communication technologies (ICTs) and personal computing with gambling.<sup>907</sup> However, the Internet gambling sector is at various stages

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<sup>902</sup> Jeffrey Simser, ‘Money Laundering: Emerging Threats and Trends’, *Journal of Money Laundering Control*; London 16, no. 1 (2013): 41–54, <http://dx.doi.org/10.1108/13685201311286841>.

<sup>903</sup> Paul Hugel and Joseph Kelly, ‘Internet Gambling, Credit Cards and Money Laundering’, *Journal of Money Laundering Control* 6, no. 1 (January 2003): 57–65, <https://doi.org/10.1108/13685200310809428>; Wilson, ‘Chips, Bits, and the Law’.

<sup>904</sup> Verschuuren, ‘Money Laundering, Sports Betting and Gambling’.

<sup>905</sup> Martin Young, ‘Gambling, Capitalism and the State: Towards a New Dialectic of the Risk Society?’, *Journal of Consumer Culture* 10, no. 2 (1 July 2010): 254–73, <https://doi.org/10.1177/1469540510364593>.

<sup>906</sup> Young, 255; Jim Cosgrave, ‘Goffman Revisited: Action and Character in the Era of Legalized Gambling’, *International Journal of Criminology and Sociological Theory* 1, no. 1 (2008), <https://ijcst.journals.yorku.ca/index.php/ijcst/article/view/16183>; James F. Cosgrave, ‘Embedded Addiction: The Social Production of Gambling Knowledge and the Development of Gambling Markets’, *The Canadian Journal of Sociology / Cahiers Canadiens de Sociologie* 35, no. 1 (2010): 113–34.

<sup>907</sup> William R. Eadington, ‘The Economics of Casino Gambling’, *Journal of Economic Perspectives* 13, no. 3 (September 1999): 173–92, <https://doi.org/10.1257/jep.13.3.173>; Eadington, ‘The Future of Online Gambling in the United States and Elsewhere’; Jan Mcmillen and Peter Grabosky, ‘Internet Gambling’, *Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice* 88 (1998): 1–6; Tatiana Tropina, ‘Fighting Money Laundering in the Age of Online Banking, Virtual

of development in The Bahamas, Jamaica and Trinidad and Tobago. The Lotteries Prohibition Act (1901) criminalised all lotteries and gaming activities in the Bahamas. In 1938 the Bahamas' anti-gambling laws were amended to selectively exempt illegally operating 'brick and mortar' casinos from the prohibition regime, establishing the regulated gambling sector.<sup>908</sup> This was further reinforced by the Lotteries and Gaming Act (1969). The restriction of casinos gambling services to tourists gave rise to an illicit local "Numbers" sector and a proliferation of illegally operated 'Web Shops' that provide online gambling services to citizens and residents.<sup>909</sup> The enactment of The Gaming Act (2014), The Gaming Regulations, and The Gaming House Operator Regulations, repealed the 1969 Act and regularised "Web Shops" as regulated entities. In 2018, an estimated 93% of transactions in the online gaming sector were cash-based.<sup>910</sup> However, the online gambling sector did not account for any of the suspicious transaction reports (STRs) in 2019.<sup>911</sup> The Bahamian Central Bank reported that the online gaming sector generated \$3.2 billion in sales between January and September 2019, which amounts to an estimated twenty-seven percent of GDP (\$12 billion), compared to gross revenues of an estimated \$1.3 billion between January and August 2019 from casino gambling.<sup>912</sup> Given the significance of the sector, The United States State department regards the Bahamas casino gambling sector to be vulnerable to ML by virtue of the jurisdiction being an IFC, and sited "potential vulnerabilities in the online gaming and money transfer business sectors... exacerbated by certain regulators' reluctance to acknowledge them."<sup>913</sup> The situation is markedly different in Jamaica and Trinidad and Tobago.

Legalising online gambling has been on Jamaica's legislative agenda since 2014. In 2017, the Government of Jamaica announced its intention to 'fast track' online gambling legislation to keep pace with technological developments in, and to facilitate growth of, the sector, including the establishment of a licensing and regulatory supervision regime

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Currencies and Internet Gambling', *ERA Forum* 15, no. 1 (June 2014): 69–84, <https://doi.org/10.1007/s12027-014-0335-2>; Wilson, 'Chips, Bits, and the Law'.

<sup>908</sup> Smith, 'Gambling in the Bahamas- Tough Call'.

<sup>909</sup> Smith.

<sup>910</sup> United States Department of State, 'International Narcotics Control Strategy Report Volume II- Money Laundering' (Washington, DC, USA: Bureau of International Narcotics and Law Enforcement Affairs, March 2020), <https://www.state.gov/wp-content/uploads/2020/03/Tab-2-INCSR-Vol-2-508.pdf>.

<sup>911</sup> United States Department of State.

<sup>912</sup> United States Department of State, 53.

<sup>913</sup> United States Department of State, 53.

for operators of interactive gambling.<sup>914</sup> Noting how lucrative the global online gambling industry is, the Government also signalled that the local sector was attracting international investment interests.<sup>915</sup> Illicit gaming in Jamaica is estimated to generate JM\$2 billion per year.<sup>916</sup> Only recently have amendments to the Betting, Gaming and Lotteries Act (1965) permitted local lotteries, sportsbook and race betting operators to use mobile telephone and text messages for wagering. Gaming Machine Operators have also been designated as DNFI's under the Proceeds of Crime Act. Online gambling is still largely illegal in Trinidad and Tobago. Illegal gaming and lottery operations are sources of ML vulnerability in Trinidad and Tobago and a common source of laundered funds.<sup>917</sup> Public casinos and online gaming are illegal in Trinidad and Tobago, although 'private members clubs operate as casinos and account for large cash movements. While the cross-border supply of remote gambling and betting services is not currently a major issue for the Bahamas, Jamaica and Trinidad and Tobago, unlike elsewhere in the Commonwealth Caribbean, their future participation in the industry cannot be ruled out as the States have sought to diversify their services sector and tap into global value chains.

Internet gambling has predominantly been an offshore industry since the 1990s.<sup>918</sup> In the mid-1990s, several Commonwealth Caribbean small island States wooed online gambling operators as an economic transformation strategy to reduce their fiscal deficits.<sup>919</sup> It is now widely recognised that the offshore Internet gambling industry originated in Antigua and Barbuda,<sup>920</sup> which adopted the Free Trade and Processing Zone

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<sup>914</sup> Jamaica Information Service (JIS), 'Gov't Developing Regulations for Interactive Gaming', Jamaica Information Service, 17 June 2017, <https://jis.gov.jm/govt-developing-regulations-for-interactive-gaming/>.

<sup>915</sup> Jamaica Information Service (JIS).

<sup>916</sup> Jamaica Information Service (JIS).

<sup>917</sup> United States Department of State, 'International Narcotics Control Strategy Report Volume II- Money Laundering', 188.

<sup>918</sup> Srephichet, 'Pirates of the Caribbean'.

<sup>919</sup> Bana, 'Online Gambling: An Appreciation of Legal Issues'; Grohman, 'Reconsidering Regulation'.

<sup>920</sup> Abovitz, 'Why the United States Should Rethink Its Legal Approach to Internet Gambling'; James Banks, *Gambling, Crime and Society* (London: Palgrave Macmillan, 2017); Andrew F. Cooper, "'Remote" in the Eastern Caribbean: The Antigua- U.S. WTO Internet Gambling Case.', Caribbean Paper (Waterloo, Canada: Centre for International Governance Innovation, 2008); Sally Gainsbury and Robert Wood, 'Internet Gambling Policy in Critical Comparative Perspective: The Effectiveness of Existing Regulatory Frameworks', *International Gambling Studies* 11, no. 3 (1 December 2011): 309–23, <https://doi.org/10.1080/14459795.2011.619553>; Jenna F. Karadbil, 'Casinos of the Next Millennium: A Look into the Proposed Ban on Internet Gambling Notes', *Arizona Journal of International and Comparative Law* 17 (2000): 413–48; Yevgeniya Roysen, 'Taking Chances: The United States' Policy on Internet Gambling and Its International Implications Notes and Recent Developments', *Cardozo Arts & Entertainment Law Journal* 26, no. 3 (2009 2008): 873–98; Robert Williams and Robert Wood,

Act to incentivise foreign direct investment by the creation of a tax-free zone that lured reputable gambling operators from the United States.<sup>921</sup> Internet gambling websites quickly popped up throughout the Caribbean, including Belize and the Turks and Caicos Islands.<sup>922</sup> Belize's own Computer Wager Licensing Act was modelled off Nevada's gambling laws.<sup>923</sup> Ironically, the significance of the offshore Internet gambling sector in the Commonwealth Caribbean, owes much to the restrictive regulatory approach that was adopted by the United States. The United States' prohibition regime has forced "most reputable operators" offshore and has been reputedly ineffective in curtailing American gamblers from using offshore Internet gambling websites.<sup>924</sup> An estimated fifty percent (50%) of Internet gambling revenue is generated by US-based customers.<sup>925</sup> The size of the global sector continues to grow exponentially.

The Internet gambling sector in the Commonwealth Caribbean is, therefore, relatively insignificant compared to the market in Europe and globally. The global Internet gambling sector was valued at US\$1 billion in 1997, between US\$10.9 and US\$15 billion in 2006,<sup>926</sup> US\$37 billion or 9% of global gambling revenues in 2015.<sup>927</sup> The global online gambling market was valued at \$58.9 billion in 2019 and is projected to grow by 13.2% to \$66.7 billion by the end of 2020.<sup>928</sup> The market is further expected to reach \$92.9 billion by 2023.<sup>929</sup> As a global e-commerce marketplace, Internet gambling has extended beyond the Commonwealth Caribbean with over 650 licensed Internet gambling operators in seventy-four jurisdictions and approximately 3,500 websites.<sup>930</sup> However, they remain concentrated in Antigua and Barbuda, Australia, Belize, Gibraltar,

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'Internet Gambling: A Comprehensive Review and Synthesis of the Literature' (Guelph, Ontario: Ontario Problem Gambling Research Centre, 2009).

<sup>921</sup> Srephichet, 'Pirates of the Caribbean'.

<sup>922</sup> Nicholas Robbins, 'Baby Needs a New Pair of Cybershoes: The Legality of Casino Gambling on the Internet Note', *Boston University Journal of Science & Technology Law* 2 (1996): 150–81.

<sup>923</sup> Robbins.

<sup>924</sup> Abovitz, 'Why the United States Should Rethink Its Legal Approach to Internet Gambling', 438.

<sup>925</sup> Srephichet, 'Pirates of the Caribbean'.

<sup>926</sup> Abovitz, 'Why the United States Should Rethink Its Legal Approach to Internet Gambling'; Edward A. Morse, 'The Internet Gambling Conundrum: Extraterritorial Impacts of U.S. Laws on Internet Businesses', *Computer Law & Security Review* 23, no. 6 (January 2007): 530, <https://doi.org/10.1016/j.clsr.2007.09.007>.

<sup>927</sup> Banks, *Gambling, Crime and Society*, 77.

<sup>928</sup> Business Research Company (The), 'Online Gambling Global Market Report 2020-30: COVID-19 Growth and Change' (United States: Business Research Company (The), May 2020).

<sup>929</sup> Business Research Company (The).

<sup>930</sup> Banks, *Gambling, Crime and Society*; John L. McMullan and Aunshul Rege, 'Online Crime and Internet Gambling', *Journal of Gambling Issues* 0, no. 24 (1 July 2010): 54–85, <https://doi.org/10.4309/jgi.2010.24.5>.

Grenada, Isle of Man, Malta, Panama, St. Kitts and Nevis and the United Kingdom,<sup>931</sup> all of which have significant offshore financial and corporate services sectors. The two largest segments of the Internet gambling industry are sports betting, and Internet casinos, which respectively account for an estimated 45.8% and 20.9% of gross gambling yield.<sup>932</sup> Nonetheless, land-based casinos constitute the 12<sup>th</sup> largest global industry and account for 35% of global gambling revenues or an estimated US\$146 billion; lotteries account for 29% or US\$121 billion; sports betting, pari-mutuel racing and other forms of gambling 28% or US\$116 billion.<sup>933</sup> Against this commercial context, the proliferation of Internet gambling websites and the geographical transcendence of Internet gambling,<sup>934</sup> have called into question the practicability and legitimacy of the State's regulatory competence over transboundary phenomena conducted in cyberspace.<sup>935</sup> Internet gambling has therefore challenged the capacity of many States to effectively develop the legal, technological and regulatory frameworks to manage associated ML/TF risks and opportunities they present for organised criminal networks.<sup>936</sup>

### **6.3. The Convergence of Financial Technologies (FinTech), Cybercrimes and the Offshore Internet Gambling Sector: A ML/TF Risk Assessment**

Despite the ease of access to online gambling sites, research evidence has suggested the offshore Internet gambling sector is not inherently high risk for money laundering and terrorism financing.<sup>937</sup> Rather, it is the convergence of online gambling and betting services with innovations in financial technology (FinTech).<sup>938</sup> Encryption technologies

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<sup>931</sup> Banks, *Gambling, Crime and Society*.

<sup>932</sup> Banks.

<sup>933</sup> Banks, 77.

<sup>934</sup> Morse, 'The Internet Gambling Conundrum'.

<sup>935</sup> Fletcher N. Baldwin, 'The Financing of Terror in the Age of the Internet: Wilful Blindness, Greed or a Political Statement?', *Journal of Money Laundering Control*; London 8, no. 2 (December 2004): 127–58; David R. Johnson and David Post, 'Law and Borders--The Rise of Law in Cyberspace Symposium: Surveying Law and Borders', *Stanford Law Review* 48 (1996 1995): 1367–1402.

<sup>936</sup> Banks, *Gambling, Crime and Society*.

<sup>937</sup> Banks.

<sup>938</sup> Banks; Danton Byrans and Franne J. Anema, 'Bitcoin and Money Laundering: Mining for an Effective Solution', in *The Money Laundering Market: Regulating the Criminal Economy*, ed. Killian J. McCarthy (Newcastle upon Tyne, UK: Agenda Publishing, 2018); Ana Alina Dumitrache and Georgeta Modiga, 'New Trends and Perspectives in the Money Laundering Process', *Challenges of the*

and the emergence of new payment methods (NPMs) and virtual currencies, which enabled instantaneous and anonymous transactions are thought to have increased ML/TF risks in the sector.<sup>939</sup> Since the 1980s, terrorist and organised clandestine networks have relied heavily on cash transactions, currency smuggling, the use of money mules and the laundering of the proceeds of drug trafficking through financial and non-bank financial institutions.<sup>940</sup> However, to overcome the regulatory and law enforcement barriers to moving and laundering large volumes of illicit cash proceeds internationally, they are increasingly exploiting virtual currencies and new payment methods (NPMs) that do not require any personally identifiable information, to obfuscate any trail of money laundering activities.<sup>941</sup> With the growing popularity of Bitcoins and other virtual currencies being tendered on Internet gambling websites,<sup>942</sup> the sector is gradually being viewed as vulnerable to money laundering and terrorist financing. There are conflicting accounts, however, as to the degree of threats supposedly posed by Internet gambling websites.

It has been pointed out that there was little evidence that Internet gambling websites posed a significant threat of laundering funds to finance terrorism, as there had only been one recorded case.<sup>943</sup> Moreover, the Quran has unequivocally proscribed gambling

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*Knowledge Society* 1, no. (2011): 50–57; John Hunt, ‘The New Frontier of Money Laundering: How Terrorist Organizations Use Cyberlaundering to Fund Their Activities, and How Governments Are Trying to Stop Them’, *Information & Communications Technology Law* 20, no. 2 (1 June 2011): 133–52, <https://doi.org/10.1080/13600834.2011.578933>; Tropina, ‘Fighting Money Laundering in the Age of Online Banking, Virtual Currencies and Internet Gambling’.

<sup>939</sup> Banks, *Gambling, Crime and Society*; Byrans and Anema, ‘Bitcoin and Money Laundering: Mining for an Effective Solution’; Dumitrache and Modiga, ‘New Trends and Perspectives in the Money Laundering Process’; Tropina, ‘Fighting Money Laundering in the Age of Online Banking, Virtual Currencies and Internet Gambling’.

<sup>940</sup> Anonymous, ‘Money Laundering Online’; European Union Agency for Law Enforcement Cooperation (Europol), ‘Internet Organised Crime Threat Assessment’ (The Hague, The Netherlands: Europol, 2018), <https://www.europol.europa.eu/internet-organised-crime-threat-assessment-2018>; Financial Action Task Force, ‘Money Laundering through the Physical Transport of Cash’ (Paris, France: FATF/OECD Secretariat, 2015), <http://www.fatf-gafi.org/media/fatf/documents/reports/money-laundering-through-transportation-cash.pdf>; He Ping, ‘New Trends in Money Laundering - from the Real World to Cyberspace’, *Journal of Money Laundering Control* 8, no. 1 (1 January 2004): 48–55, <https://doi.org/10.1108/13685200510621253>.

<sup>941</sup> Banks, *Gambling, Crime and Society*; Byrans and Anema, ‘Bitcoin and Money Laundering: Mining for an Effective Solution’; Tropina, ‘Fighting Money Laundering in the Age of Online Banking, Virtual Currencies and Internet Gambling’.

<sup>942</sup> Verschuuren, ‘Money Laundering, Sports Betting and Gambling’.

<sup>943</sup> Sparrow Malcolm, Bazelon Coleman, and Charles Jackson, ‘Can Internet Gambling Be Effectively Regulated? Managing the Risks’ (Cambridge, Massachusetts: Brattle Group, December 2009).

(‘maysir’).<sup>944</sup> An investigation into the security threat of money laundering in the EU’s online gambling sector, based on interviews with industry representatives, found that while money launders could potentially exploit some regulatory gaps, “the risks associated with the sector were comparatively modest, due to the high traceability of e-gaming transactions and customer identification controls in the regulated sector.”<sup>945</sup> For instance, attention was drawn to the fact that Internet gambling operators often collected important data on IP addresses and transactional patterns for wagering and betting.<sup>946</sup> This, it has been maintained, has had putative value for developing risk profiles of gamblers.<sup>947</sup> Additionally, advanced machine learning tools have been used to develop predictive modelling techniques for risk assessments and mapping customers to ‘hotlists’ that flag criminal and terrorist networks as well as corrupt politically exposed persons (PEPs) and their associates.<sup>948</sup>

Nonetheless, Europol has insisted that Internet gambling websites featured in money laundering techniques.<sup>949</sup> Interestingly, however, the Council of Europe highlighted in 2013 that private studies conducted on the issue have suggested that ML/TF risks associated with regulated Internet gambling were low.<sup>950</sup> It further doubted the sector would be a priority option for money launders and terrorist financiers.<sup>951</sup> The argument advanced in this regard was that the know your customers (KYC) AML requirements and the high traceability of financial transactions in the regulated Internet gambling sector had disincentivised would-be money launderers.<sup>952</sup> More recently, such platforms were also reportedly used for terrorist fundraising.<sup>953</sup>

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<sup>944</sup> Franz Rosenthal, *Man versus Society in Medieval Islam*, ed. Dimitri Gutas, vol. 7, Brill Classics in Islam (Leiden, The Netherlands: Brill, 2014).

<sup>945</sup> Levi, ‘E-Gaming and Money Laundering Risks’, 1.

<sup>946</sup> Levi, ‘E-Gaming and Money Laundering Risks’.

<sup>947</sup> Levi.

<sup>948</sup> Levi.

<sup>949</sup> European Union Agency for Law Enforcement Cooperation (Europol), ‘Internet Organised Crime Threat Assessment’.

<sup>950</sup> MONEYVAL, ‘Typologies Report on Laundering the Proceeds of Organised Crime’ (Brussels, Belgium: Council of Europe, Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism, April 2013), <https://rm.coe.int/research-report-the-use-of-online-gambling-for-money-laundering-and-th/168071509c>.

<sup>951</sup> MONEYVAL.

<sup>952</sup> Banks, *Gambling, Crime and Society*; Levi, ‘E-Gaming and Money Laundering Risks’.

<sup>953</sup> Banks, *Gambling, Crime and Society*; European Union Agency for Law Enforcement Cooperation (Europol), ‘Internet Organised Crime Threat Assessment’.

Another major source of perceived ML/TF vulnerability associated with Internet gambling is the convergence of cybercrimes and money laundering activities. Several Internet gambling operators were victimised by cyber-extortionists.<sup>954</sup> They have also been victims and perpetrators of fraud, international phishing schemes, identity-theft, scams, and money laundering operations.<sup>955</sup> Hackers, cybernomads (i.e., lone cybercriminals) and dot.com teams (i.e., informal networks of cybercriminals) have colluded with gambling insiders such as software developers and employees of Internet gambling operations to launder illicit proceeds.<sup>956</sup>

Additionally, ‘botnets herders’ associated with organised criminal groups have used bots to fraudulently wager, select cards and fold in online casino games.<sup>957</sup> A bot is an autonomously running malicious programme on a machine used to compromise information security, while a botnet is a collection of such remotely controlled compromised machines on a computer network.<sup>958</sup> Furthermore, they have been used to deposit illicit proceeds into accounts of fake Internet gambling customers who then deliberately lose to their associates in online poker and casino rooms (i.e. ‘chip dumping’), then transfer winnings through a network of accounts to layer or conceal the trail of illicit proceeds.<sup>959</sup> Illustratively, between 1998 and 2005, the US Department of Justice reported that botnets were used to launder money using offshore Internet gambling websites by appropriating US online gamblers’ bets, transferred the illegal funds to shell companies, then to offshore accounts in Caribbean jurisdictions.<sup>960</sup>

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<sup>954</sup> McMullan and Rege, ‘Online Crime and Internet Gambling’.

<sup>955</sup> McMullan and Rege.

<sup>956</sup> McMullan and Rege.

<sup>957</sup> McMullan and Rege, 336; David Sullivan, ‘Botnets Meet Ocean’s Eleven: Scamming Online Gambling. Retrieved From’, 2007, [http://www.realtime-websecurity.com/articles\\_and\\_analysis/2007/10/botnets\\_meet\\_oceans\\_eleven\\_sca.html](http://www.realtime-websecurity.com/articles_and_analysis/2007/10/botnets_meet_oceans_eleven_sca.html).

<sup>958</sup> Claire Elliott, ‘Botnets: To What Extent Are They a Threat to Information Security?’, *Information Security Technical Report*, Computer Crime - A 2011 Update, 15, no. 3 (1 August 2010): 79–103, <https://doi.org/10.1016/j.istr.2010.11.003>.

<sup>959</sup> McMullan and Rege (n 568); Sullivan (n 591).

<sup>960</sup> McMullan and Rege, ‘Online Crime and Internet Gambling’.

### 6.3.1. Virtual Assets, Virtual Service Providers and Cyber-laundering: Emerging Threats in the Internet Gambling Sector

Money laundering has historically been geared towards disguising or concealing the true nature, location, source, ownership, or control of the profits of largely cash-intensive crimes. However, although the value of virtual assets (VAs) detected in ML/TF cases has been comparatively small in relation to the misuse of traditional financial services and products, VAs have been shown to be misused to raise funds to support terrorism.<sup>961</sup> The FATF defines a VA as “a digital representation of value that can be digitally traded, or transferred, or used for payment or investment purposes.”<sup>962</sup> This excludes digital representations of fiat currencies, securities and other financial assets that are already covered elsewhere in the FATF Recommendations. VASPs are any legal or natural person who engages in the business of exchanges between VAs and fiat currencies or among VAs; transfers of VAs; the safeguarding and/or administration of VAs; enables control of VAs; or participates in or provides financial services linked to an issuer’s offer and/or sale of VAs.<sup>963</sup> Outside the Commonwealth Caribbean, there is anecdotal evidence that virtual assets (VAs) are being used to launder illicit proceeds, through complex multijurisdictional transactions and channels including online gambling platforms. Illustratively, investigations stemming from a STR filed by a VASP relating to high value VA transactions, subsequently revealed purchases on a darknet, online betting activities, peer-to-peer transactions, and ‘mixing’ of VAs.<sup>964</sup> The account holder’s funds had been deposited by individuals from jurisdictions in Asia and Europe (Italy) who had bought bitcoins in cash, as well as from individuals in Africa and the Middle East. Funds were used for online gambling then withdrawn in cash from ATMs in Italy.<sup>965</sup> Such criminal

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<sup>961</sup> Financial Action Task Force, ‘12-Month Review of the Revised FATF Standards on Virtual Assets and Virtual Asset Service Providers’ (Paris, France: FATF/OECD Secretariat, June 2020), 6, <http://www.fatf-gafi.org/media/fatf/documents/recommendations/12-Month-Review-Revised-FATF-Standards-Virtual-Assets-VASPS.pdf>.

<sup>962</sup> Financial Action Task Force, ‘International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations’, 126.

<sup>963</sup> Financial Action Task Force, 127.

<sup>964</sup> Financial Action Task Force, ‘Virtual Assets Red Flag Indicators of Money Laundering and Terrorist Financing’ (Paris, France: FATF/OECD Secretariat, September 2020), 13, <http://www.fatf-gafi.org/media/fatf/documents/recommendations/Virtual-Assets-Red-Flag-Indicators.pdf>.

<sup>965</sup> Financial Action Task Force, 13–14.

abuse of anonymity-enhanced cryptocurrencies (AECs) to fund criminal activities and launder illicit proceeds is reportedly increasing.<sup>966</sup> Bitcoins, the most popular cryptocurrency, are digitally encrypted tokens which are usually traded over decentralised peer-to-peer global networks.<sup>967</sup> That is, a “chain of digital signatures recorded by a distributed time-stamp server in cryptographically secure ledger called the Block Chain.”<sup>968</sup> Cryptocurrencies may afford complete anonymity to users, circumventing preventative AML/CFT measures associated with cash transactions and wire transfers.<sup>969</sup> Cryptocurrencies have also made the money laundering process more efficient. Usefully recall that money laundering usually occurs in three stages- placement, layering and integration.<sup>970</sup>

In the placement stage, illicit proceeds are introduced into the formal financial system, often by structuring transactions to avoid suspicion of larger transfers above reporting thresholds, smuggling across border (cash), purchasing foreign exchange or even gambling.<sup>971</sup> However, placing large volumes of illicit cash proceeds into the financial system has been frustrated by AML/CFT compliance and risk management measures.<sup>972</sup> Gatekeepers in the banking sector and financial intermediaries are now required to assess and disclose money laundering risks to regulatory and law enforcement authorities.<sup>973</sup> With respect to cryptocurrencies, in the placement stage, illicit funds could be indirectly entered into the legitimate financial system by purchasing virtual currencies,

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<sup>966</sup> European Union Agency for Law Enforcement Cooperation (Europol), ‘Internet Organised Crime Threat Assessment’.

<sup>967</sup> Malcolm Campbell-Verduyn, ‘Bitcoin, Crypto-Coins, and Global Anti-Money Laundering Governance’, *Crime, Law and Social Change* 69, no. 2 (1 March 2018): 283–305, <https://doi.org/10.1007/s10611-017-9756-5>.

<sup>968</sup> Isaac Pflaum and Emmeline Hateley, ‘A Bit of a Problem: National and Extraterritorial Regulation of Virtual Currency in the Age of Financial Disintermediation’, *Georgetown Journal of International Law* 45, no. 4 (2014 2013): 1174.

<sup>969</sup> Campbell-Verduyn, ‘Bitcoin, Crypto-Coins, and Global Anti-Money Laundering Governance’; Andres Rueda, ‘The Implications of Strong Encryption Technology on Money Laundering’, *Albany Law Journal of Science & Technology* 12, no. 1 (2002 2001): 1–96.

<sup>970</sup> Dennis Cox, *Handbook of Anti-Money Laundering* (Chichester, West Sussex, United Kingdom: Wiley, 2014).

<sup>971</sup> Guiora and Field, ‘Using and Abusing the Financial Markets’; Hinterseer, *Criminal Finance*; Simon Planzer, ‘Anti-Money Laundering and Online Gambling: Guidance on How to Implement Broad and Indistinct AML Notions in Regulatory Practice’, *SSRN Electronic Journal*, 2017, <https://doi.org/10.2139/ssrn.3048303>; Rider, ‘The Crusade against Money Laundering - Time to Think’.

<sup>972</sup> Simser, ‘Money Laundering’.

<sup>973</sup> Simser.

from unregulated issuers.<sup>974</sup> Additionally, it is a decentralised network of users that certifies transactions, instead of centralised and regulated institutions such as commercial banks that often function as ‘choke points’ for illicit proceeds entering the financial system.<sup>975</sup> Consequently, crypto-transactions are not subjected to AML/CFT measures such as CDD, KYC, suspicious transactions reports and would immediately conceal the origins of illicit proceeds, as seemingly legitimate and untraceable electronic money.<sup>976</sup> Placement has become particularly easy since e-money is becoming commodity-backed digital currencies (e.g. gold), which are commonly traded to end-users by third party exchange agents, for cash or by wire-transfers.<sup>977</sup> Money launderers are also using cryptocurrencies directly in their operations and exploiting emerging decentralised exchanges and coin mixing for enhanced anonymity.<sup>978</sup> Furthermore, by design, the complex mathematical scrambling technique used in cryptographic blockchain makes it difficult to link crypto-transactions to personally identifiable information of users,<sup>979</sup> and therefore, for law enforcement authorities to monitor transactions. Moreover, as online criminal markets grow, such as illicit trade arms and drugs on the dark web and other emerging platforms using cryptocurrencies,<sup>980</sup> the demand for online activities, such as Internet gambling, through which to launder illicit proceeds may also increase.

In the layering stage, any audit trail of the illicit proceeds is obscured from its source.<sup>981</sup> Layering may use complex, cross-border transactions and accounts for which beneficial ownership may be hidden, or multiple electronic fund transfers, real estate

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<sup>974</sup> Baldwin, ‘The Financing of Terror in the Age of the Internet’; Kim-kwang Raymond Choo et al., ‘The Future of Technology-Enabled Crime in Australia’, *Trends & Issues in Crime and Criminal Justice*, 2007, 1–6; Rueda, ‘The Implications of Strong Encryption Technology on Money Laundering’.

<sup>975</sup> Campbell-Verduyn, ‘Bitcoin, Crypto-Coins, and Global Anti-Money Laundering Governance’; Hunt, ‘The New Frontier of Money Laundering’; Rueda, ‘The Implications of Strong Encryption Technology on Money Laundering’.

<sup>976</sup> Baldwin, ‘The Financing of Terror in the Age of the Internet’; Choo et al., ‘The Future of Technology-Enabled Crime in Australia’; Rueda, ‘The Implications of Strong Encryption Technology on Money Laundering’.

<sup>977</sup> Simser, ‘Money Laundering’.

<sup>978</sup> European Union Agency for Law Enforcement Cooperation (Europol), ‘Internet Organised Crime Threat Assessment’.

<sup>979</sup> Campbell-Verduyn, ‘Bitcoin, Crypto-Coins, and Global Anti-Money Laundering Governance’.

<sup>980</sup> European Union Agency for Law Enforcement Cooperation (Europol), ‘Internet Organised Crime Threat Assessment’.

<sup>981</sup> Guiora and Field, ‘Using and Abusing the Financial Markets’; Hinterseer, *Criminal Finance*; Planzer, ‘Anti-Money Laundering and Online Gambling’; Rider, ‘The Crusade against Money Laundering - Time to Think’.

purchases, investments, life insurance policies and trading of luxury goods.<sup>982</sup> VAs have mostly been used for layering, presumably due to the rapidity of exchanges.<sup>983</sup> Cryptocurrencies expedite the layering process by instantaneously routing large volumes of illicit proceeds through multiple transactions or across multiple jurisdictional boundaries, anonymously.<sup>984</sup> In the online gambling world, money launderers may conduct multiple small transactions to avoid detection and then request repayment from offshore Internet casinos and websites, including through the use of the deposit accounts of ‘money mules’ to obscure the illicit money trail.<sup>985</sup> These instantaneous transmissions of funds, with almost complete anonymity of computer users, have undermined the investigation and prosecution of ML/TF offences.<sup>986</sup> Cyber money mules have emerged as new money laundering actors, and are using cryptocurrency tumblers and mixing services providers to obscure their crypto-transactions.<sup>987</sup>

In the integration stage, the ‘laundered’ proceeds are returned to the launderer as legitimate assets and fully assimilated into the formal financial system.<sup>988</sup> Internet gambling operators often permit their customers to credit winnings or unused funds to third party bank accounts not used for wagering or transfer funds from ‘brick and mortar’ gambling establishments to online gambling platforms.<sup>989</sup> These transactional practices make layering more efficient insofar as they bypass CDD requirements.<sup>990</sup> Cryptocurrency exchangers have facilitated the integration of crypto-funds into the regulated financial system and are being increasingly targeted by law enforcement.<sup>991</sup>

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<sup>982</sup> Guiora and Field, ‘Using and Abusing the Financial Markets’; Hinterseer, *Criminal Finance*; Planzer, ‘Anti-Money Laundering and Online Gambling’; Rider, ‘The Crusade against Money Laundering - Time to Think’.

<sup>983</sup> Financial Action Task Force, ‘12-Month Review of the Revised FATF Standards on Virtual Assets and Virtual Asset Service Providers’.

<sup>984</sup> Rueda, ‘The Implications of Strong Encryption Technology on Money Laundering’.

<sup>985</sup> Banks, *Gambling, Crime and Society*; Choo et al., ‘The Future of Technology-Enabled Crime in Australia’.

<sup>986</sup> Baldwin, ‘The Financing of Terror in the Age of the Internet’.

<sup>987</sup> European Union Agency for Law Enforcement Cooperation (Europol), ‘Internet Organised Crime Threat Assessment’.

<sup>988</sup> Guiora and Field, ‘Using and Abusing the Financial Markets’; Hinterseer, *Criminal Finance*; Planzer, ‘Anti-Money Laundering and Online Gambling’; Rider, ‘The Crusade against Money Laundering - Time to Think’.

<sup>989</sup> Banks, *Gambling, Crime and Society*; Levi, ‘E-Gaming and Money Laundering Risks’; Mcmillen and Grabosky, ‘Internet Gambling’.

<sup>990</sup> Banks, *Gambling, Crime and Society*; Levi, ‘E-Gaming and Money Laundering Risks’; Mcmillen and Grabosky, ‘Internet Gambling’.

<sup>991</sup> European Union Agency for Law Enforcement Cooperation (Europol), ‘Internet Organised Crime Threat Assessment’.

They often employ ‘swappers’ or semi-automated exchange techniques that do not require KYC procedures and allow exchanges between fiat and cryptocurrencies or among cryptocurrencies.<sup>992</sup> Moreover, winnings are usually paid by cheques by offshore gambling service providers.<sup>993</sup> In practice, however, little empirical evidence has been furnished to support concerns about the prevalent misuse of cryptocurrencies for money laundering and terrorist financing.<sup>994</sup>

### **6.3.2. New Payment Methods and Cyber-Laundering: Emerging Threats in the Offshore Internet Gambling Sector**

The transnational AML/CFT system developed around the surveillance of banks and other traditional financial institutions, which are now heavily regulated by the FATF Forty Recommendations. In consequence, there is an emerging tendency to disguise illicit proceeds using new payment methods.<sup>995</sup> Alternative electronic fund transfer systems, including on online gambling websites are also being used.<sup>996</sup> Stored value cards (SVCs) and interactive payment platforms have featured prominently in AML/CFT risk assessments and can be used for funding Internet gambling accounts. SVCs often contain pre-paid electronic cash, accessible at points of sale or withdrawal terminals.<sup>997</sup> They are not considered monetary instruments as they have no inherent value but allow access to pooled funds.<sup>998</sup> SVCs need not be declared to customs officials if being transported across jurisdictional borders; and law enforcement authorities would be unable to determine the stored value or seize the laundered funds on the card.<sup>999</sup>

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<sup>992</sup> European Union Agency for Law Enforcement Cooperation (Europol).

<sup>993</sup> Simser, ‘Money Laundering’.

<sup>994</sup> Campbell-Verduyn, ‘Bitcoin, Crypto-Coins, and Global Anti-Money Laundering Governance’.

<sup>995</sup> European Union Agency for Law Enforcement Cooperation (Europol), ‘Internet Organised Crime Threat Assessment’; Financial Action Task Force, ‘Money Laundering Using New Payment Methods’ (Paris, France: FATF/OECD Secretariat, 2010), <http://www.fatf-gafi.org/media/fatf/documents/reports/ML%20using%20New%20Payment%20Methods.pdf>; Simser, ‘Money Laundering’.

<sup>996</sup> Gainsbury and Wood, ‘Internet Gambling Policy in Critical Comparative Perspective’.

<sup>997</sup> Baldwin, ‘The Financing of Terror in the Age of the Internet’.

<sup>998</sup> Simser, ‘Money Laundering’.

<sup>999</sup> Simser.

In the case of cyber-laundering, the funds on SVCs are usually ‘placed’ in, or uploaded to, cyberspace using under-regulated online banks and financial intermediaries.<sup>1000</sup> SVCs have no in-built systems of customer identification and thereby offer anonymity.<sup>1001</sup> Moreover, as micro-chipped cards with electronic monetary values, their nature allows for instantaneous transactions worldwide.<sup>1002</sup> Thus, they could transport large volumes of illicit proceeds transnationally without detection by custom officials.<sup>1003</sup> On these accounts SVCs bypass many AML/CFT preventative regulatory standards. With respect to interactive payment platforms, these were initially developed to facilitate greater online transactions and financial inclusion of unbanked or underbanked sections of the population, by reducing transaction costs.<sup>1004</sup> Platforms such as ‘MobillCash’, for instance, require no personally identifiable information or registration, save for a mobile number.<sup>1005</sup> These NPMs are therefore vulnerable to exploitation by money launderers and can be used to fund e-wallets on Internet gambling platforms.

The FATF reported the detection of money laundering and terrorist financing using NPMs, such as prepaid cards and internet payment systems, based on analysis of thirty-three (33) case studies.<sup>1006</sup> In some cases, the amounts laundered were in excess of US\$1 million.<sup>1007</sup> The anonymity afforded by prepaid cards, which need not be linked to personally identifiable information and their ability to be customised using fake or stolen identities or nominees to circumvent AML/CFT and CDD measures have been emphasised as key ML/TF vulnerabilities.<sup>1008</sup> The high negotiability of prepaid cards and global accessibility at ATMs have also made them particularly vulnerable to ML/TF.<sup>1009</sup> The ML/TF risks have been found to be higher where NPM services are offered jointly by digital currency providers, card programme managers and other third parties that are

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<sup>1000</sup> Baldwin, ‘The Financing of Terror in the Age of the Internet’.

<sup>1001</sup> Baldwin.

<sup>1002</sup> Baldwin.

<sup>1003</sup> Baldwin.

<sup>1004</sup> Pflaum and Hateley, ‘A Bit of a Problem’; Sally Ramage, ‘Information Technology Facilitating Money Laundering’, *Information & Communications Technology Law* 21, no. 3 (October 2012): 269–82, <https://doi.org/10.1080/13600834.2012.744226>; Simser, ‘Money Laundering’.

<sup>1005</sup> Ramage, ‘Information Technology Facilitating Money Laundering’.

<sup>1006</sup> Financial Action Task Force, ‘Money Laundering Using New Payment Methods’.

<sup>1007</sup> Financial Action Task Force.

<sup>1008</sup> Financial Action Task Force.

<sup>1009</sup> Financial Action Task Force.

not adequately regulated by AML/CFT regulation and supervision.<sup>1010</sup> This is particularly concerning since Internet gamblers may act as ‘money mules’, allowing criminals to use their online gambling accounts for nefarious purposes.<sup>1011</sup> As has been demonstrated, there is little empirical evidence, and a dearth of scholarship, on ML/TF activities related to the misuse of Internet gambling platform in the Caribbean. However, pursuant to the FATF’s risk-based approach (RBA), the conceptualisation of ML/TF risks may have had more unintended consequences for the sovereign regulatory authority of small jurisdictions in the region that license offshore Internet gambling operators, than anticipated.

### 6.3.3. Observations on ML/TF Risk Assessment of the Internet Gambling Sector in the Commonwealth Caribbean

The 2003 revision of the FATF’s Forty Recommendations introduced a risk-based approach (RBA) for national risk assessments (NRAs) of technical compliance with international AML/CFT standards.<sup>1012</sup> Pursuant to the RBA approach formulated in Recommendation No.1, the FATF Methodology (2013-2019) has required countries to identify and assess relevant ML/TF risks and align AML/CFT measures and resources in a manner “commensurate with the risks identified.”<sup>1013</sup> This differs from the rules-based approach that required regulated sectors and professions to comply with all international AML/CFT rules, assess implementation gaps, and make regulatory adjustments reinforced by sanctions.<sup>1014</sup> However, under the RBA, assessments of higher risk would

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<sup>1010</sup> Financial Action Task Force.

<sup>1011</sup> Banks, *Gambling, Crime and Society*.

<sup>1012</sup> Campbell-Verduyn, ‘Bitcoin, Crypto-Coins, and Global Anti-Money Laundering Governance’; Louis de Koker, ‘Identifying and Managing Low Money Laundering Risk: Perspectives on FATF’s Risk-Based Guidance’, *Journal of Financial Crime; London* 16, no. 4 (2009): 334–52, <http://dx.doi.org/10.1108/13590790910993717>; Ernesto Ugo Savona and Michele Riccardi, ‘Assessing the Risk of Money Laundering: Research Challenges and Implications for Practitioners’, *European Journal on Criminal Policy and Research* 25, no. 1 (1 March 2019): 1–4, <https://doi.org/10.1007/s10610-019-09409-3>; Anna Simonova, ‘The Risk-Based Approach to Anti-Money Laundering: Problems and Solutions’, *Journal of Money Laundering Control; London* 14, no. 4 (2011): 346–58, <http://dx.doi.org/10.1108/13685201111173820>.

<sup>1013</sup> Financial Action Task Force, ‘International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations’.

<sup>1014</sup> Lishan Ai, ‘“Rule-Based but Risk-Oriented” Approach for Combating Money Laundering in Chinese Financial Sectors’, *Journal of Money Laundering Control; London* 15, no. 2 (2012): 198–209,

require enhanced AML/CFT measures and lower risks more simplified preventative measures.<sup>1015</sup>

Since Internet gambling operators, like those of ‘brick and mortar’ casinos, would qualify as DNFBPs, they would be required to comply with those AML/CFT standards that align with identified and assessed ML/TF risks distributed across their products, clients and transactions. In resolving the divergences between the legitimacy of externally perceived ML/TF risks associated with the Caribbean’s offshore Internet gambling sector and its own internal assessments of those risks, both conceptual and empirical issues arise, which have impinged on the sovereignty of the region’s constituent small States that are involved in the sector.

From a conceptual standpoint, there has been little academic engagement with the notion of ML/TF risks, despite being the cornerstone of the transnational AML/CFT regulatory discourse.<sup>1016</sup> Resultantly, theoretical and methodological frameworks developed and the empirical evidence they produce of risk assessments have been decidedly weak and subjective.<sup>1017</sup> Illustratively, the FATF Methodology (2013) has used the concepts of threats, vulnerabilities, and consequences in assessing ML/TF risks, but did not define the concept of risk.<sup>1018</sup> The FATF merely stipulated that risk was a function of threats, vulnerabilities and consequences. Threats relate to the environment in which predicate offences and illicit proceeds are generated.<sup>1019</sup> They have been taken to denote actors (e.g. criminal and terrorist groups and their facilitators) and activities (e.g. predicate crimes such as drug trafficking, fraud and corruption).<sup>1020</sup> Vulnerabilities have

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<http://dx.doi.org/10.1108/13685201211218225>; de Koker, ‘Identifying and Managing Low Money Laundering Risk’; Matt Hopkins and Nikki Shelton, ‘Identifying Money Laundering Risk in the United Kingdom: Observations from National Risk Assessments and a Proposed Alternative Methodology’, *European Journal on Criminal Policy and Research* 25, no. 1 (1 March 2019): 63–82, <https://doi.org/10.1007/s10610-018-9390-5>.

<sup>1015</sup> Savona and Riccardi, ‘Assessing the Risk of Money Laundering’; Simonova, ‘The Risk-Based Approach to Anti-Money Laundering’.

<sup>1016</sup> Savona and Riccardi, ‘Assessing the Risk of Money Laundering’.

<sup>1017</sup> Hopkins and Shelton, ‘Identifying Money Laundering Risk in the United Kingdom’; Savona and Riccardi, ‘Assessing the Risk of Money Laundering’.

<sup>1018</sup> de Koker, ‘Identifying and Managing Low Money Laundering Risk’; Joras Ferwerda and Edward R. Kleemans, ‘Estimating Money Laundering Risks: An Application to Business Sectors in the Netherlands’, *European Journal on Criminal Policy and Research* 25, no. 1 (1 March 2019): 45–62, <https://doi.org/10.1007/s10610-018-9391-4>; Joras Ferwerda and Peter Reuter, ‘Learning from Money Laundering National Risk Assessments: The Case of Italy and Switzerland’, *European Journal on Criminal Policy and Research* 25, no. 1 (1 March 2019): 5–20, <https://doi.org/10.1007/s10610-018-9395-0>; Savona and Riccardi, ‘Assessing the Risk of Money Laundering’.

<sup>1019</sup> Financial Action Task Force, ‘Financial Action Task Force Methodology (2013-2019)’.

<sup>1020</sup> Financial Action Task Force.

been taken to mean the characteristics of a sector or country that attract ML/TF or may be exploited by threats/actors, including the robustness of AML/CFT preventative regulatory frameworks and NPMs, products and services within a business sector.<sup>1021</sup> Consequences denote the impact of, or harm caused by, ML/TF activities, including on national economic interests and reputation.<sup>1022</sup>

With respect to the domestic conceptualisation of ML/TF risks in NRAs, there is no available crime data or evidence establishing that domestic organised crime or terrorist groups and corrupt PEPs in the Caribbean are using crypto-currencies or NPMs for money laundering and terrorism financing using Internet gambling platforms. As the Caribbean's biggest Internet gambling sector, Antigua and Barbuda has only eight internet gambling and sport wagering operators licensed in its jurisdiction.<sup>1023</sup> Pursuant to the Interactive Gaming and Interactive Wager Regulation 2007, operators are subjected to 'fit and proper' test.<sup>1024</sup> Antigua and Barbuda's most recent Mutual Evaluation Report (2018), confirmed that prior to their licensing, beneficial owners, officers and other key individuals associated with Internet gambling operations are subjected to "strict probity and due diligence assessment" by an independent third-party service provider.<sup>1025</sup> This suggests that the sector may not be as vulnerable as perceived externally. Moreover, even in more developed financial and FinTech markets, the limited usability of cryptocurrencies, limited supply and therefore volatile value due to demand and speculation, have led to the conclusion that the purported ML/TF risks associated with cryptocurrencies are exaggerated.<sup>1026</sup> In the United Kingdom, such money laundering risks were found to be low.<sup>1027</sup> If the nationally assessed threat and vulnerability levels of the sector are both low in the Caribbean, then it would stand to reason that the ML/TF risks associated with the sector are also likely to be low. However, even in low-risk

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<sup>1021</sup> Financial Action Task Force.

<sup>1022</sup> Financial Action Task Force.

<sup>1023</sup> Caribbean Financial Action Task Force, 'Anti-Money Laundering and Counter-Terrorist Financing Measures: Antigua and Barbuda Mutual Evaluation Report' (Port-of-Spain, Trinidad & Tobago: Caribbean Financial Action Task Force, July 2018), <https://cfatf-gafic.org/documents/4th-round-meal-reports/10083-antigua-and-barbuda-4th-round-mer/file>.

<sup>1024</sup> Caribbean Financial Action Task Force.

<sup>1025</sup> Caribbean Financial Action Task Force, 121.

<sup>1026</sup> Campbell-Verduyn, 'Bitcoin, Crypto-Coins, and Global Anti-Money Laundering Governance'.

<sup>1027</sup> Her Majesty Treasury/Home Office, 'UK National Risk Assessment of Money Laundering and Terrorist Financing', 2015, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/468210/UK\\_NRA\\_October\\_2015\\_final\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/468210/UK_NRA_October_2015_final_web.pdf).

scenarios within the sector, hefty compliance costs are still incurred given the fact that AML/CFT national risk assessments (NRAs) and sectoral regulatory methodologies for CDD increasingly require sophisticated expertise in machine-learning and artificial intelligence.<sup>1028</sup>

As regards the external conceptualisation of ML/TF risks in the Caribbean, the United States has unilaterally conceptualised vulnerability to ML/TF risks in the Caribbean with respect to purely structural features of the economic sectors. For instance, in 2019 the US Department of State noted that the Bahamas' 'vulnerability' stemmed from the concentration of financial services companies in its jurisdiction, and the high volume of cross-border asset transactions facilitated by the sector.<sup>1029</sup> Additionally, it questioned the low number of suspicious transaction reports (STRs) filed based on the size of its IFCs,<sup>1030</sup> without contrary evidence of suspicious transactions. Yet it also recognised that in 2018 the Bahamas enacted the Financial Transactions Reporting Act to strengthen KYC rules, STR procedures, risk assessment obligations for financial and DNFBPs and CDD for beneficial owners and PEPs.<sup>1031</sup> Moreover, the United States would likely view Caribbean jurisdictions that license offshore Internet gambling operators as vulnerable since under US anti-gambling laws, all revenue generated from American Internet gamblers would constitute the proceeds of crime. This could be used as a pre-text for further stigmatising Caribbean jurisdictions and extraterritorially applying its anti-gambling and AML/CFT laws to regulate the sector, at the expense of regulatory capacity of Caribbean small States.

From an empirical standpoint, crypto-markets in the Caribbean are underdeveloped. To the author's knowledge, there is no reported empirical evidence of crypto-currency dealers operating as professional enablers of criminal or terrorist groups laundering money through the Caribbean's offshore Internet gambling and wager sector. Again, both ML/TF threat and vulnerability levels are low. Furthermore, the conversion of cryptocurrencies used in Internet gambling to disguise illicit proceeds to fiat currencies is likely to take place in onshore financial capitals. Additionally, the perceived low risk

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<sup>1028</sup> Savona and Riccardi, 'Assessing the Risk of Money Laundering'.

<sup>1029</sup> United States Department of States, 'International Narcotics Control Strategy Report (Vol.2)- Money Laundering'.

<sup>1030</sup> United States Department of States.

<sup>1031</sup> United States Department of States.

of ML/TF using Internet gambling could also be attributed to the issue of scalability of ML/TF operations. That is, given the large volume of illicit proceeds generated by organised crimes, it would be more worthwhile for criminal enterprises and terrorist networks to establish Internet gambling operations to launder money than laundering as mere bettors. For instance, the setting-up of companies offering services payable over the Internet is a known money laundering mechanism.<sup>1032</sup> Such operators would use their own services, pay for them using credit or debit cards often linked to offshore accounts containing criminal proceeds.<sup>1033</sup> The operators would then invoice the financial institutions that issued the cards and the transferred payments for services procured would then appear as legitimate revenue.<sup>1034</sup> The US Department of Justice reported that shell companies were used to set up an illegal casino-style Internet gambling website by the Giordano family in the United States.<sup>1035</sup> These were then used to move illicit proceeds from sport wagers by over 40,000 customers through shell companies and bank accounts in the Caribbean, Central America, Switzerland and Hong Kong.<sup>1036</sup> Strides made by Caribbean jurisdictions to strengthen their AML/CFT regulatory regimes are well-recognised.<sup>1037</sup> It would stand to reason that ‘fit and proper’ tests and other due diligence requirements for licensing would-be Internet gambling proprietors as DNFBPs are sufficiently robust to determine potential misuse of remote gambling operations by organised crime and terrorist networks.

To summarise, this section was highlighted that external concerns about ML/TF risks associated with VAs and the Internet gambling in the Commonwealth Caribbean have not been empirically supported. Both conceptual and empirical questions were raised, from a cost-benefit perspective, about the external conceptualisation of ML/TF risks in the sector. Specifically, divergences in the FATF’s conceptualisation of ML/TF risks and the United States’ unilateral ML/TF labelling practices, have material consequences for the regulatory responsibilities and costs that Caribbean jurisdictions that license Internet gambling operations are expected to assume. Yet, the human, technological and financial

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<sup>1032</sup> Ramage, ‘Information Technology Facilitating Money Laundering’.

<sup>1033</sup> Hugel and Kelly, ‘Internet Gambling, Credit Cards and Money Laundering’; Ramage, ‘Information Technology Facilitating Money Laundering’.

<sup>1034</sup> Ramage, ‘Information Technology Facilitating Money Laundering’.

<sup>1035</sup> McMullan and Rege, ‘Online Crime and Internet Gambling’.

<sup>1036</sup> McMullan and Rege.

<sup>1037</sup> United States Department of States, ‘International Narcotics Control Strategy Report (Vol.2)- Money Laundering’.

capacity constraints experienced by developing countries in transplanting ML/TF risk management approaches from developed countries are already well-recognised.<sup>1038</sup> In the final analysis, the externally perceived ML/TF risks associated with the Commonwealth Caribbean has seemingly overshadowed the Internet gambling industry. In order to appreciate the shrinkage in the regulatory policy space of the Bahamas, Jamaica and Trinidad and Tobago has become, it is worth briefly revisiting the doctrine of state sovereignty.

#### **6.4. Problematising State Sovereignty, Regulatory Spaces and Extraterritoriality in AML/CFT Surveillance**

Usefully recall that the doctrine of state sovereignty was conceived of as a seventeenth century juridical and institutional safeguard against “rule by outsiders.”<sup>1039</sup> State sovereignty remains a normative barrier to foreign interference in the territorial jurisdiction of other States and the dominant form of political organisation in international relations.<sup>1040</sup> In the international normative order, it donates a State’s exclusive jurisdiction within its territory and politico-legal independence of other States.<sup>1041</sup> Thus, the principles of sovereign equality of States and non-interference in the internal matters of other States and self-determination have been codified in the United Nations Charter. However, the concept of sovereignty has become increasingly contested.<sup>1042</sup> There are three conceptual fronts, however, on which the orthodoxy of the

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<sup>1038</sup> Ai, “‘Rule-Based but Risk-Oriented’ Approach for Combating Money Laundering in Chinese Financial Sectors’.

<sup>1039</sup> Robert Jackson, ‘Sovereignty in World Politics: A Glance at the Conceptual and Historical Landscape’, *Political Studies* 47, no. 3 (August 1999): 431, <https://doi.org/10.1111/1467-9248.00211>; Winston P. Nagan and Craig Hammer, ‘The Changing Character of Sovereignty in International Law and International Relations’, *Columbia Journal of Transnational Law*, no. 1 (2005 2004): 141–88.

<sup>1040</sup> Aalberts, ‘Sovereignty. Evolution of an Idea’; Jackson, ‘Sovereignty in World Politics’; Robert Jackson, ‘Sovereignty and Its Presuppositions: Before 9/11 and After’, *Political Studies* 55, no. 2 (1 June 2007): 297–317, <https://doi.org/10.1111/j.1467-9248.2007.00668.x>; Krasner, ‘Sovereignty’; Nagan and Hammer, ‘The Changing Character of Sovereignty in International Law and International Relations’.

<sup>1041</sup> Samantha Besson, ‘International Courts and the Jurisprudence of Statehood’, *Transnational Legal Theory* 10, no. 1 (2 January 2019): 30–64, <https://doi.org/10.1080/20414005.2019.1599672>; Jackson, ‘Sovereignty in World Politics’.

<sup>1042</sup> Aalberts, ‘Sovereignty. Evolution of an Idea’; Besson, ‘International Courts and the Jurisprudence of Statehood’; Krasner, ‘Sovereignty’; Krasner, ‘Abiding Sovereignty’; Jackson, ‘Sovereignty and Its

exclusive territorially of the State has been challenged. These have had implications for the extraterritorial regulation of AML/CFT risks purportedly associated with the offshore Internet gambling sector.

Firstly, the exclusivity of a political authority and importance of territoriality ascribed to States under the doctrine of Westphalian sovereignty,<sup>1043</sup> has arguably become obsolete. In the contemporary era, conceptually, the State sovereignty has a derivative character.<sup>1044</sup> To an extent, it has “lost meaning and analytical relevance” since sovereign States can no longer credibly claim supremacy of authority within their territory or authoritative control over transborder movements.<sup>1045</sup> That is, exclusive territorial jurisdiction. In a globalised context, economic and security threats to the State have become increasingly transnationalised. Organised criminal groups and terrorist networks have become a major disruptive source of global financial instability and insecurity.<sup>1046</sup> They have exploited unprecedented capital mobility, electronic currencies and NPMs to evade international AML/CFT regulatory standards and circumvent the increased scrutiny of wire transfers within the formal banking sector.<sup>1047</sup> As a result, States’ exclusive regulatory power in the financial sector and their sovereign prerogative to control cross-border financial flows and economic crimes within their territories have been weakened.<sup>1048</sup> As geographic borders are rendered increasingly porous, and the State’s capacity to control and flight cyber-laundering and terrorist financing undermined, then the orthodox significance of territoriality becomes diminished.<sup>1049</sup> Naturally, States have asserted extraterritorial legal authority to regulate transnational

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Presuppositions’; Nagan and Hammer, ‘The Changing Character of Sovereignty in International Law and International Relations’.

<sup>1043</sup> Jackson, ‘Sovereignty in World Politics’.

<sup>1044</sup> Jackson, ‘Sovereignty and Its Presuppositions’; Krasner, ‘Sovereignty’; Nagan and Hammer, ‘The Changing Character of Sovereignty in International Law and International Relations’.

<sup>1045</sup> Krasner, ‘Sovereignty’, 86.

<sup>1046</sup> Jackson, ‘Sovereignty and Its Presuppositions’; Robert Mandel, *Dark Logic: Transnational Criminal Tactics and Global Security* (Stanford, Calif: Stanford Security Studies, 2011); Mugarura, ‘Has Globalisation Rendered the State Paradigm in Controlling Crimes, Anachronistic?’

<sup>1047</sup> Eric Helleiner, ‘Electronic Money: A Challenge to the Sovereign State?’, *Journal of International Affairs* 51, no. 2 (1998): 387–409; Mugarura, ‘Has Globalisation Rendered the State Paradigm in Controlling Crimes, Anachronistic?’

<sup>1048</sup> Helleiner, ‘Electronic Money’; Hudson, ‘Reshaping the Regulatory Landscape’; Stephen J. Kobrin, ‘Electronic Cash and the End of National Markets’, *Foreign Policy*, no. 107 (1997): 65–77, <https://doi.org/10.2307/1149333>; Mugarura, ‘Has Globalisation Rendered the State Paradigm in Controlling Crimes, Anachronistic?’; Saskia Sassen, *Losing Control: Sovereignty in an Age of Globalization*, University Seminars: Leonard Hastings Schoff Memorial Lectures (New York: Columbia University Press, 2015).

<sup>1049</sup> Mugarura, ‘Has Globalisation Rendered the State Paradigm in Controlling Crimes, Anachronistic?’

ML/TF risks, which often leads to jurisdictional conflicts.<sup>1050</sup> This is the context in which the United States' extraterritorial application of its anti-gambling and money laundering laws to regulate offshore Internet gambling should be seen.

Secondly, there has been the discursive construction of 'trans-territorial spaces', such as offshore,<sup>1051</sup> both configured and constituted by sovereign States in line with transnationalised risks, service delivery and evolving global value chains. However, these 'trans-territorial' spatial configurations have been characterised by asymmetrical authority relations in which powerful States have self-ascribed the legitimacy for extraterritorial rule and domination.<sup>1052</sup> This "Eurocentric bias" in the Westphalia narrative of sovereignty continues to reproduce the ostracization of non-Western States with the consequence of "misdiagnoses" of major contemporary problems.<sup>1053</sup> Moreover, the relational exercise of sovereignty among States of diverging sizes and material capabilities constitutively reinforces hierarchical power arrangements.<sup>1054</sup> Thus, the discursive representation of States of the Global South as either untrustworthy with, or incapable of, AML/CFT self-regulation, by more powerful States within the TAMLO has been used as a pretext for forcible extraterritorial surveillance. In the context of AML/CFT regulation in the offshore Internet gambling sector, this has been exemplified by corrective extraterritorial regulatory and law enforcement responses of powerful onshore States, aimed at surreptitious cross-border transactions, and resulting illicit financial flows presumably being facilitated by the sector.

Thirdly, in the post-war, globalised era, security has increasingly taken on an economic regulatory dimension. Consequently, the orthodox security-centric underpinnings of territorial integrity, as a defining feature of State sovereignty has been expanded to address economic concerns.<sup>1055</sup> Coercive extraterritorial AML/CFT

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<sup>1050</sup> Hudson, 'Reshaping the Regulatory Landscape'.

<sup>1051</sup> John Gerard Ruggie, 'Territoriality and beyond: Problematizing Modernity in International Relations', *International Organization* 47, no. 1 (1993): 139–74, <https://doi.org/10.1017/S0020818300004732>.

<sup>1052</sup> Ruggie.

<sup>1053</sup> Turan Kayaoglu, 'Westphalian Eurocentrism in International Relations Theory', *International Studies Review* 12, no. 2 (1 June 2010): 193, <https://doi.org/10.1111/j.1468-2486.2010.00928.x>.

<sup>1054</sup> Nagan and Hammer, 'The Changing Character of Sovereignty in International Law and International Relations'.

<sup>1055</sup> Alan M. Simon and Spencer Weber Waller, 'A Theory of Economic Sovereignty: An Alternative to Extraterritorial Jurisdictional Disputes Essay', *Stanford Journal of International Law*, no. 2 (1986): 337–62.

surveillance measures have seemingly become blurred with uncompetitive foreign economic policy interests such as preventing capital flight and regulating tax competition.<sup>1056</sup> This would constitute “illegitimate interference”<sup>1057</sup> with the sovereignty of less powerful States. In relation to the interests of States of the Global South, the concept of economic sovereignty has become particularly important. That is, their right or capacity to independently and effectively determine their economic and regulatory strategies in line with defined national interests and priorities.<sup>1058</sup> Objections have been raised conflating the term economic autonomy (i.e., a State’s sovereign authority to pursue nationalistic economic policies), with economic sovereignty. Economic autonomy is viewed as not intrinsic to statehood but a residual consequence of it.<sup>1059</sup> However, in a capitalist international order, the notion of a State’s economic sovereignty has evolved under the New International Economic Order (NIEO) and the Charter of Economic Rights and Duties of States, which include provision on the right of development.<sup>1060</sup> On this basis, several Caribbean small jurisdictions have sought to leverage their economic sovereignty to license remote betting and gambling operations within their territorial borders, to drive economic growth and sustainable development, while the United States has opted for a strict prohibition regime.

#### 6.4.1. Regulatory State Practice as Economic Sovereignty

In the context of regulatory approaches towards Internet gambling, and the associated AML/CFT risk management strategies, States have exercised their economic sovereignty differently. An estimated seventy countries have now legalised online gambling in some form.<sup>1061</sup> Some States have opted for total prohibition, others for a high level of regulatory oversight, and some for a liberalised Internet betting and gambling sector.<sup>1062</sup> However,

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<sup>1056</sup> Vlcek, *Offshore Finance and Small States*.

<sup>1057</sup> Hudson, ‘Reshaping the Regulatory Landscape’, 96.

<sup>1058</sup> Bravo, ‘Challenges to Caribbean Economic Sovereignty in a Globalizing World Symposium Articles’, 2012 2011; Simon and Waller, ‘A Theory of Economic Sovereignty’.

<sup>1059</sup> Jackson, ‘Sovereignty in World Politics’ (n 658).

<sup>1060</sup> {Citation}

<sup>1061</sup> Wilson, ‘Chips, Bits, and the Law’.

<sup>1062</sup> Banks, *Gambling, Crime and Society*.

it is commonly accepted that regulation, as opposed to express prohibition, is the most prudent approach to mitigating the ML/TF risks associated with Internet gambling.<sup>1063</sup> This is because regulation institutes licensing requirements such as the need to establish physical presence in a particular jurisdiction, subjects operators to preventative AML/CFT standards and enables the traceability of financial transfers through customer registration and the collection of personally identifiable information from Internet gamblers.<sup>1064</sup> By regulating, rather than prohibiting the Internet gambling sector, supervisory authorities can subject operators to ‘fit and proper person’ tests as a criteria for licensing businesses and facilitate due diligence to ensure that beneficial owners or controllers have no links to organised criminal and terrorist networks that would use online gambling businesses as vehicles for money laundering and terrorism financing.<sup>1065</sup> However, the biggest challenge to regulating the ML/TF risks associated with Internet gambling is inter-jurisdictional inconsistencies.<sup>1066</sup>

Several Commonwealth Caribbean jurisdictions, including Antigua and Barbuda, Belize, and most recently Jamaica, have taken steps to legalise Internet gambling, as a matter of their sovereign prerogative. The United States chose a strict prohibition regime under the federal inter-state Commerce Clause.<sup>1067</sup> There are also intra-jurisdictional inconsistencies at the federal and state/provincial levels in the Australia, Canada, and the United States.<sup>1068</sup> In fact, Internet gambling is one commercial policy issue on which the OECD is divided. Belgium, France, Italy and Spain have liberalised Internet gambling by licensing operators for sports betting, horse racing, online casino games and poker tournaments.<sup>1069</sup> Australia, under the Interactive Gambling Act 2001, prohibits the supply

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<sup>1063</sup> Eadington, ‘The Future of Online Gambling in the United States and Elsewhere’; Thomas James Friedrich, ‘Internet Casino Gambling: The Nightmare of Lawmaking, Jurisdiction, Enforcement & the Dangers of Prohibition’, *CommLaw Conspectus: Journal of Communications Law and Technology Policy* 11 (2003): 369–88; Gainsbury and Wood, ‘Internet Gambling Policy in Critical Comparative Perspective’; Theresa E. Loscalzo and Stephen J. Shapiro, ‘Internet Gambling Policy: Prohibition versus Regulation Symposium: Place Your Bets: Who Will Hold the Cards in Internet Gambling’, *Villanova Sports & Entertainment Law Journal* 7 (2000): 11–28; Ramage, ‘Information Technology Facilitating Money Laundering’; Schopper, ‘Internet Gambling, Electronic Cash & (and) Money Laundering’.

<sup>1064</sup> Gainsbury and Wood, ‘Internet Gambling Policy in Critical Comparative Perspective’.

<sup>1065</sup> Levi, ‘E-Gaming and Money Laundering Risks’.

<sup>1066</sup> Gainsbury and Wood, ‘Internet Gambling Policy in Critical Comparative Perspective’.

<sup>1067</sup> Ali, *Money Laundering Control in the Caribbean*; Friedrich, ‘Internet Casino Gambling: The Nightmare of Lawmaking, Jurisdiction, Enforcement & the Dangers of Prohibition’.

<sup>1068</sup> Gainsbury and Wood, ‘Internet Gambling Policy in Critical Comparative Perspective’.

<sup>1069</sup> Banks, *Gambling, Crime and Society*.

of online gambling services to residents but permitted offerings to overseas consumers.<sup>1070</sup> Furthermore, it was recalled that the United States' policy approach was "diametrically opposed to strategies of other top-tier countries,"<sup>1071</sup> including the United Kingdom. Thus, States may abuse normative claims to economic sovereignty where regulatory inconsistencies exist.

Illustratively, introduced by the then Labour Government under the Gambling Act 2005, the United Kingdom required Internet gambling regulators from offshore jurisdictions to apply to be enlisted to its 'whitelist'.<sup>1072</sup> Enlistment conferred approval that the regulatory standards that were being applied to offshore Internet gambling operators by foreign supervisory authorities, were equivalent to the United Kingdom's.<sup>1073</sup> This would then authorise relevant offshore Internet gambling operators to legally advertise the cross-border supply of remote gambling services to UK consumers.<sup>1074</sup> Albeit legitimately exercising its sovereignty, the United Kingdom, in effect, supplanted the regulatory authority of relevant Caribbean jurisdictions with its own. The United Kingdom still permits its citizens to be solicited by offshore remote gambling operators, under the Gambling (Licensing and Advertising) Act 2014, provided they are licensed by the Gaming Commission.<sup>1075</sup> The latter legislation replaced the 'white list'.<sup>1076</sup> The Gambling Act 2014 also levied a fifteen percent (15%) consumption tax on betting companies operating in the United Kingdom irrespective of their geographic origins, to mitigate capital flight offshore.<sup>1077</sup> This underscores the confluence of States' economic interests and AML/CFT concerns in Internet gambling regulation.

With respect to the politics of 'blacklists' and 'whitelists' post-9/11, attention was drawn to the use of racialised discursive practices in relation to the trustworthiness and transparency of offshore Internet gambling jurisdictions such as Antigua and Barbuda.<sup>1078</sup> Likewise, the United Kingdom's short-lived 'whitelist' was attributed to it having

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<sup>1070</sup> Banks.

<sup>1071</sup> Eadington, 'The Future of Online Gambling in the United States and Elsewhere', 216.

<sup>1072</sup> Kate Bedford, 'Letting the Right Ones in: Whitelists, Jurisdictional Reputation, and the Racial Dynamics of Online Gambling Regulation', *Environment and Planning D: Society and Space* 34, no. 1 (February 2016): 30–47, <https://doi.org/10.1177/0263775815595816>.

<sup>1073</sup> Bedford.

<sup>1074</sup> Banks, *Gambling, Crime and Society*; Bedford, 'Letting the Right Ones In'.

<sup>1075</sup> Banks, *Gambling, Crime and Society*.

<sup>1076</sup> Banks.

<sup>1077</sup> Banks.

<sup>1078</sup> Bedford, 'Letting the Right Ones In'.

“disrupted the racialised reputational hierarchies” that have underpinned regulatory regimes, insofar as it granted access to foreign places and people viewed with suspicion.<sup>1079</sup> These divergencies in exercise of economic sovereignty may explain why ML/TF risks in the Internet gambling sector have been slow to emerge as a pressing transnational problem on the agenda of the OECD and FATF.

#### **6.4.2. Problem of Transnational Regulatory Harmonisation- The Financial Action Task Force**

It is imperative that regulatory and legal standards are harmonised if Internet gambling is to be properly regarded as the trade in remote betting and gambling services.<sup>1080</sup> This would prevent arbitrary claims to sovereignty as a basis for anti-competitive and protectionist extraterritorial regulatory practices. With respect to ML/TF risks associated with cryptocurrencies used for cyber-laundering, it has not helped that there is considerable institutional fragmentation and configurations at the transnational level. However, in 2015, the FATF attempted to mitigate the widespread divergences in regulatory practices. The FATF issued guidelines on the regulation of ML/TF risks associated with virtual currencies and NPMs, recommending enhanced due diligence (EDD) measures, industry self-regulation and, effective, proportionate, and dissuasive sanctions whether they be criminal, civil, or administrative.<sup>1081</sup>

However, the FATF Forty Recommendations have made no express reference to ML/TF risk associated with Internet gambling. The FATF has acknowledged the significant gap in knowledge about geographic ML/TF risks and vulnerabilities of online casinos and Internet gambling websites.<sup>1082</sup> Curiously, the FATF has not developed any typology reports in this area. It would not be unreasonable to draw adverse inference from such inaction as to the seriousness of ML/TF activities in the Internet gambling sector.

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<sup>1079</sup> Bedford, 31.

<sup>1080</sup> Bana, ‘Online Gambling: An Appreciation of Legal Issues’.

<sup>1081</sup> Campbell-Verduyn, ‘Bitcoin, Crypto-Coins, and Global Anti-Money Laundering Governance’.

<sup>1082</sup> Financial Action Task Force, ‘Vulnerabilities of Casinos and Gaming Sector’ (Paris, France: FATF/OECD Secretariat, 2009), <http://www.fatf-gafi.org/media/fatf/documents/reports/Vulnerabilities%20of%20Casinos%20and%20Gaming%20Sector.pdf>.

Although the FATF Forty Recommendations were intended to apply to ‘brick and mortar’ casinos and other gambling establishments, some States have applied the recommendations relevant to designated non-financial businesses and professions (DNFBPs) to online casinos.<sup>1083</sup> Licensed and regulated Internet gambling companies in the EU, for example, have complied with AML/CFT standards under the Third and Fourth EU Directives implementing the FATF’s Forty Recommendations at the EU level.<sup>1084</sup>

If licensing jurisdictions regulate online casinos as DNFBPs, along with ‘brick and mortar’ gambling establishments, then several FATF AML/CFT standards would apply to their operations. FATF Recommendation 22 would require the preventative customer due diligence (CDD) and record-keeping measures laid out in Recommendations 10, 11, 12, 15 and 17 be applied to Internet casinos, where their customers engage in financial transactions equal to or above the applicable designated threshold (USD/EUR 3,000). Additionally, pursuant to FATF Recommendation 28 (Regulatory and Supervision of DNFBPs), online casinos would need to be subject to comprehensive regulatory and supervisory regime that ensures that they effectively implement necessary AML/CFT measures. At a minimum, they would have to be licensed; the necessary legal and regulatory measures put in place to prevent criminals or their associates from holding or being the beneficial owner of, a significant or controlling interest, holding a management function in, or being an operator of an online casino. Competent national authorities in offshore jurisdictions licensing online casinos would also have to ensure that their operations are effectively supervised for compliance with AML/CFT requirements. However, the cash-intensive nature of ‘brick and mortar’ casino establishments presents particular vulnerabilities for laundering large volumes of illicit proceeds of organised crimes. Whether these requirements are ‘fit-for-purpose’ for online casinos and other Internet gambling and betting operations remains to be seen. The FATF ‘Interpretive Note to Recommendation No.22’ suggesting that ‘casino’ operators should be able to link CDD information to the customers’ actual transactions “in the casino,”<sup>1085</sup> would prove problematic in virtual casino rooms.

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<sup>1083</sup> Banks, *Gambling, Crime and Society*.

<sup>1084</sup> Levi, ‘E-Gaming and Money Laundering Risks’.

<sup>1085</sup> Financial Action Task Force, ‘International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations’, 84.

With respect to the ML/TF risk associated with value transfer services used in the offshore Internet gambling sector, only those affiliated with the formal banking sector are subjected to AML/CFT measures. Thus, to comply with FATF Recommendation 15, offshore Internet gambling jurisdictions ought to require their financial institutions to identify and assess ML/TF risk associated with the development of new products and business practices, including delivery mechanisms and the use of new or emerging technologies for both pre-existing and new products in the sector. Recommendation 15 has further provided that financial institutions should be given the added responsibility of carrying out ML/TF risk assessment prior to launching new products, business practices or the use of new or developing technologies and take appropriate steps to manage and mitigate relevant risks. The FATF also recommended that States ensure virtual assets service providers are subject to AML/CFT regulations so as to manage and mitigate risks associated with virtual assets, as well as licensing or registration requirements, and effective monitoring of compliance with FATF Recommendations.

In the final analysis, the FATF's current regulatory regime for the gaming sector is inadequate. In effect, it has left non-casino Internet gambling operators outside the transnational AML/CFT regulatory regime,<sup>1086</sup> as well as financial intermediaries and third-party value transfer service providers that are not formally financial institutions. Transnational harmonisation of regulatory standards for Internet gambling has been advocated as a possible solution to problems of 'regulatory spillover' and unilateral extraterritoriality.<sup>1087</sup> In the context of AML/CFT risk management in the offshore Internet gambling sector, the lack of an inclusive and collective regulatory approach has embolden powerful onshore States to either selectively or discriminatorily prohibit the provision of remote gambling services to their residents.<sup>1088</sup> The result is diverging assessments of ML/TF risks in the sector, as well as in standards of monitoring, accountability and supervisory proportionality.<sup>1089</sup> However, given the importance of the jurisdictional and sovereignty interests at stake, it is likely that unilateral regulation of Internet gambling will persist.<sup>1090</sup> Absent a coherent transnational regulatory framework

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<sup>1086</sup> Banks, *Gambling, Crime and Society*.

<sup>1087</sup> Goldsmith, 'Unilateral Regulation of the Internet'.

<sup>1088</sup> Bana, 'Online Gambling: An Appreciation of Legal Issues'.

<sup>1089</sup> Bana.

<sup>1090</sup> Goldsmith, 'Unilateral Regulation of the Internet'.

and coordinated action on the emerging trend towards the disintermediation of financial services delivery in the offshore Internet gambling sector, the United States has sought to extraterritorially apply federal laws to regulate ML/TF risks associated with virtual currencies, including Bitcoins.<sup>1091</sup> These bases for this will be examined in turn.

### **6.4.3. The Limits of Sovereignty: Grounds for the Assertion of Extraterritorial Jurisdiction over Licenced Offshore Internet Gambling Operators**

There is a spatial relationship between regulated economic activities, on the one hand, and the practicality and legitimacy of a State's territorial legal jurisdiction, on the other hand.<sup>1092</sup> That spatial relationship has been challenged by the geographical transcendence of the Internet and risks of cyber-laundering using NPMs and VAs. Unsurprisingly, some States have unilaterally asserted extraterritorial jurisdiction over Internet gambling operations on the basis that the ML/TF vulnerabilities associated with the sector, have undermined their national security interests. Simply put, extraterritorial jurisdiction denotes a States exercise of legal power beyond its territorial borders.<sup>1093</sup> However, in theory, a State's sovereignty ought to inherently restrict the extraterritorial reach of another State's laws or regulatory authority within its territory.<sup>1094</sup> Thus, generally, under international law, a State may not exercise any regulatory power in another's territory, over natural or legal persons, conducts or property, absent a permissive international customary rule.<sup>1095</sup> This is consistent with the international legal principles of sovereign equality of States, non-interference in internal affairs, and self-determination.

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<sup>1091</sup> Pflaum and Hateley, 'A Bit of a Problem'.

<sup>1092</sup> Wilson, 'Chips, Bits, and the Law'.

<sup>1093</sup> Anthony J Colangelo, 'What Is Extraterritorial Jurisdiction?', *Cornell Law Review* 99, no. 6 (2014): 51; Joel P. Trachtman, 'Reflections on the Nature of the State: Sovereignty, Power and Responsibility Sovereignty in the North American Context and in a Changing World', *Canada-United States Law Journal* 20 (1994): 399–416.

<sup>1094</sup> Nelson Rose, 'Gambling and the Law: The International Law of Remote Wagering Gaming Law Symposium', *John Marshall Law Review* 40 (2007 2006): 1159–94.

<sup>1095</sup> Ali, *Money Laundering Control in the Caribbean*; Austen L. Parrish, 'Reclaiming International Law from Extraterritoriality', *Minnesota Law Review*, no. 3 (2009 2008): 815–74; Peter M. Roth, 'Reasonable Extraterritoriality: Correcting the "Balance of Interests"', *International & Comparative Law Quarterly* 41, no. 2 (April 1992): 245–86, <https://doi.org/10.1093/iclqaj/41.2.245>; Jay Lawrence Westbrook, 'Extraterritoriality, Conflict of Laws, and the Regulation of Transnational Business Review Essay', *Texas International Law Journal*, no. 1 (1990): 71–98.

Nonetheless, for there are three relevant restricted bases on which international law has permitted the exercise of extraterritorial jurisdiction, namely territoriality, nationality and the ‘effects doctrine’.<sup>1096</sup>

Exclusive territoriality has always been considered the very essence of sovereign statehood.<sup>1097</sup> The territoriality principle recognises a State’s sovereign authority, under international law, to prescribe, enforce and adjudicate legal rules to legally regulate activities within its geographic borders.<sup>1098</sup> Prescriptive jurisdiction encapsulates the limits of a State’s power to legislatively stipulate rules regulating persons, activities and conduct within its territory.<sup>1099</sup> By extension, extraterritoriality or extraterritorial prescriptive jurisdiction denotes the circumstances in which a State may legitimately extend its legislative authority to stipulate rules regulating persons, property or conduct in another State’s territory.<sup>1100</sup> This includes cross-border conduct that partially occurred within its territorial borders or foreign conduct that have had ‘effects’ within a State’s territory.<sup>1101</sup>

However, where a proscribed conduct occurs in multiple territories, concurrent jurisdiction may be asserted by the respective States provided a substantial part of the regulated conduct was authored within their borders.<sup>1102</sup> For instance, there is an inherent jurisdictional conflict between Caribbean countries that have leveraged their sovereignty to allow online gambling websites to legally operate or use servers in their territories, and the United States that has a sovereign right to both control web content and prosecute offshore Internet gambling operators that provide proscribed remote gambling and

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<sup>1096</sup> Ali, *Money Laundering Control in the Caribbean*; Colangelo, ‘What Is Extraterritorial Jurisdiction?’; Kenneth W. Dam, ‘Economic and Political Aspects of Extraterritoriality’, *The International Lawyer* 19, no. 3 (1985): 887–96; Hudson, ‘Reshaping the Regulatory Landscape’; Federick J. Knecht, ‘Extraterritorial Jurisdiction and the Federal Money Laundering Offense Note’, *Stanford Journal of International Law* 22 (1986): 389–420.

<sup>1097</sup> Hudson, ‘Reshaping the Regulatory Landscape’; Alex Mills, ‘Rethinking Jurisdiction in International Law’, *British Yearbook of International Law* 84, no. 1 (1 January 2014): 187–239, <https://doi.org/10.1093/bybil/bru003>.

<sup>1098</sup> Knecht, ‘Extraterritorial Jurisdiction and the Federal Money Laundering Offense Note’; Jeffrey A. Meyer, ‘Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law’, *Minnesota Law Review* 95 (2011 2010): 110–86; Wilson, ‘Chips, Bits, and the Law’.

<sup>1099</sup> Colangelo, ‘What Is Extraterritorial Jurisdiction?’; Mills, ‘Rethinking Jurisdiction in International Law’.

<sup>1100</sup> Colangelo, ‘What Is Extraterritorial Jurisdiction?’; Knecht, ‘Extraterritorial Jurisdiction and the Federal Money Laundering Offense Note’; Mills, ‘Rethinking Jurisdiction in International Law’; Parrish, ‘Reclaiming International Law from Extraterritoriality’.

<sup>1101</sup> Mills, ‘Rethinking Jurisdiction in International Law’.

<sup>1102</sup> Knecht, ‘Extraterritorial Jurisdiction and the Federal Money Laundering Offense Note’.

betting services to American citizens which has been deemed offensive to public moral and certain public interests.<sup>1103</sup> Additionally, with respect to the territoriality principle, given the integral use of US telecommunication infrastructure for the Bitcoin network and Block Chain, the United States could legitimately exercise extraterritorial jurisdiction over foreign nationals who use Bitcoins in money laundering activities,<sup>1104</sup> on the basis that a part of the transaction occurred in the United States. Similarly, the United States could exercise jurisdiction over a foreign national who operates an online casino or offshore Internet gambling website if the wagering is deemed to have partially occurred in the US territory since wagering information is transmitted cross-border.<sup>1105</sup>

The nationality principle is more straightforward. A State may prescribe legal rules to regulate conduct of its nationals, irrespective of whether the proscribed conduct occurred within its borders or overseas.<sup>1106</sup> This basis of jurisdiction is connected to the person's, whether natural or legal, subjectivity to the sovereign power of their State regardless of their physical location. For example, the US Federal Money Laundering Control Act (MLCA) 1986 expressly regulates financial transactions by US nationals overseas and subsidiaries of legal persons incorporated in the United States' jurisdiction.<sup>1107</sup> Furthermore, a significant portion of offshore Internet gambling operators have been US nationals who retained substantial contacts with the United States and therefore are subject to its extraterritorial prosecutorial jurisdiction.<sup>1108</sup> This has made the sector particularly vulnerable to the US extraterritoriality.

The effects of organised criminal activities, illicit financial flows and the misuse of corporate entities and business arrangements, offshore for money laundering, are increasingly felt in multiple jurisdictions. States have, therefore, sought to mitigate these effects through extraterritorial legal or regulatory authority irrespective of the foreign origins.<sup>1109</sup> In principle, a State's attempt to apply its penal laws extraterritorially to regulate the conduct of foreigners overseas would be an unjustifiable interference with the sovereignty of States within which those foreigners are based,<sup>1110</sup> unless their conduct

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<sup>1103</sup> Wilson, 'Chips, Bits, and the Law'.

<sup>1104</sup> Pflaum and Hateley, 'A Bit of a Problem'.

<sup>1105</sup> Robbins, 'Baby Needs a New Pair of Cybershoes'.

<sup>1106</sup> Knecht, 'Extraterritorial Jurisdiction and the Federal Money Laundering Offense Note'.

<sup>1107</sup> Knecht.

<sup>1108</sup> Loscalzo and Shapiro, 'Internet Gambling Policy'.

<sup>1109</sup> Meyer, 'Dual Illegality and Geoambiguous Law'.

<sup>1110</sup> Knecht, 'Extraterritorial Jurisdiction and the Federal Money Laundering Offense Note'.

had a substantial effect in its territory or on its citizens.<sup>1111</sup> This permissive rule was the product of the decision of the Permanent Court of International Justice in the *Lotus case* (1927). Illustratively, the MLCA 1986 further created extraterritorial jurisdiction over money laundering activities of foreign nationals outside the US' territory and expanded the investigative powers of its law enforcement agencies.<sup>1112</sup>

A majority of States have recognised the 'effects doctrine'.<sup>1113</sup> It purports that a State may exercise prescriptive jurisdiction to extraterritorially regulate conduct or activities if they cause a substantial effect within its territory.<sup>1114</sup> In this regard, it has been argued that where a State has prescribed domestic regulatory requirements for foreign service providers, the State ought not to be seen as extraterritorially regulating conduct in the foreign jurisdiction but, rather, prescribing the limits of the effects of such conduct in its jurisdiction.<sup>1115</sup> Under US federal law, the effect must be substantial and a direct and foreseeable result of the overseas conduct; the relevant conduct and effect must be constituent elements of proscribed activity and the legal rule being applied must be consistent with generally recognised principles of justice by States with developed legal systems.<sup>1116</sup> However, the *Lotus case* did not specify the kind or extent of effects that may legitimately justify extraterritorial jurisdiction.<sup>1117</sup>

While most States and legal scholars have advocated a restrictive interpretation of the 'effects doctrine', US courts have traditionally adopted a liberal and expansive approach.<sup>1118</sup> The United States has been criticised for applying the 'effects doctrine' to conduct not widely regarded as criminal offences by other States, contrary to international law.<sup>1119</sup> Thus, the effects doctrine has been misused to defy the conventionally accepted territorial restrictions on a State's regulatory authority, in order

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<sup>1111</sup> Rose, 'Gambling and the Law'.

<sup>1112</sup> Knecht, 'Extraterritorial Jurisdiction and the Federal Money Laundering Offense Note'.

<sup>1113</sup> Knecht; Roth, 'Reasonable Extraterritoriality'; Simon and Waller, 'A Theory of Economic Sovereignty'.

<sup>1114</sup> Knecht, 'Extraterritorial Jurisdiction and the Federal Money Laundering Offense Note'.

<sup>1115</sup> Rose, 'Gambling and the Law'.

<sup>1116</sup> Knecht, 'Extraterritorial Jurisdiction and the Federal Money Laundering Offense Note'; Simon and Waller, 'A Theory of Economic Sovereignty'.

<sup>1117</sup> Knecht, 'Extraterritorial Jurisdiction and the Federal Money Laundering Offense Note'; Simon and Waller, 'A Theory of Economic Sovereignty'.

<sup>1118</sup> Knecht, 'Extraterritorial Jurisdiction and the Federal Money Laundering Offense Note'; Simon and Waller, 'A Theory of Economic Sovereignty'.

<sup>1119</sup> Knecht, 'Extraterritorial Jurisdiction and the Federal Money Laundering Offense Note'; Simon and Waller, 'A Theory of Economic Sovereignty'.

to protect economic interests from foreign operators that do not subscribe to its regulatory rules.<sup>1120</sup> For instance, by accepting wagers and bets from US residents, an offshore Internet gambling operator would be deemed to have intentionally diverted tax revenue from state licensed gambling and, in effect, encouraged the violation of state and federal anti-gambling laws.<sup>1121</sup>

#### **6.4.4. International Comity vs. Jurisdiction to Enforce and Adjudicate against Offshore Internet Gambling Operators**

In the context of federal Internet gambling regulation, even where the United States has established one of the foregoing bases of extraterritorial jurisdiction, its capacity to compel compliance with relevant laws and regulation will be dependent on it having both adjudicative and enforcement jurisdiction.<sup>1122</sup> Adjudicative jurisdiction defines the limits of the power of a State's judicial branch of government or courts to subject persons or property to judicial processes.<sup>1123</sup> In the case of the prosecution of offshore Internet gambling operators, where the culpable act is perpetrated offshore, a United States court's jurisdiction to adjudicate the substantive matter will usually depend on the establishment of personal jurisdiction over to defendant to satisfy due process requirements.<sup>1124</sup> This usually means that the defendant must be physically present or have assets within US territory, as forum State, or voluntarily avail themselves of US adjudicative jurisdiction.<sup>1125</sup> In some circumstances a State may seek to enforce a default judgement abroad or rely on extradition requests.<sup>1126</sup>

On the other hand, enforcement jurisdiction refers to the limits of the power of a State's executive branch of government (e.g. law enforcement authorities) to compel

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<sup>1120</sup> Hudson, 'Reshaping the Regulatory Landscape'; Meyer, 'Dual Illegality and Geoambiguous Law'.

<sup>1121</sup> Robbins, 'Baby Needs a New Pair of Cybershoes'.

<sup>1122</sup> Goldsmith, 'Unilateral Regulation of the Internet'.

<sup>1123</sup> Colangelo, 'What Is Extraterritorial Jurisdiction?'; Mills, 'Rethinking Jurisdiction in International Law'.

<sup>1124</sup> Ali, *Money Laundering Control in the Caribbean*; Burk, 'Jurisdiction in a World without Borders'.

<sup>1125</sup> Ali, *Money Laundering Control in the Caribbean*; Burk, 'Jurisdiction in a World without Borders'; Goldsmith, 'Unilateral Regulation of the Internet'.

<sup>1126</sup> Goldsmith, 'Unilateral Regulation of the Internet'.

compliance or punish non-compliance with stipulated rules of law.<sup>1127</sup> Enforcement jurisdiction, under international law, is almost exclusively territorial and absent express authorisation or permissive rule of international law, its exercise in another State's territory would violate the principle of non-intervention in the internal affairs of other States and infringe their sovereignty.<sup>1128</sup> Where the regulatory policies towards Internet gambling are as diametrically opposed as in the case of licensing Caribbean jurisdictions and the United States, both enforcement and adjudicative jurisdictions become a matter of power politics.

The doctrine of state sovereignty generally requires deference to lawful conduct in other jurisdictions.<sup>1129</sup> Consequently, a State may opt not to exercise extraterritorial jurisdiction on account of international comity.<sup>1130</sup> The principle of international comity has underpinned the degree of recognition that a State may allow within its territory for the legislative, executive or judicial activities of another State, having regard to its international duty and convenience.<sup>1131</sup> Out of comity, States may exercise their sovereign prerogative to voluntarily cede authority to regulate a specified conduct.<sup>1132</sup> Thus, both international comity and sovereignty, ought to restrain policy judgements as to whether the United States should assert jurisdiction over purely foreign individual and corporations operating offshore Internet gambling websites operating in territories whose gambling laws and regulatory regimes conflict with US anti-gambling laws.<sup>1133</sup>

However, where Congressional extraterritorial intent is evident, as in the case of federal anti-gambling laws, US courts have demonstrated deference to American foreign policy interests.<sup>1134</sup> Similarly, with respect to money laundering, the United States has extraterritorially applied its AML/CFT laws to the Caribbean since the 1980s 'war on drugs',<sup>1135</sup> in response to the laundering of illicit proceeds through US banks that failed

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<sup>1127</sup> Colangelo, 'What Is Extraterritorial Jurisdiction?'

<sup>1128</sup> Colangelo; Mills, 'Rethinking Jurisdiction in International Law'.

<sup>1129</sup> Parrish, 'Reclaiming International Law from Extraterritoriality'; Roth, 'Reasonable Extraterritoriality'; Westbrook, 'Extraterritoriality, Conflict of Laws, and the Regulation of Transnational Business Review Essay'.

<sup>1130</sup> Ali, *Money Laundering Control in the Caribbean*.

<sup>1131</sup> Aaron Craig, 'Gambling on the Internet', *Computer Law Review and Technology Journal* 1998, no. 2 (1998): 61–102.

<sup>1132</sup> Rose, 'Gambling and the Law'.

<sup>1133</sup> Craig, 'Gambling on the Internet'.

<sup>1134</sup> Craig; Robbins, 'Baby Needs a New Pair of Cybershoes'.

<sup>1135</sup> Ali, *Money Laundering Control in the Caribbean*.

to comply with currency reporting requirements pursuant to the Banking Secrecy Act (1970).<sup>1136</sup> This foreign policy posture towards the region has undermined the sovereignty of its constituent small island States by jurisdictionally encroaching on their authority to regulate commercial activities and govern persons within their territorial borders, in accordance with their domestic laws.<sup>1137</sup> Likewise, where the United States has exercised its sovereign right to pursue Internet gambling operators, its capacity to unilaterally detect, investigate and prosecute incidences of unlawful Internet gambling has been severely curtailed.<sup>1138</sup>

The unilateral assertion of the United States' sovereign prosecutorial powers may therefore be restricted to the cooperation of the State in whose territory the perpetrator is present, since the United States may not legitimately enforce its powers within another State's territory.<sup>1139</sup> The effectiveness of the United States' enforcement jurisdiction will be vitiated by the fact that extradition or mutual legal assistance would be unlikely.<sup>1140</sup> This is because the prohibited act of supplying cross-border betting and gambling services to Americans would be legal in the requested Caribbean offshore jurisdictions. Transnational judicial cooperation, in this regard, would be inimical to the region's sustainable development interests. Moreover, unless the offshore Internet gambling operator physically travels to the United States' territory then the extraterritorial applicability of US anti-gambling laws would be undermined in practice.<sup>1141</sup> States have often retaliated against US extraterritoriality by enacting blocking or clawback statutes, with varying consequences for its commercial, financial and political relationships to those countries.<sup>1142</sup> While it is doubtful that the United States will go to such extreme in case of offshore Internet gambling, where transnational cooperation has been refused, the United States has conventionally violated the sovereignty of other States by forcibly and

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<sup>1136</sup> Knecht, 'Extraterritorial Jurisdiction and the Federal Money Laundering Offense Note'.

<sup>1137</sup> Ali, *Money Laundering Control in the Caribbean*.

<sup>1138</sup> Mcmillen and Grabosky, 'Internet Gambling'.

<sup>1139</sup> Ali, *Money Laundering Control in the Caribbean*.

<sup>1140</sup> Abovitz, 'Why the United States Should Rethink Its Legal Approach to Internet Gambling'; Goldsmith, 'Unilateral Regulation of the Internet'; Shekel Masoud, 'The Offshore Quandary: The Impact of Domestic Regulation on Licensed Offshore Gambling Companies Notes and Comments', *Whittier Law Review*, no. 4 (2004 2003): 989–1010; Mcmillen and Grabosky, 'Internet Gambling'; Robbins, 'Baby Needs a New Pair of Cybershoes'.

<sup>1141</sup> Robbins, 'Baby Needs a New Pair of Cybershoes'.

<sup>1142</sup> Dam, 'Economic and Political Aspects of Extraterritoriality'; Meyer, 'Dual Illegality and Geoambiguous Law'; Parrish, 'Reclaiming International Law from Extraterritoriality'; Roth, 'Reasonable Extraterritoriality'.

secretly retrieving high-profile offenders allegedly involved in drug trafficking from offshore jurisdictions.<sup>1143</sup>

### **6.5. Pursuing Illicit Wealth or Criminalising Legitimate Capital in the Offshore Internet Gambling Sector? Case Study of US Unilateralism & Commonwealth Caribbean Small States' Sovereignty**

The United States campaign against offshore Internet gambling in the Caribbean has come under increased scrutiny. Global AML policy has been geared towards removing the profit from serious drug-related crimes to disrupt organised criminal networks, by freezing, seizing and confiscating their operational capital.<sup>1144</sup> This policy was initially championed by the United States.<sup>1145</sup> However, it would appear that the initial national security concerns of curbing the laundering of illicit proceeds using Internet gambling platforms has given way to a crusade of criminalising legitimately licensed operators within the Caribbean offshore Internet gambling sector that accept American clients. In effect, this has rendered legitimately generated profits from the US market, as 'dirty money'. Unsurprisingly, the sentencing of offshore Internet gambling operators under the Laundering of Monetary Instruments Act, has been criticised as dangerous and unjustifiable.<sup>1146</sup> In this regard, an appropriate point of departure is a critical analysis of the latent policy interests that underpinned the United States' legal policy framework.

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<sup>1143</sup> Ali, *Money Laundering Control in the Caribbean*.

<sup>1144</sup> Naylor, 'Wash-Out'.

<sup>1145</sup> Naylor.

<sup>1146</sup> Masoud, 'The Offshore Quandary'.

### 6.5.1. The United States' Policy & Legal Framework for Extraterritorial Regulation of Unlawful Internet Gambling – ML/TF Risks Mitigation or Tax Preservation?

From a national security policy perspective, the United States has always been keen to curb money laundering and terrorist financing, Offshore. In fact, the global AML/CFT regime emerged in response to the 'war on drugs' it waged from the 1970s,<sup>1147</sup> which was internationalised in the 1980s, when the United States co-opted the G7.<sup>1148</sup> It was in the context of the 'war on drugs' that the United States' anti-gambling regime progressively developed. Organised criminal networks were using illegal gambling businesses both as a profitable enterprise and for laundering the illicit proceeds of drug trafficking.<sup>1149</sup>

More recently, a key regulatory dilemma that the US Federal Government has had to grapple with, is how to balance the interests of its respective states in directly raising tax revenues from legalised gambling while proscribing Internet gambling and wagering.<sup>1150</sup> The US Federal Government has conventionally reserved regulatory jurisdiction for Internet gambling to its states. Some states have used consumer protection laws to target proprietors of offshore Internet gambling websites by designating the provision of online gambling services to their residents as false advertising.<sup>1151</sup> Thus, for a long time, tax preservation was a major factor underpinning the US' federal policy position on Internet gambling, rather than ML/TF risks, since most Internet casinos are operated in foreign jurisdictions, would have no tax liability in the United States and may outcompete legalised 'brick and mortar' gambling establishments due to accessibility.<sup>1152</sup>

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<sup>1147</sup> Alldridge, *What Went Wrong with Money Laundering Law?*; Mariano-Florentino Cuellar, 'The Tenuous Relationship between the Fight against Money Laundering and the Disruption of Criminal Finance Criminal Law', *Journal of Criminal Law and Criminology* 93, no. 2–3 (2003 2002): 311–466; Steven B. Duke and Albert C. Gross, *America's Longest War: Rethinking Our Tragic Crusade against Drugs* (New York: Putnam's Sons, 1993); Knecht, 'Extraterritorial Jurisdiction and the Federal Money Laundering Offense Note'; Vlcek, *Offshore Finance and Small States*.

<sup>1148</sup> Ferwerda and Kleemans, 'Estimating Money Laundering Risks'; Vlcek, *Offshore Finance and Small States*.

<sup>1149</sup> Friedrich, 'Internet Casino Gambling: The Nightmare of Lawmaking, Jurisdiction, Enforcement & the Dangers of Prohibition'; Srephichet, 'Pirates of the Caribbean'.

<sup>1150</sup> Craig, 'Gambling on the Internet'.

<sup>1151</sup> Mcmillen and Grabosky, 'Internet Gambling'.

<sup>1152</sup> Grohman, 'Reconsidering Regulation'; Loscalzo and Shapiro, 'Internet Gambling Policy'; Morse, 'The Internet Gambling Conundrum'; Edward A Morse, 'Regulation of Online Gambling', in *Research Handbook on Electronic Commerce Law*, ed. John Rothchild (ElgarOnline, 2016), 449–72.

However, jurisdictional loopholes between federal and state laws allowed residents to circumvent state regulations.<sup>1153</sup> Courts were therefore extraterritorially applying state laws to regulate offshore internet gambling operators on the basis of their “continuous contacts” with their residents as well as the use of US financial service providers to conduct gambling transactions.<sup>1154</sup> To protect gambling revenue from regulated and taxed ‘brick and mortar’ establishments, several states within the United States attempted to use their police powers to exclude Internet gambling.<sup>1155</sup> The key federal legislation initially used to target remote betting and gambling operators in the Caribbean were the Interstate Wire Act (1961), the Travel Act (1961), Illegal Gambling Businesses Act 1970 and more recently the Unlawful Internet Gambling Enforcement Act (UIGEA) 2006. The Racketeer Influenced and Corrupt Organisations Act (RICO) of 1970 and the USA PATRIOT Act (2001), have also been used to target the offshore Internet gambling sector. However, the legal position of Internet gambling was not always clear in the United States.<sup>1156</sup>

The Interstate Wire Act, which was enacted under US Attorney General, Robert F. Kennedy’s ‘war on crime’ in 1961,<sup>1157</sup> has been the most significant federal legislation restricting Internet gambling. It targeted illegal bookies engaged in horseracing and other sports betting and wagering, who knowingly used ‘wire communication facilities’ to transmit bets and wagers on “any sport event or contest” in interstate or foreign commerce, especially the telegraph.<sup>1158</sup> This left online casinos in a questionable legal vacuum. Interestingly, federal courts restricted the application of the 1961 Wire Act to remote sports betting and wagering.<sup>1159</sup> Nonetheless, the US Justice Department rejected this position and insisted that all forms of Internet gambling were illegal under the federal

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<sup>1153</sup> Abovitz, ‘Why the United States Should Rethink Its Legal Approach to Internet Gambling’.

<sup>1154</sup> Abovitz.

<sup>1155</sup> Abovitz.

<sup>1156</sup> Mcmillen and Grabosky, ‘Internet Gambling’.

<sup>1157</sup> Rose, ‘Gambling and the Law’, 2.

<sup>1158</sup> Joseph J. McBurney, ‘To Regulate or to Prohibit: An Analysis of the Internet Gambling Industry and the Need for a Decision on the Industry’s Future in the United States Notes & Comments’, *Connecticut Journal of International Law*, no. 2 (2006 2005): 337–66; Rose, ‘Gambling and the Law’; Roysen, ‘Taking Chances’.

<sup>1159</sup> Banks, *Gambling, Crime and Society*; McBurney, ‘To Regulate or to Prohibit’; Robbins, ‘Baby Needs a New Pair of Cybershoes’; Roysen, ‘Taking Chances’.

statutes, namely the Travel Act and the Illegal Gambling Business Act.<sup>1160</sup> For example, in *re MasterCard International Inc. Internet Gambling Litigation case*, the US' Fifth Circuit court ruled that the language of the Wire Act only prohibits online betting and wagering on sporting events or contests rather than a blanket ban on all online gambling.<sup>1161</sup> Concerningly, the Wire Act 1961 selectively permitted electronic pari-mutuel betting on horseracing and state lotteries.<sup>1162</sup> It is now settled that although the Wire Act 1961 had been enacted before the advent of contemporary Internet gambling, it applies to all cross-border online wagering and betting using wire communications facilities.<sup>1163</sup>

The Travel Act (1961) prohibited interstate or foreign travel for the use of the US mail or any other facility for the purposes of engaging in an unlawful activity. Since Internet gambling is largely outlawed in most states in the United States, it would be caught by this federal criminal statute.<sup>1164</sup> The federal Illegal Gambling Business Act (IGBA) was enacted under the Organised Crime Control Act 1970, to complement the Wire Act and assist states in curbing unlawful inter-state gambling.<sup>1165</sup> The IGBA 1970 has provided that a person will be subject to federal criminal prosecution where one conducts, finances, manages, supervises, directs or owns all or any part of an illegal gambling business. On the basis of the nationality principle of extraterritorial jurisdiction, the IGBA was interpreted as applying to US nationals and legal persons operating the offshore Internet gambling sectors overseas.<sup>1166</sup> However, this legal and regulatory framework did not prevent US citizens from dialling offshore servers or using offshore financial services providers to conduct proscribed Internet gambling transactions.<sup>1167</sup>

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<sup>1160</sup> Abovitz, 'Why the United States Should Rethink Its Legal Approach to Internet Gambling'; Banks, *Gambling, Crime and Society*; McBurney, 'To Regulate or to Prohibit'; Robbins, 'Baby Needs a New Pair of Cybershoes'; Roysen, 'Taking Chances'.

<sup>1161</sup> Abovitz, 'Why the United States Should Rethink Its Legal Approach to Internet Gambling'.

<sup>1162</sup> Banks, *Gambling, Crime and Society*.

<sup>1163</sup> Banks; Robbins, 'Baby Needs a New Pair of Cybershoes'; Roysen, 'Taking Chances'.

<sup>1164</sup> Abovitz, 'Why the United States Should Rethink Its Legal Approach to Internet Gambling'; Banks, *Gambling, Crime and Society*.

<sup>1165</sup> Jay S. Albanese, 'Illegal Gambling Businesses & Organized Crime: An Analysis of Federal Convictions', *Trends in Organized Crime* 21, no. 3 (1 September 2018): 262–77, <https://doi.org/10.1007/s12117-017-9302-y>.

<sup>1166</sup> Abovitz, 'Why the United States Should Rethink Its Legal Approach to Internet Gambling'; Banks, *Gambling, Crime and Society*.

<sup>1167</sup> Mcmillen and Grabosky, 'Internet Gambling'.

The seminal case of *United States v Cohen* is instructive in relation to the United States use of the Wire Act. In 1998 the US Attorney for New York filed charges against offshore Internet sport bookie Jay Cohen, founder of World Sports Exchange (WSE), which was licensed in Antigua and Barbuda, for conspiracy and substantive violations of the Wire Act.<sup>1168</sup> Having surrendered to the United States' enforcement jurisdiction by returning to the United States to face criminal charges, he was convicted and the 2<sup>nd</sup> Circuit Court of Appeal upheld his conviction. WSE only conducted sports betting and wagering, including accepting bets over the telephone,<sup>1169</sup> which were clearly captured by the Wire Act. The position of whether Internet casinos, which are not sport betting companies, were caught by the statute was not raised.<sup>1170</sup> Cohen was an American citizen, surrendered himself to the personal jurisdiction of the New York court, and had significant ties to the United States, having issued cheques for winnings using US banks and the mailing system.<sup>1171</sup> The case also left unclear, whether foreign nationals and offshore gambling business could be extraterritorially regulated if they had no ties to the United States.<sup>1172</sup> The United States campaign against the Caribbean's received impetus after the September 11, 2001 terrorist attacks in New York.

In the aftermath of 9/11, Congress became concerned with offshore Internet gambling websites being potentially misused for terrorist financing.<sup>1173</sup> Accordingly, it initiated hearings in 2001 on ways to empower federal law enforcement with effective tools to curb the illegal supply of remote gambling services to US residents via the Internet.<sup>1174</sup> Additionally, the United States federal government adopted the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act 2001.<sup>1175</sup> The USA PATRIOT Act redeployed

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<sup>1168</sup> Abovitz, 'Why the United States Should Rethink Its Legal Approach to Internet Gambling'; Grohman, 'Reconsidering Regulation'; Masoud, 'The Offshore Quandary'; Morse, 'The Internet Gambling Conundrum'.

<sup>1169</sup> Abovitz, 'Why the United States Should Rethink Its Legal Approach to Internet Gambling'; Grohman, 'Reconsidering Regulation'; Masoud, 'The Offshore Quandary'; Morse, 'The Internet Gambling Conundrum'.

<sup>1170</sup> Abovitz, 'Why the United States Should Rethink Its Legal Approach to Internet Gambling'; Grohman, 'Reconsidering Regulation'; Morse, 'The Internet Gambling Conundrum'.

<sup>1171</sup> Grohman, 'Reconsidering Regulation'.

<sup>1172</sup> Grohman.

<sup>1173</sup> Charles P. Jr. Ciaccio, 'Internet Gambling: Recent Developments and State of the Law IV. Cyberlaw: A. Notes', *Berkeley Technology Law Journal*, no. 1 (2010): 529.

<sup>1174</sup> Ciaccio, 'Internet Gambling'.

<sup>1175</sup> Vlcek, *Offshore Finance and Small States*; Wechsler, 'Follow the Money Essay'.

US banking and anti-money laundering laws and regulations and co-opted non-financial businesses and professions into efforts to extraterritorially combat the financing of terrorism.<sup>1176</sup> The United States has therefore had bona fide justifications for the extraterritorial surveillance of the offshore Internet gambling sector. Section 377 of the USA PATRIOT Act (2001) expressly created broad extraterritorial jurisdiction for money laundering activities perpetrated by any person outside the United States' territorial jurisdiction who engages in any act, which if had been committed within the United States, would have constituted an offence under the Act if some connection with a US financial account or institution is established. The US policy and legal context further changed after Antigua and Barbuda challenged the United States discriminatory prohibition of the supply of remote betting and gambling services before the World Trade Organisation Dispute Settlement Mechanism.

The Unlawful Internet Gambling Enforcement Act ( UIGEA ), which was signed into law by President George W. Bush on 13<sup>th</sup> October 2006, the United States has now strictly prohibited the supply of remote betting and gambling services.<sup>1177</sup> To fill gaps in the US' prohibition regime, it prescribes federal criminal charges for accepting Internet wagers from a jurisdiction where said wagering is illegal.<sup>1178</sup> It was recalled that during Congressional discussions on the UIGEA 2006 organised crime, corruption, money laundering, tax preservation, gambling addiction were among the policy concerns raised.<sup>1179</sup> However, as this legislative move was in blatant defiance of the WTO's Appellate Body ruling and strengthened the United States' prohibition regime by proscribing the acceptance of payments related to illegal online gambling.<sup>1180</sup> The policy issues raised could have been to shore up the use of federal police powers to exclude offshore Internet gambling operators from the US gambling market.

The UIGEA (2006) neither criminalised Internet gambling nor the sending or receiving funds to or from Internet gambling websites by American gamblers.<sup>1181</sup> Rather it has targeted offshore gambling and wagering businesses by criminalising the knowing

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<sup>1176</sup> Vlcek, *Offshore Finance and Small States*; Wechsler, 'Follow the Money Essay'.

<sup>1177</sup> Mcmillen and Grabosky, 'Internet Gambling'.

<sup>1178</sup> Morse, 'The Internet Gambling Conundrum'; Roysen, 'Taking Chances'.

<sup>1179</sup> Srephichet, 'Pirates of the Carribean'.

<sup>1180</sup> Roysen, 'Taking Chances'.

<sup>1181</sup> Abovitz, 'Why the United States Should Rethink Its Legal Approach to Internet Gambling'; Rose, 'Gambling and the Law'; Wilson, 'Chips, Bits, and the Law'.

acceptance of payments from a person engaged in unlawful Internet gambling.<sup>1182</sup> The UIGEA 2006 has imposed strict regulatory oversight on processors of related transactions, to indirectly cut the financing of the sector.<sup>1183</sup> For example, the UIGEA 2006 has prohibited banks, financial services and other businesses from electronically transferring funds to offshore gambling accounts for the purposes of wagering on sports betting, online casino games and poker.<sup>1184</sup> Thus, financial services providers will incur aiding and abetting liability for facilitating financial transactions to offshore Internet gambling operators.<sup>1185</sup> The UIGEA 2006 has mandated US regulatory authorities to require financial institutions that offer designated payment systems such as credit cards, electronic funds transfer, cheques, and e-wallets to identify and block financial transactions related to unlawful Internet gambling.<sup>1186</sup> Furthermore, they must conduct risk assessment or due diligence of commercial customers likely to participate in Internet gambling.<sup>1187</sup> It has been observed that the UIGEA 2006 has not prevented American gamblers from transferring funds from offshore bank accounts to foreign Internet gambling websites.<sup>1188</sup> These transactions are usually conducted using new payment methods offered by offshore third-party payment processors thereby circumventing obligations of issuing US financial institutions to identify and block unlawful gambling related transactions.<sup>1189</sup>

Arguably discriminatory, the UIGEA exempted bets or wagers initiated and received, or made exclusively, intra-state from designation as unlawful Internet gambling, so far as such activities are permitted under state laws.<sup>1190</sup> To the extent that the UIGEA (2006) exempted intrastate Internet gambling and selected forms of online gambling under the

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<sup>1182</sup> Simser, 'Money Laundering'; Wilson, 'Chips, Bits, and the Law'.

<sup>1183</sup> Abovitz, 'Why the United States Should Rethink Its Legal Approach to Internet Gambling'; Banks, *Gambling, Crime and Society*; Rose, 'Gambling and the Law'; Simser, 'Money Laundering'.

<sup>1184</sup> Abovitz, 'Why the United States Should Rethink Its Legal Approach to Internet Gambling'; Banks, *Gambling, Crime and Society*; Rose, 'Gambling and the Law'.

<sup>1185</sup> Morse, 'The Internet Gambling Conundrum'; Morse, 'Regulation of Online Gambling'; Simser, 'Money Laundering'.

<sup>1186</sup> Hugel and Kelly, 'Internet Gambling, Credit Cards and Money Laundering'; Morse, 'The Internet Gambling Conundrum'; Morse, 'Regulation of Online Gambling'; Simser, 'Money Laundering'.

<sup>1187</sup> Hugel and Kelly, 'Internet Gambling, Credit Cards and Money Laundering'; Morse, 'The Internet Gambling Conundrum'; Morse, 'Regulation of Online Gambling'; Simser, 'Money Laundering'.

<sup>1188</sup> Abovitz, 'Why the United States Should Rethink Its Legal Approach to Internet Gambling'; Eadington, 'The Future of Online Gambling in the United States and Elsewhere'.

<sup>1189</sup> Abovitz, 'Why the United States Should Rethink Its Legal Approach to Internet Gambling'; Eadington, 'The Future of Online Gambling in the United States and Elsewhere'.

<sup>1190</sup> Srephichet, 'Pirates of the Caribbean'.

Interstate Horseracing Act (1978), the public policy justifications for prohibiting offshore became suspect. The Interstate Horseracing Act 1978 was intended to preserve revenue for racetrack operators, prohibited the acceptance of interstate off-track wagers, but created an exception for legalised online wagering connected to horseracing.<sup>1191</sup> This exception was expressly reinforced by the UIGEA 2006. The US prohibition on Internet gambling has been criticised as an “unfair protectionist practice,” insofar as it restricts US residents from legally accessing offshore Internet gambling websites.<sup>1192</sup> Yet, the use of wireless gambling devices in brick and mortar casinos in Nevada is legal, as well as Internet gambling for off-track horserace betting.<sup>1193</sup> Delaware and New Jersey have also legalised online gambling to varying degrees for their residents.<sup>1194</sup> This underscores that morality concerns raised by the federal Government were questionable.<sup>1195</sup> Moreover, legislators from gambling states in the United States were the primary advocates for the prohibition of Internet gambling, and for exemptions in the UIGPA related to state lotteries, pari-mutuel betting on horse racing and casinos that permitted remote wagering from hotel rooms.<sup>1196</sup> This provides an insight into the tax preservation policy interests that underpinned the legislation. The sovereignty claims advanced by the United States, at the WTO, to justify this notoriously discriminatory legislation will now be scrutinised.

### **6.5.2. Case Study on US Measures Prohibiting Remote Betting and Gambling- Antigua-United States Remote Gambling case at the World Trade Organisation (WTO)**

In the context of the United States crackdown on offshore Internet gambling operators licenced in the Caribbean, in the aftermath of the *United States v Cohen* ruling, which dealt a significant blow to offshore Internet gambling operations in its jurisdiction,<sup>1197</sup>

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<sup>1191</sup> Roysen, ‘Taking Chances’.

<sup>1192</sup> Morse, ‘The Internet Gambling Conundrum’, 530.

<sup>1193</sup> Morse, ‘The Internet Gambling Conundrum’.

<sup>1194</sup> Morse, ‘Regulation of Online Gambling’.

<sup>1195</sup> Michael P. Kailus, ‘Do Not Bet on Unilateral Prohibition of Internet Gambling to Eliminate Cyber-Casinos Note’, *University of Illinois Law Review*, no. 3 (1999): 1045–82.

<sup>1196</sup> Kailus.

<sup>1197</sup> Roysen, ‘Taking Chances’.

Antigua and Barbuda requested consultations under the WTO Dispute Settlement Understanding with respect to the United States' prohibition of cross-border supply of offshore Internet gambling services.<sup>1198</sup> Antigua and Barbuda, in its submission to the WTO, cited the “increasingly aggressive strategy of the United States” as the reason for the decline in the size of its offshore Internet gambling sector.<sup>1199</sup> The United States contended that its federal criminal statutes proscribing remote Internet gambling, namely, the Wire Act, the Travel Act and the Illegal Gambling Business Act, were necessary to “protect public morals and maintain public order” including to combat money laundering and organised crime.<sup>1200</sup>

The decision of the WTO Dispute Settlement Mechanism in the *Antigua-United States Remote Gambling case* has reiterated that a State may exercise its sovereign prerogative to prevent market access of offshore Internet gambling and wagering services, where it reasonably believes that it is necessary to protect important public interests.<sup>1201</sup> This sovereign prerogative is referred to as police powers. Police powers denotes a State has exclusive authority to promote and protect the health, general welfare, morals and safety of its citizens, owing to its sovereignty.<sup>1202</sup> In WTO jurisprudence, a Member State may legitimately take ‘necessary actions’ to preserve public order including the violation of provisions of a relevant treaty if the infraction is deemed in its best interest.<sup>1203</sup> The regulation of gambling has always been regarded as falling within police powers and a State’s authority to do so is often largely unrestricted and a question of domestic discretion.<sup>1204</sup> Consequently, treaty organisations such as the WTO tend to defer to exercise of police powers by member States.<sup>1205</sup>

Police powers were codified in the ‘general exceptions’ provisions of Article XIV(a) of the General Agreement on Trade in Service (GATS). Under Article XIV GATS,

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<sup>1198</sup> World Trade Organisation, ‘United States- Measures Affecting the Cross-Border Supply of Gambling and Betting Services: Request for Consultations by Antigua and Barbuda’ (Geneva, Switzerland: WTO Secretariat, 27 March 2003), <https://antiguawto.com/WTOListPg.html>.

<sup>1199</sup> World Trade Organisation.

<sup>1200</sup> World Trade Organisation, ‘Appellate Report, United States- Measures Affecting the Cross-Border Supply of Gambling and Betting Services’ (Geneva, Switzerland: WTO Secretariat, 7 April 2005), <https://antiguawto.com/WTOListPg.html>.

<sup>1201</sup> Rose, ‘Gambling and the Law’.

<sup>1202</sup> Rose.

<sup>1203</sup> Rose.

<sup>1204</sup> Rose.

<sup>1205</sup> Rose.

Members of the World Trade Organisation (WTO) retained the sovereign right to justifiably impose restrictive measures on trade in services that are “necessary to protect public morals or to maintain public order”, contrary to any other provisions of GATS. Both the Panel and Appellate Body of the WTO Dispute Settlement Body in the *US-Antigua Remote Gambling and Betting case*, reiterated that it is entirely the sovereign prerogative of WTO Members to define “the scope of ‘public morals’ with respect to various values prevailing in their societies at a given time” and “to determine the level of protection that they consider appropriate.”<sup>1206</sup> The WTO DSB found that in the Schedule of Specific Commitments published by the United States, pursuant to Article XX GATS, concerning services to be harmonised, liberalised and given open access, whereas other States expressly excluded gambling services, the United States did not. The Appellate Body held that the United States had a duty to ensure full market access to offshore Internet gambling operators on the basis of the most favoured nation treatment (MFN) principle (i.e. reciprocal extension of equal treatment in trade relations), in line with Article XVI GATS and that its prohibition regime was discriminatory, unlawful and a barrier to the free trade in recreational gambling and betting services.<sup>1207</sup> However, it is important to note that the WTO Appellate Body accepted that the United States’ public interest concerns were largely valid and that the prohibition on Internet gambling was justified, despite the restrictive effects that its prohibition regime had on Antigua’s supply of offshore gambling and betting services.<sup>1208</sup>

What the WTO Appellate Body did not accept, was that the total prohibition on remote gambling was proportionate to protect those public interests or was extraterritorially applied to Antiguan licensed operators in a non-discriminatory manner.<sup>1209</sup> The Appellate Body, therefore, held that the United States’ prohibition on remote betting and gambling constituted an arbitrary and unjustifiable “disguised restriction on international trade.” Thus, laws necessary to protect public interest could be found invalid on two primary grounds. Firstly, if they are “overboard”- that is, if the objective sought by the exercise of police powers could be achieved by alternative means

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<sup>1206</sup> World Trade Organisation, ‘WTO Appellate Report- U.S.- Antigua Remote Gambling Dispute’.

<sup>1207</sup> World Trade Organisation, ‘United States- Measures Affecting the Cross-Border Supply of Gambling and Betting Services- Panel Report’ (Geneva, Switzerland: WTO Secretariat, 2007), <https://antiguawto.com/WTOListPg.html>.

<sup>1208</sup> World Trade Organisation, ‘WTO Appellate Report- U.S.- Antigua Remote Gambling Dispute’.

<sup>1209</sup> Rose, ‘Gambling and the Law’.

without infringing the sovereign rights of other States.<sup>1210</sup> Secondly, if they arbitrarily discriminate against other sovereign States.<sup>1211</sup> The WTO Appellate Body ruled that by permitting domestic wagering on horseracing and precluding licensed Antiguan operators from accepting horseracing bets, that the United States' prohibition regime on Internet gambling had violated Antigua's rights under GATS.<sup>1212</sup> In particular, the WTO Appellate Body found that the Interstate Horseracing Act permitted remote gambling among states within the United States but not with foreign countries, which constituted unjustifiable discrimination and that the Travel Act and the Illegal Gambling Business Act were also being applied in violation of GATS.<sup>1213</sup>

From the perspective of the leveraging of State sovereignty by powerful onshore centres to extraterritorially regulate ML/TF risks associated with the offshore Internet gambling sector as opposed to respecting the rule of international law, the United States' Congressional response to the WTO Appellate Body's ruling is instructive. It was recalled that when the WTO ruling was specifically raised in the US Congress under the section of a bill branded "Sense of Congress Regarding Sovereignty."<sup>1214</sup> The Congressional findings in relation to the WTO Appellate ruling expressly reiterated the responsibilities of the US Government to "ensure that Federal and State laws are not usurped by foreign governments or organisations;" to "prevent the loss of Federal and State sovereignty" and reassert the primacy of US laws over international law, noting the former "should not be overridden by the provisions in trade agreements."<sup>1215</sup> Unsurprisingly, therefore, the United States refused to amend the Interstate Horseracing Act to regularise the acceptance of wagering on horseracing by licensed Antiguan operators.<sup>1216</sup>

The role of power in enabling the exercise of effective sovereignty was underscored by the United States' insistence on its sovereign right to unilaterally alter its obligations under GATS. This was justified on the basis that there was no Congressional intent to permit legal offshore Internet gambling at the time it ratified GATS as this would have

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<sup>1210</sup> Rose.

<sup>1211</sup> Rose.

<sup>1212</sup> World Trade Organisation, 'WTO Appellate Report- U.S.- Antigua Remote Gambling Dispute'.

<sup>1213</sup> World Trade Organisation; World Trade Organisation, 'WTO Panel Report- U.S.- Antigua Remote Gambling Dispute'.

<sup>1214</sup> Rose, 'Gambling and the Law', 1188.

<sup>1215</sup> Rose, 1188.

<sup>1216</sup> Rose, 'Gambling and the Law'.

been contrary to federal laws, and would not pay compensation to Antigua.<sup>1217</sup> This was pursuant to Article XXI GATS ‘Modification of Schedules’, which has permitted a State Party to modify or withdraw any commitment after three years following the entry into force of said commitment; provided the modifying State enters negotiations with a view to agreeing on compensatory adjustments that must be awarded in line with the most-favoured-nation principle. It has further provided that where an agreement cannot be reached the affected State Party may refer to matter for arbitration and the modifying State may not modify or withdraw its commitments before compensatory adjustments are made pursuant to arbitral findings. This expressly excludes unilateralism.

In December 2007, Antigua instituted compliance proceedings and the WTO appointed Arbitrator authorised the nullification of up to \$21 million of United States intellectual property rights under the WTO Trade Related Intellectual Property Rights (TRIPs) Agreement. The retaliatory measures authorised by the Appellate Body were notoriously ineffective,<sup>1218</sup> in vindicating Antigua’s sovereign rights to supply remote betting and gambling services without them being discriminatorily blocked under the pretext of ML/TF risks. The United States simply withdrew from its commitment to liberalise recreational services under the GATS.<sup>1219</sup> The United States’ blatant disregard for the WTO DSM’s ruling marginalised Antigua and Barbuda’s interests as is often the case of small States in multilateral institutions.<sup>1220</sup> This underscored the inability of smaller States to enforce economic sanctions and hold larger States accountable even when their interests are threatened while being simultaneously unable to resist the curtailment of their own economic sovereignty by powerful onshore economic centres.

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<sup>1217</sup> Rose.

<sup>1218</sup> Rajesh Babu, ‘WTO and the Protection of Public Morals’, *Asian Journal of WTO & International Health Law and Policy* 13, no. 2 (28 September 2018): 333–54; Cooper, ““Remote” in the Eastern Caribbean: The Antigua- U.S. WTO Internet Gambling Case.’; Roysen, ‘Taking Chances’.

<sup>1219</sup> Bravo, ‘Challenges to Caribbean Economic Sovereignty in a Globalizing World Symposium Articles’, 2012 2011.

<sup>1220</sup> Peter Clegg, ‘The Commonwealth Caribbean and the Challenges of Institutional Exclusion’, *The Round Table* 97, no. 395 (April 2008): 227–41, <https://doi.org/10.1080/00358530801962022>.

## 6.6. Observations on the Caribbean Offshore Internet Gambling Sector post Antigua- United States Remote Betting & Gambling Case- Small States' Sovereignty Under Siege?

### 6.6.1. Shrinkage of the Caribbean Offshore Internet gambling sector

Since the emergence of the sector, Internet gambling operators have viewed the national sovereignty of licensing Caribbean offshore jurisdictions as a shield against the extraterritorial reach of the United States federal anti-gambling penal laws.<sup>1221</sup> Illustratively, Warren Eugene, a Canadian who operated an Internet casino website in Antigua and Barbuda publicly glorified the sense of security from prosecution by US authorities that licensing Caribbean jurisdictions afforded.<sup>1222</sup> However, this security has since been rendered illusive. The United States has been unrestrained in the unilateral application of its laws, extraterritorially.<sup>1223</sup> The United States has viewed such extraterritoriality as its sovereign right to protect Americans and remedy the effects of conduct of persons, businesses and economic regulatory activities in foreign jurisdictions, which adversely affect its national interests.<sup>1224</sup> The consequences of such extraterritoriality for the sovereignty and sustainable development of the small Commonwealth Caribbean jurisdictions have been immaterial. Illustratively, in 1998 the US Attorney in New York filed charges against twenty one offshore gambling operators under the 1961 Wire Act.<sup>1225</sup> At that time, there were approximately twenty five licensed

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<sup>1221</sup> Robbins, 'Baby Needs a New Pair of Cybershoes'.

<sup>1222</sup> John Warren Kindt and Stephen W. Joy, 'Internet Gambling and the Destabilization of National and International Economies: Time for a Comprehensive Ban on Gambling over the World Wide Web', *Denver University Law Review*, no. 1 (2003 2002): 129–30.

<sup>1223</sup> Colangelo, 'What Is Extraterritorial Jurisdiction?'; Dam, 'Economic and Political Aspects of Extraterritoriality'; Vaughan Lowe, 'The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution', *International & Comparative Law Quarterly* 34, no. 4 (October 1985): 724–46, <https://doi.org/10.1093/iclqaj/34.4.724>; Roth, 'Reasonable Extraterritoriality'; Simon and Waller, 'A Theory of Economic Sovereignty'.

<sup>1224</sup> Dam, 'Economic and Political Aspects of Extraterritoriality'; Lowe, 'The Problems of Extraterritorial Jurisdiction'; Simon and Waller, 'A Theory of Economic Sovereignty'.

<sup>1225</sup> Masoud, 'The Offshore Quandary'.

sportsbooks registered in Antigua and Barbuda.<sup>1226</sup> In 2018, there were only eight operators within the sector.<sup>1227</sup> In 2018 the Government of Antigua and Barbuda reported a decline in international gaming companies as well as in international banks operating in its jurisdiction.<sup>1228</sup> This is a direct result of the United States targeting the sector. Furthermore, where a Caribbean State (Belize) was uncooperative in freezing accounts of a US fugitive, the US Justice Department simply used the PATRIOT Act to seize US\$1.7 million from the correspondent accounts that Belizean banks had with US banks.<sup>1229</sup>

An investigation into federal convictions involving unlawful gambling businesses revealed that, in 2014, of eighty (80) persons convicted across twenty-three (23) states, offshore Internet betting and gambling account for 38% of all implicated illegal gambling operations, the largest category.<sup>1230</sup> These operations mostly involved the supply sport betting services and, a significant amount, came from Costa Rica.<sup>1231</sup> Importantly, the main offences charged for online and offshore Internet betting and gambling were money laundering and under the Racketeer Influenced and Corrupt Organisations Act (RICO) 1970.<sup>1232</sup> Scholars have confirmed the use of federal money laundering statutes to target offshore Internet gambling operators.<sup>1233</sup> Furthermore, by amplifying the ML/TF risks associated with Internet gambling, the US appears to have used its anti-gambling laws as a foreign policy tool to ‘securitise’ its fiscal interests (i.e. capital flight and the potential loss of tax revenue from state-regulated brick and mortar gambling establishments), on clearly uncompetitive grounds. This extraterritorial application of federal penal laws, in turn, has encroached on the sovereign right of Caribbean small island States to liberally regulate remote gambling and betting to attract mobile capital to finance their sustainable development.

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<sup>1226</sup> McBurney, ‘To Regulate or to Prohibit’.

<sup>1227</sup> Caribbean Financial Action Task Force, ‘4th Round Mutual Evaluation Report- Antigua and Barbuda’.

<sup>1228</sup> United States Department of States, ‘International Narcotics Control Strategy Report (Vol.2)- Money Laundering’.

<sup>1229</sup> Vlcek, *Offshore Finance and Small States*.

<sup>1230</sup> Albanese, ‘Illegal Gambling Businesses & Organized Crime’.

<sup>1231</sup> Albanese.

<sup>1232</sup> Albanese.

<sup>1233</sup> McMullan and Rege, ‘Online Crime and Internet Gambling’.

### 6.6.2. Emergence of Third-Party Value Transfers Services & New ML/TF Risks

Determined US online gamblers have often circumvented US laws by using non-US financial intermediaries e-wallets to deposit, withdraw and transfer funds to Internet gambling websites.<sup>1234</sup> Neteller and Firepay, for instance, are two of the largest offshore gambling transaction processors. Neteller and Firepay have hosted accounts to which gamblers could transfer funds and then onwards to online gambling accounts, thereby circumventing restrictions imposed on financial institutions or credit card issuers directly transferring funds to online gambling websites.<sup>1235</sup> Neteller is publicly traded on the London Stock Exchange.<sup>1236</sup> However, to close this loophole, s.5362(4) UIGEA has included international payment networks used for electronic fund transfer within the scope of regulated ‘financial transaction providers’ to extraterritorially extend the reach of US law enforcement to target third-party service providers.<sup>1237</sup> This could further disrupt the capitalisation of the offshore Internet gambling sector. For example, the United States has targeted PayPal, for violating the USA PATRIOT Act for transferring funds to offshore Internet gambling operators and force it to settle the case for US\$10 million.<sup>1238</sup>

By preventing banks and non-bank financial institutions that are regulated under robust AML/CFT frameworks from dealing with offshore Internet gambling operators, the United States may inadvertently expose the region to further ML/TF risks. Caribbean Casino, for instance, which operated from Turks and Caicos Islands, specifically required all American citizens to open an offshore bank account before gambling.<sup>1239</sup> Winnings would be deposited in these offshore accounts and could then be withdrawn from any automatic teller machine (ATM) in the United States.<sup>1240</sup> Caribbean Casino would also send winnings through third-party electronic payment processors such as E-Cash, a Dutch company.<sup>1241</sup> These financial arrangements are vulnerable to misuse by criminal

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<sup>1234</sup> Srephichet, ‘Pirates of the Caribbean’.

<sup>1235</sup> Grohman, ‘Reconsidering Regulation’.

<sup>1236</sup> Grohman.

<sup>1237</sup> Srephichet, ‘Pirates of the Caribbean’.

<sup>1238</sup> Srephichet.

<sup>1239</sup> Robbins, ‘Baby Needs a New Pair of Cybershoes’.

<sup>1240</sup> Robbins.

<sup>1241</sup> Robbins.

networks. In jurisdictions outside of the Caribbean, despite the extraterritorial extension of federal anti-gambling laws to regulate offshore cyber-casinos, the rapid development in encryption technologies and electronic banking have challenged the enforcement of those laws.<sup>1242</sup> It remains to be seen whether the Caribbean's offshore Internet gambling sector will similarly mechanise so as to become resilient.

### 6.6.3. Questions Surrounding the Proportionality of Regulatory Costs

Theoretically, from a cost-benefit perspective, jurisdictions that proscribe Internet gambling would bear the disproportionate cost of policing ML/TF risks associated with the sector, whereas permissive jurisdictions would be presumed to benefit from gambling generated revenue or licensing fees.<sup>1243</sup> However, in the context of extraterritorial AML/CFT regulation of the sector in the Caribbean, this has not been the case. Extraterritoriality has relegated the cost of domestic regulation to foreign jurisdictions and actors.<sup>1244</sup> The onus has been put on Internet gambling website operators to exclude American gamblers using identifiable IP addresses, in order to avoid prosecution,<sup>1245</sup> including through investment in costly regulatory technology (RegTech). Expenditure on the latter could undermine their competitiveness and ultimately the sector in the Caribbean. This regulatory practice has reflected the tendency for States to regulate cyber activities and the Internet by promoting privatised enforcement and compliance strategies that deliver technological solutions to substantive legal issues.<sup>1246</sup>

Consequently, offshore targets of US extraterritorial laws are often compelled to bear the costs of domestic regulation within the United States, have little or no recourse to a democratic remedy or the capacity to either affect or consent to be subject to US governance.<sup>1247</sup> Unfortunately, despite the apparent unfairness in the proportionality of

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<sup>1242</sup> Robbins.

<sup>1243</sup> Mcmillen and Grabosky, 'Internet Gambling'.

<sup>1244</sup> Parrish, 'Reclaiming International Law from Extraterritoriality'.

<sup>1245</sup> Wilson, 'Chips, Bits, and the Law'.

<sup>1246</sup> Boyle, 'The Scandal of the Tax Havens'.

<sup>1247</sup> Mark P. Gibney, 'The Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles', *Boston College International and Comparative Law Review* 19 (1996): 297–322; Meyer,

the regulatory burden placed on the Caribbean's offshore Internet gambling sector, there are no foreseeable solutions. Generally, where small sovereign States have insisted on their authority to maintain the liberal offshore regulatory spaces, OECD States have sought to ensure those less powerful States fall in line, including through pressure to adopt costly reforms.<sup>1248</sup>

#### 6.6.4. Irreconcilable Conflicts in Regulatory Jurisdiction and Substantive National Security and Foreign Trade Policy Interests

The unilateral projection of laws to regulate conduct in a State's territory undermines its sovereignty, just as any attempt to curtail a State's authority to regulate foreign conducts that affect it,<sup>1249</sup> as is the case of Caribbean Internet gambling jurisdictions and the United States, respectively. Legalistic and scholastic attempts to resolve the intractable issue of extraterritoriality or the over-extension of prescriptive jurisdiction, have proven futile.<sup>1250</sup> In the *Lotus* case, the PCIJ found "no neutral principles on which to distinguish, judicially, the reasonableness of the concurrent, mutually inconsistent exercise of jurisdiction." The PCIJ opined that considerations of comity and balancing competing interests only led to the conclusion that either State could exercise jurisdiction but not how such jurisdictional conflict should be resolved.<sup>1251</sup> In this regard, there is a prevailing view that, in the case of jurisdictional conflicts, the legitimacy of a State's extraterritorial assertion of regulatory jurisdiction should not be adjudged merely on the basis of the power to assert the right but rather whether such assertion would infringe "protected state interests under international law."<sup>1252</sup> However, protected state interests

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'Dual Illegality and Geoambiguous Law'; Parrish, 'Reclaiming International Law from Extraterritoriality'.

<sup>1248</sup> Sharman, 'The Bark Is the Bite'.

<sup>1249</sup> Trachtman, 'Reflections on the Nature of the State'; Dam, 'Economic and Political Aspects of Extraterritoriality'; Lowe, 'The Problems of Extraterritorial Jurisdiction'; Simon and Waller, 'A Theory of Economic Sovereignty'; Trachtman, 'Reflections on the Nature of the State'.

<sup>1250</sup> Dam, 'Economic and Political Aspects of Extraterritoriality'; Lowe, 'The Problems of Extraterritorial Jurisdiction'; Simon and Waller, 'A Theory of Economic Sovereignty'; Trachtman, 'Reflections on the Nature of the State'.

<sup>1251</sup> Simon and Waller, 'A Theory of Economic Sovereignty', 343.

<sup>1252</sup> Simon and Waller, 344.

have been imprecisely defined in terms of ‘public policy’; ‘non-interference’ in domestic affairs of a State.<sup>1253</sup>

It has been proposed that in resolving competing sovereignty claims, a State must establish that the extraterritorially applied national laws or regulations affected a core state policy so as to infringe its sovereign rights or the integrity of its statehood.<sup>1254</sup> Thus, regulatory actions that lead to a loss of revenue or capital flight would not be deemed to have affected the integrity of the State.<sup>1255</sup> If the United States’ discriminatory prohibition of remote gambling is seen as a trade issue, then this would not resolve the competing economic sovereignty claims of either Caribbean jurisdictions or the United States. If viewed from a public morality or national security perspective of mitigating ML/TF risks, then the United States interests would trump those of the Caribbean, on this reasoning. Moreover, where regulatory actions were taken after the jurisdictional conflicts, these could be construed as having been taken in bad faith.<sup>1256</sup> This would cover the United States adoption of the UIGEA in 2006, after the *Antigua-United States Remote Betting and Gambling Case* appeared to be going in Antigua and Barbuda’s interest. Secondly, injury caused should be shown to threaten the integrity or existence of the state.<sup>1257</sup> This is a rather high threshold, and it is still not clear what would undermine the integrity of the State.

As has been demonstrated, although framed in terms of a clash of moralities and public interests in mitigating ML/TF risks, the *Antigua-United States remote betting and gambling case* was essentially about incompatible economic interests and conflicts in legal and regulatory jurisdictional authority.<sup>1258</sup> The WTO DSB confirmed that excluding offshore Internet gambling on anti-competitive grounds to protect the local gambling sector and preserve tax revenue would not meet the public interest test of necessity.<sup>1259</sup> Still, there does not appear to be any easy resolution to two legitimate competing claims to economic sovereignty. It is submitted that, in part, this is due to inadequate weight being attached to the role of size and asymmetrical power relations in negotiating the

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<sup>1253</sup> Simon and Waller, ‘A Theory of Economic Sovereignty’.

<sup>1254</sup> Simon and Waller.

<sup>1255</sup> Simon and Waller.

<sup>1256</sup> Simon and Waller.

<sup>1257</sup> Simon and Waller.

<sup>1258</sup> Cooper, *Internet Gambling Offshore*.

<sup>1259</sup> Rose, ‘Gambling and the Law’.

effective exercise of economic sovereignty and ultimately deciding whose interests are safeguarded. Small Caribbean jurisdictions that license Internet gambling operators simply lack power.

The United States has used its superpower status to unilaterally project its laws and deploy its law enforcement machinery, extraterritorially, to regulate activities in foreign countries with more liberal regimes, to serve its particularistic economic self-interests.<sup>1260</sup> By criminalising offshore operators taking bets online from American gamblers and sanctioning financial institutions that facilitate gambling transactions,<sup>1261</sup> the United States has leveraged its powerful influence within the TAMLO and, specifically over international financial markets, to target the Caribbean's remote gambling industry. In the absence of evidence of ML/TF activities in the sector, it would appear that the protected US interests is tax preservation linked to its 'brick and mortar' casinos. This has been especially contentious where US courts are called upon to balance competing politico-economic interests of the United States and relevant foreign States, in determining the reasonableness of applying extraterritorial jurisdiction.<sup>1262</sup> The role of state power in resolving jurisdictional conflicts is more apparent at the bilateral level.

It was not coincidental that during the height of the *Antigua-United States remote betting and gambling case*, the United States sought to consolidate extradition treaties with the Governments of the six Members States of the Organisation of Eastern Caribbean States, namely- Antigua and Barbuda, Dominica, Grenada, St. Lucia, St. Kitts and Nevis and St. Vincent and the Grenadines in 2006. Instead, such political manoeuvrings deliberately delegitimise the economic sovereignty of Commonwealth Caribbean States, whose current or future offshore Internet gambling sectors may threaten tax revenue from onshore 'brick and mortar' casinos. Yet, those fiscal interests have often been discursively framed by the United States as AML/CFT issues. In so doing, the United States has been careful to avoid the 'politicisation' of jurisdictional conflicts to minimise its exposure to criticisms of illegitimately, unilaterally exercising extraterritorial jurisdiction overseas.<sup>1263</sup> This has, however, been futile.

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<sup>1260</sup> Meyer, 'Dual Illegality and Geoambiguous Law'.

<sup>1261</sup> Rose, 'Gambling and the Law'.

<sup>1262</sup> Meyer, 'Dual Illegality and Geoambiguous Law'.

<sup>1263</sup> Patrick Emmenegger and Katrin Eggenberger, 'State Sovereignty, Economic Interdependence and US Extraterritoriality: The Demise of Swiss Banking Secrecy and the Re-Embedding of International

Additionally, at the bilateral level, the United States has antagonistically waged a stigmatisation campaign against the Caribbean jurisdictions that licence offshore Internet gambling and betting operations based on perceived ML/TF vulnerabilities.<sup>1264</sup> The stigmatisation of Caribbean offshore Internet gambling jurisdictions ‘pariah States’,<sup>1265</sup> or “regulatory havens,”<sup>1266</sup> has been used by the United States as a pretext for the unilateralism in extraterritorially extending its anti-gambling and AML/CFT laws to undermine the sector in the region and with little consideration for the sovereignty of its constituent small island States.

### 6.7. Critical Observations on Unilateralism in Transnational AML/CFT Regulation of Internet Gambling

States of the Global South have long been encouraged to embrace e-commerce platforms and digital technologies to access global markets and boost opportunities for economic growth and sustainable development.<sup>1267</sup> Several Commonwealth Caribbean States have sought to diversify their post-colonial economic bases into e-business sectors, by developing new offshore business products such as Internet gambling and betting services.<sup>1268</sup> However, despite having formal sovereign equality, many small Caribbean States continue to negotiate their economic sovereignty with large capitalist onshore

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Finance’, *Journal of International Relations and Development* 21, no. 3 (1 July 2018): 798–823, <https://doi.org/10.1057/s41268-017-0088-y>.

<sup>1264</sup> Cooper, *Internet Gambling Offshore*.

<sup>1265</sup> Cooper; Hampton and Christensen, ‘Offshore Pariahs?’

<sup>1266</sup> Mcmillen and Grabosky, ‘Internet Gambling’, 3–4.

<sup>1267</sup> Organisation for Economic Cooperation and Development, ‘Free for All Zone’- Free Trade & Special Economic Zones, International Online Betting Operators & Gambling- Report of 5th OECD Task Force for Countering Illicit Trade’; United Nations Conference on Trade and Development, ‘Harnessing E-Commerce for Sustainable Development’, in *Aid for Trade at a Glance 2017: Promoting Trade, Inclusiveness and Connectivity for Sustainable Development*, ed. World Bank Group (Washington, DC, USA: World Bank Group, 2017), 195–217; World Bank Group, ‘Digital Dividends Overview: World Bank Report’ (Washington, DC, USA: World Bank Group, 2016), <http://documents.worldbank.org/curated/en/961621467994698644/pdf/102724-WDR-WDR2016Overview-ENGLISH-WebResBox-394840B-OUO-9.pdf>.

<sup>1268</sup> Mina Balamoune-Lutz and Sharon C. Cobb, ‘Evolutionary Economic Geography for OFCs: Do Political Ties to the Onshore Reduce Capital Inflow Volatility?’, *Growth & Change* 47, no. 4 (December 2016): 535–55, <https://doi.org/10.1111/grow.12137>.

economies that insist on encroaching on the regulatory spaces created offshore,<sup>1269</sup> including for Internet gambling. Sadly, this has been overshadowed by their previous experience with extraterritorial regulatory scrutiny and pressure from the OECD and the European Union (EU) for ‘harmful tax competition’, the perceived facilitation of tax evasion through banking secrecy laws in their jurisdictions and consequent vulnerability to money laundering risks.<sup>1270</sup>

Admittedly, policing ML/TF risks in the offshore Internet gambling raises difficult regulatory and jurisdictional challenges not associated with cash-based laundering in the ‘brick and mortar’ gambling establishments.<sup>1271</sup> This is especially due to geographic transcendence of Internet gambling and the emerging use of anonymous NPMs and cryptocurrencies, which have challenged the conventional territoriality of a State’s sovereign regulatory authority.<sup>1272</sup> It is impossible to police every risk associated with FinTech innovations that could potentially be used in the Caribbean’s offshore Internet gambling sector. The question which therefore arises is how to reasonably delineate the proportionality of regulatory responsibility for their misuse, for AML/CFT risk management purposes, and who has a legitimate right to decide on those boundaries. Yet, it remains unclear how, if at all, the risk-based approach (RBA) has attenuated the AML/CFT compliance cost for regulating the Caribbean offshore Internet gambling sector, where powerful States unilaterally conceptualise ML/TF risks associated with the sector, outside of established institutional processes and agreed methodologies. Judging from their most recent mutual evaluation reports (MERs), Caribbean States have sought to balance their economic sovereignty with their collective responsibility to curb ML/TF risks in the Internet gambling sector, by subjecting operators to AML/CFT measures appropriate for DNFBCs, absent international harmonisation of regulatory standards for probity across the sector.

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<sup>1269</sup> Cobb, ‘Re-Defining “Offshore” in Latin America’; Hudson, ‘Reshaping the Regulatory Landscape’; Alan Hudson, ‘Offshorenness, Globalization and Sovereignty: A Postmodern Geo-Political Economy?’, *Transactions of the Institute of British Geographers* 25, no. 3 (1 September 2000): 269–83, <https://doi.org/10.1111/j.0020-2754.2000.00269.x>; Marshall, ‘The New International Financial Architecture and Caribbean OFCs’; Vlcek, ‘Why Worry?’

<sup>1270</sup> Balamoune-Lutz and Cobb, ‘Evolutionary Economic Geography for OFCs’; Hampton, *The Offshore Interface*.

<sup>1271</sup> Gainsbury and Wood, ‘Internet Gambling Policy in Critical Comparative Perspective’.

<sup>1272</sup> Masoud, ‘The Offshore Quandary’.

Because of the formal indeterminacy of the proper scope of a State's prescriptive jurisdiction over foreign conduct and transactions that affect its interests,<sup>1273</sup> the extraterritoriality of powerful States, and particularly the United States has become normalised. Targeted smaller jurisdictions can no longer effectively claim the sovereign right to take advantage of market access opportunities in onshore markets for the cross-border supply of online betting and gambling services, without consequences. Perhaps the biggest "threat of extraterritoriality,"<sup>1274</sup> is the United States' perversion of the international policy of 'removing the profit from crime' by misusing the AML/CFT narrative discursively 'securitise' its states' fiscal interests' in the 'brick and mortar' gambling industry. The United States has sought to disrupt financial flows to the Caribbean Internet gambling sector,<sup>1275</sup> by prosecuting offshore Internet gambling operators that engage in business relationships with Americans. Nonetheless, it could be viewed as a legitimate exercise of its economic sovereignty. However, there is another view that this approach constitutes a blatant misuse of its extraterritorial legal authority and courts as foreign policy instruments.<sup>1276</sup>

Given the bad experience that Commonwealth Caribbean small States have had with forcible extraterritorial AML/CFT surveillance and backlisting by the OECD under its Harmful Tax Initiative and the FATF's Non-Cooperative Countries and Territories (NCCTs) 'blacklist', there is some amount of scepticism about the amplification of AML/CFT risks in the region's offshore Internet gambling sector. Caribbean States, themselves have referred to these stigmatisation initiatives as "discriminatory economic blackmail."<sup>1277</sup> This provides a classic example of how globalisation has exacerbated tensions between "geographies of power" in the global political economy.<sup>1278</sup> The result is the increasing marginalisation of the offshore spaces, including the Commonwealth Caribbean, within transnational regulatory governance with dire consequences 'the economic sovereignty of powerless States.

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<sup>1273</sup> Trachtman, 'Reflections on the Nature of the State'.

<sup>1274</sup> Parrish, 'Reclaiming International Law from Extraterritoriality', 869.

<sup>1275</sup> Eadington, 'The Future of Online Gambling in the United States and Elsewhere'; Grohman, 'Reconsidering Regulation'.

<sup>1276</sup> Parrish, 'Reclaiming International Law from Extraterritoriality'.

<sup>1277</sup> Bravo, 'Challenges to Caribbean Economic Sovereignty in a Globalizing World Symposium Articles', 2012 2011, 38.

<sup>1278</sup> Hudson, 'Offshorenness, Globalization and Sovereignty', 269.

## 7. Rethinking the Risk-Based Approach to Combating Money Laundering and Terrorist Financing: Towards a Framework of ‘Common but Differentiated Responsibility’?

This chapter critically probes how the Financial Action Task Force (FATF) has discursively narrated the concept of money laundering and terrorist financing (ML/TF) risks. It is concerned to highlight the implications this has had on the proportionality of anti-money laundering and counter-financing of terrorism and proliferation (AML/CFTP) regulatory responsibilities conferred on Commonwealth Caribbean States. Specifically, it assesses the degree to which the FATF’s transnational institutionalisation of the risk-based approach to combating money laundering and the financing of terrorism and proliferation (RBA) has remedied the failings of the previous rules-based approach. It will be argued that insofar as the RBA has sought to rationalise resources rather than AML/CFTP regulatory responsibilities, based on national risk assessments (NRAs), it has not materially addressed the overriding technical compliance and effectiveness challenges experienced by under-resourced developing countries. The RBA’s failure to attenuate de-risking and financial exclusion, as unintended AML/CFTP regulatory consequences for poor countries, will be attributed to ‘agency capture’. Agency capture generally describes circumstances where organised regulated actors exert undue influence over rulemaking, within a regulatory agency, to advance particularistic agendas at the expense of broader public interest.<sup>1279</sup> Within the transnational anti-money laundering legal order (TAMLO), agency capture is taken to denote the hegemonic influence of the OECD States (as regulated actors) in AML/CFTP rulemaking by the

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<sup>1279</sup> Rachel E. Barkow, ‘Insulating Agencies: Avoiding Capture through Institutional Design’, *Texas Law Review* 89, no. 1 (2011 2010): 15–80; Rachel E. Barkow, ‘Explaining and Curbing Capture Transcripts’, *North Carolina Banking Institute* 18, no. 1 (2014 2013): 17–26; Ernesto Dal Bo, ‘Regulatory Capture: A Review’, *Oxford Review of Economic Policy* 22, no. 2 (2006): 203–25, <https://doi.org/10.1093/oxrep/grj013>; Michael E. Levine and Jennifer L. Forrence, ‘Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis’, *Journal of Law, Economics, & Organization* 6 (1990): 167–98; Saby Ghoshray, ‘Compliance Convergence in FATF Rulemaking: The Conflict between Agency Capture and Soft Law Part I: Combating Threats to the International Financial System: The Financial Action Task Force’, *New York Law School Law Review* 59, no. 3 (2015 2014): 521–46; Justin Rex, ‘Anatomy of Agency Capture: An Organizational Typology for Diagnosing and Remedying Capture’, *Regulation & Governance* 14, no. 2 (2020): 271–94, <https://doi.org/10.1111/rego.12209>; Paul Rose and Christopher J. Walker, ‘Dodd-Frank Regulators, Cost-Benefit Analysis, and Agency Capture’, *Stanford Law Review Online* 66 (2014 2013): 9–16.

FATF (as regulatory agency).<sup>1280</sup> The cumulative effect has been the erosion of state sovereignty,<sup>1281</sup> regulatory autonomy, and the marginalisation of a majority of States of the Global South within FATF-rulemaking. This has been especially true of Commonwealth Caribbean jurisdictions whose efforts to innovatively leverage their economic sovereignty to exploit global value chains in financial, corporate, and recreational services, have been fiercely contested. A strong case will be made for reconstituting the transnational AML/CFTP discourse as development discourse. This will be premised on the recognised emancipatory mission of Development Studies,<sup>1282</sup> as an academic field. Thus, the transnational AML/CFTP discourse will be cross-fertilised using the principle of common but differentiated responsibility (CBDR) as a potential normative solution for reaffirming the sovereignty and development sustainability of small Commonwealth Caribbean States.

### **7.1. The Emergence and Discursive Narration of ML/TFP Risks by FATF: ‘Agency Capture’ and Conceptual issues.**

Risk-based regulatory ideas emerged in the 1980s in tandem with the ‘regulatory state’ in advanced industrialised countries, which adapted corporate risk management strategies.<sup>1283</sup> The subsequent shift to deregulation in the late 1990s was underpinned by the recognition that legalistic regulatory ideas and strategies were inflexible, burdensome

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<sup>1280</sup> There is a view that the FATF was never captured by G7 or OECD States because it was established in 1989 to pursue their geopolitical and regulatory interests related to money laundering. However, the argument being advanced here is that insofar as the FATF has been purportedly ‘repurposed’ as a technocratic international standard-setter with global reach, the continuing undue influence of the G7 and OECD Member States in the FATF’s rulemaking and agenda-setting is tantamount to capture. Moreover, within the Global South, the FATF is viewed as less responsive to the interests of developing countries and compliance with its International Standards too costly for poor countries. The FATF Secretariat is also only staffed by OECD nationals whom, although are technocrats, might not be particularly sensitive to, or have the autonomy to drive, developing countries’ interests in the FATF rulemaking.

<sup>1281</sup> Doyle, ‘Cleaning up Anti-Money Laundering Strategies’.

<sup>1282</sup> Murat Arsel and Anirban Dasgupta, ‘Critique, Rediscovery and Revival in Development Studies’, *Development and Change* 46, no. 4 (2015): 644–65, <https://doi.org/10.1111/dech.12183>.

<sup>1283</sup> Bridget Hutter, ‘The Attractions of Risk-Based Regulation: Accounting for the Emergence of Risk Ideas in Regulation’, *LSE Discussion Paper*, no. 33 (2005): 21; Stuart Ross and Michelle Hannan, ‘Money Laundering Regulation and Risk-Based Decision-Making’, *Journal of Money Laundering Control*; London 10, no. 1 (2007): 106–15, <http://dx.doi.org/10.1108/13685200710721890>.

and costly for both States and industry.<sup>1284</sup> Rationalising the costs of regulatory compliance and enforcement has, therefore, always been central to risk-based discourses.<sup>1285</sup> However, the extension of risk-based ideas to AML/CFTP regulatory governance is considerably more recent. This is, perhaps, attributable to the fact that throughout the 1980s and 1990s combating money laundering was framed as a criminal justice or national security issue rather than a question of prudential regulation. The appropriateness of transferring risk-based ideas to AML/CFT regulatory governance has been questioned,<sup>1286</sup> particularly given the secretive nature and uncertainty surrounding the scale and nature of the ML/FTP phenomenon. What is clear, however, is that the cost-benefit underpinnings of risk-based ideas have remained central to their application in the AML/CFT context. Within the TAMLO, risk-based regulation has been driven by pressures to rationalise policing and financial surveillance resources in accordance with hegemonically constructed policy priorities and perceived threats.<sup>1287</sup> For the G7, the objective has been to leverage risk concepts to ‘safeguard the integrity of the global financial system’. This has largely been pursued by imposing responsibilities for policing ML/FTP risks and financial intelligence gathering on the financial services sector, functions that had been traditionally consigned to the state.<sup>1288</sup> To avoid reputational and financial sanctions, financial institutions (FIs) have been required to conduct ongoing monitoring of the legality of clients’ transactions and share financial intelligence with regulators and law enforcement authorities (LEAs). However, there is little empirical evidence that ‘risk-policing’ the formal financial sector and mobilising the private sector

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<sup>1284</sup> Hutter, ‘The Attractions of Risk-Based Regulation: Accounting for the Emergence of Risk Ideas in Regulation’.

<sup>1285</sup> Hutter; Giandomenico Majone, ed., *Regulating Europe*, European Public Policy Series (London ; New York: Routledge, 1996).

<sup>1286</sup> Baldwin and Black, ‘Driving Priorities in Risk-Based Regulation- What’s the Problem?’; Abdullahi Usman Bello and Jackie Harvey, ‘From a Risk-Based to an Uncertainty-Based Approach to Anti-Money Laundering Compliance’, *Security Journal* 30, no. 1 (1 January 2017): 24–38, <https://doi.org/10.1057/s41284-016-0002-0>; de Koker, ‘Identifying and Managing Low Money Laundering Risk’; Pellegrina Lucia Dalla and Donato Masciandaro, ‘The Risk-Based Approach in the New European Anti-Money Laundering Legislation: A Law and Economics View’, *Review of Law & Economics* 5, no. 2 (2009): 931–952, <https://doi.org/10.2202/1555-5879.1422>; Simonova, ‘The Risk-Based Approach to Anti-Money Laundering’.

<sup>1287</sup> Michael Levi and William Gilmore, ‘Terrorist Finance, Money Laundering and the Rise and Rise of Mutual Evaluation: A New Paradigm for Crime Control?’, in *Financing Terrorism*, ed. Mark Pieth (Dordrecht: Springer Netherlands, 2002), 87–114, [https://doi.org/10.1007/0-306-48044-1\\_6](https://doi.org/10.1007/0-306-48044-1_6).

<sup>1288</sup> Levi and Gilmore; Mohammed Ahmad Naheem, ‘The Agency Dilemma in Anti-Money Laundering Regulation’, *Journal of Money Laundering Control* 23, no. 1 (1 January 2020): 26–37, <https://doi.org/10.1108/JMLC-01-2016-0007>.

in crime control have significantly curbed ML/FTP or increased related criminal convictions.<sup>1289</sup> Nonetheless, the FATF's RBA is now a globally institutionalised best practice.<sup>1290</sup>

The RBA was introduced by the FATF in 2003 in relation to selected aspects of the Forty Recommendations.<sup>1291</sup> The requirement for its application by States was formally institutionalised by the FATF in 2012 as “an essential foundation” of a country's AML/CFTP regulatory framework and as obligatory for the effective implementation of the revised FATF Recommendations.<sup>1292</sup> The RBA does not purport to eliminate all risks. Technical compliance with FATF regulatory standards and implementing even the most effective risk management strategies can only mitigate ML/FTP risks.<sup>1293</sup> Instead, the RBA requires LEAs, regulators as well as FIs and designated non-financial business and professions (DNFBPs) to prioritise the most serious ML/TFP threats.<sup>1294</sup> The RBA further requires the targeting of resources and alignment of detection, prevention and mitigation strategies in accordance with assessed ML/FTP risks.<sup>1295</sup> This contrasts with the initial rules-based approach that required compliance with prescribed legislative, regulatory and risk mitigation measures, irrespective of the ML/FTP risk context.<sup>1296</sup>

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<sup>1289</sup> Levi, ‘Combating the Financing of Terrorism: A History and Assessment of the Control of “Threat Finance”’.

<sup>1290</sup> David Chaikin, ‘Risk-Based Approaches to Combating Financial Crime’, *Journal of Law and Financial Management* 8, no. 2 (2009): 20–27.

<sup>1291</sup> ‘Financial Action Task Force. (2007). Guidance on the Risk-Based Approach to Combating Money Laundering and Terrorist Financing: High Level Principles and Procedures. Paris: FATF/OECD Secretariat.’, accessed 24 August 2019, <http://www.fatf-gafi.org/media/fatf/documents/reports/High%20Level%20Principles%20and%20Procedures.pdf>; Financial Action Task Force, ‘FATF Guidance for a Risk-Based Approach- Money or Value Transfer Services’, FATF Guidance (Paris, France: FATF/OECD Secretariat, February 2016), <http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-RBA-money-value-transfer-services.pdf>.

<sup>1292</sup> Financial Action Task Force, ‘International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations’.

<sup>1293</sup> Chaikin, ‘Risk-Based Approaches to Combating Financial Crime’.

<sup>1294</sup> Chaikin; Ross and Hannan, ‘Money Laundering Regulation and Risk-Based Decision-Making’; Sisira Dharmasri Jayasekara, ‘Challenges of Implementing an Effective Risk-Based Supervision on Anti-Money Laundering and Countering the Financing of Terrorism under the 2013 FATF Methodology’, *Journal of Money Laundering Control*; London 21, no. 4 (2018): 601–15, <http://dx.doi.org/10.1108/JMLC-11-2017-0062>.

<sup>1295</sup> Chaikin, ‘Risk-Based Approaches to Combating Financial Crime’; Ross and Hannan, ‘Money Laundering Regulation and Risk-Based Decision-Making’; Jayasekara, ‘Challenges of Implementing an Effective Risk-Based Supervision on Anti-Money Laundering and Countering the Financing of Terrorism under the 2013 FATF Methodology’, 2018; de Koker, ‘Identifying and Managing Low Money Laundering Risk’.

<sup>1296</sup> Chaikin, ‘Risk-Based Approaches to Combating Financial Crime’; Hutter, ‘The Attractions of Risk-Based Regulation: Accounting for the Emergence of Risk Ideas in Regulation’; Ross and Hannan, ‘Money Laundering Regulation and Risk-Based Decision-Making’.

However, the rules-based approach had led to over-regulation and excessive compliance costs.<sup>1297</sup> It caused regulated entities to engage in ‘tick-the-box’ compliance practices. Moreover, defensive reporting generated poor financial intelligence due to the inordinate amount of suspicious transaction reports (STRs) filed.<sup>1298</sup> Indeed, the introduction of the RBA has been lauded as the most innovative development in the transnational AML/CFT regulatory governance.<sup>1299</sup> However, as will be demonstrated, this becomes open to argument when one considers the RBA’s failure to rationalise the disproportionate compliance and development costs and regulatory responsibilities along the Global North/South axis.

The RBA’s obligations operate at both the transnational and domestic levels. Within the context of transnational regulatory governance, the FATF International Standards have required States to identify, assess and understand the ML/FTP risks in their jurisdictions.<sup>1300</sup> Commensurate with those risks, countries should then take appropriate steps to effectively mitigate them.<sup>1301</sup> The FATF has emphasised that the RBA should be “an essential foundation for the efficient allocation of resources” across national AML/CFT regimes.<sup>1302</sup> The Recommendation one (R.1) requires States to respond appropriately where ML/FTP risks are higher and may permit simplified risk management measures for some of the FATF Recommendations where the identified risks are lower. At the domestic level, once the FATF Recommendations have been transposed into the national AML/CFT frameworks by regulatory and supervisory authorities, FIs and other regulated DNFBPs should be required to identify, assess, and monitor ML/FTP risks across sectors, customers, jurisdictions, new payment products

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<sup>1297</sup> Bello and Harvey, ‘From a Risk-Based to an Uncertainty-Based Approach to Anti-Money Laundering Compliance’; Hutter, ‘The Attractions of Risk-Based Regulation: Accounting for the Emergence of Risk Ideas in Regulation’; Ross and Hannan, ‘Money Laundering Regulation and Risk-Based Decision-Making’.

<sup>1298</sup> Bello and Harvey, ‘From a Risk-Based to an Uncertainty-Based Approach to Anti-Money Laundering Compliance’; David Chaikin, ‘How Effective Are Suspicious Transaction Reporting Systems?’, *Journal of Money Laundering Control*; London 12, no. 3 (2009): 238–53, <http://dx.doi.org/10.1108/13685200910973628>; Hutter, ‘The Attractions of Risk-Based Regulation: Accounting for the Emergence of Risk Ideas in Regulation’; Ross and Hannan, ‘Money Laundering Regulation and Risk-Based Decision-Making’.

<sup>1299</sup> Simonova, ‘The Risk-Based Approach to Anti-Money Laundering’.

<sup>1300</sup> Financial Action Task Force, ‘International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations’.

<sup>1301</sup> Financial Action Task Force.

<sup>1302</sup> Financial Action Task Force, 9.

and services, delivery channels, and business relationships.<sup>1303</sup> They must also take effective risk mitigation actions that are proportional to the identified risks (R.1). Where there are higher ML/FTP risks, FIs and DNFBPs should take enhanced due diligence measures (EDD). Where the risks are lower, FIs and DNFBPs should be permitted to apply simplified due diligence measures (SDD). Preventative measures applied by FIs and DNFBPs should address deterrence including through appropriate customer due diligence (CDD) standards; detection including through transaction monitoring and reporting of suspicious activities; and record-keeping to ensure a trail of transactions for investigative purposes.<sup>1304</sup> In essence, the RBA requires countries to target their resources at high ML/TF risks; and FIs at areas with higher legal, operational and reputational risks.<sup>1305</sup> Still, in under-resourced developing contexts, the application of the RBA is not as conceptually coherent as it might appear. This will become apparent by locating the RBA within the broader discourse of ‘agency capture’ of the FATF with respect to transnational AML/CFTP regulatory governance, as well as by critically evaluating its relationship with national ML/CFTP risk assessments (NRAs) and mutual evaluation processes.

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<sup>1303</sup> Simonova, ‘The Risk-Based Approach to Anti-Money Laundering’; Stuart Ross and Michelle Hannan, ‘Money Laundering Regulation and Risk-based Decision-making’, *Journal of Money Laundering Control* 10, no. 1 (9 January 2007): 106–15, <https://doi.org/10.1108/13685200710721890>; de Koker, ‘Identifying and Managing Low Money Laundering Risk’; Brigitte Unger and Waarden Frans van, ‘How to Dodge Drowning in Data? Rule- and Risk-Based Anti-Money Laundering Policies Compared’, *Review of Law & Economics* 5, no. 2 (2009): 953–985, <https://doi.org/10.2202/1555-5879.1423>.

<sup>1304</sup> Financial Action Task Force, ‘Guidance on the Risk-Based Approach to Combating Money Laundering and Terrorist Financing- High Level Principles and Procedures’ (Paris, France: FATF/OECD Secretariat, June 2007), 2, para. 1.10, <http://www.fatf-gafi.org/media/fatf/documents/reports/High%20Level%20Principles%20and%20Procedures.pdf>.

<sup>1305</sup> Chaikin, ‘Risk-Based Approaches to Combating Financial Crime’; Stephen Dawe, ‘Conducting National Money Laundering or Financing of Terrorism Risk Assessment’, in *Research Handbook on Money Laundering*, ed. Brigitte Unger and Daan van der Linde (USA: Edward Elgar Publishing Limited, 2013), 110–26.

### 7.1.1. The RBA and FATF ‘Agency Capture’ in Transnational AML/CFTP Rulemaking: Implications for the Sovereignty and Sustainable Development of Commonwealth Caribbean States

The RBA cannot be insulated from the perceived ‘agency capture’ of the FATF and its global AML/CFTP rulemaking.<sup>1306</sup> It is worth recalling that the decision by the G7 to establish the FATF in 1989 was intended to expediently circumvent the United Nations’ institutional role in combating money laundering.<sup>1307</sup> This may have accounted for the conventional ‘development deficit’ in the global AML/CFT discourse. By establishing the ‘safeguarding of the global financial system’ as the ultimate objective of the global AML/CFTP regime, the G7 shifted the focus of the AML/CFTP discourse from development consequences of drug trafficking and major organised crimes to prudential regulation.<sup>1308</sup> For instance, FATF R.3 requires the criminalisation of “all serious offences, with a view to including the widest range of predicate offences.” This expansive approach has accommodated onshore interests in repatriating offshore finance and curbing capital flight related to legitimate offshore tax planning, using “follow the money” rhetoric. Consequently, this effectively supplanted development-centric policy issues associated with money laundering, such as the threat to criminal justice systems, rule of law and governance institutions,<sup>1309</sup> with the preoccupation with the ‘integrity of the global financial system’. In effect, and consistent with the mandate of the FATF, the RBA was not intended to take account of the systemic effects of ML/FTP regulatory compliance on fragile private sectors and issues such as financial inclusion of mostly unbanked societies in the Global South.<sup>1310</sup> While the FATF now proudly highlights its

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<sup>1306</sup> Saby Ghoshray, ‘Compliance Convergence in FATF Rulemaking: The Conflict between Agency Capture and Soft Law Part I: Combating Threats to the International Financial System: The Financial Action Task Force’, *New York Law School Law Review* 59, no. 3 (2015 2014): 521–46.

<sup>1307</sup> Levi and Gilmore, ‘Terrorist Finance, Money Laundering and the Rise and Rise of Mutual Evaluation’.

<sup>1308</sup> Levi and Gilmore.

<sup>1309</sup> Emmanuel Senanu Mekpor, Anthony Aboagye, and Jonathan Welbeck, ‘The Determinants of Anti-Money Laundering Compliance among the Financial Action Task Force (FATF) Member States’, *Journal of Financial Regulation and Compliance; London* 26, no. 3 (2018): 442–59, <http://dx.doi.org/10.1108/JFRC-11-2017-0103>.

<sup>1310</sup> Ghoshray, ‘Compliance Convergence in FATF Rulemaking’, 2015 2014; Ben Hayes, ‘Counter-Terrorism, Policy Laundering, and the FATF: Legalizing Surveillance, Regulating Civil Society Financial Action Task Force’, *International Journal of Not-for-Profit Law* 14, no. 1–2 (2012): 5–48.

work on financial inclusion and proportionality in the implementation of its Recommendations,<sup>1311</sup> it took more than two decades for these issues to have been included on its agenda and incorporated into the Forty Recommendations.

It has been argued that the FATF Forty Recommendations were intended to “bolster the sovereign State” by reinforcing its regulatory power within its territorial borders, through international cooperation and information exchange.<sup>1312</sup> However, this contention is rebuttable on several accounts. At the transnational level, the implications of ‘agency capture’ for state sovereignty become particularly glaring when one deconstructs the institutional legitimacy of the FATF. Over two hundred and five jurisdictions (i.e., independent States and quasi-independent territories), have committed to implementing the FATF Recommendations. Yet, despite its undeniable success in achieving global AML/CFTP policy convergence, the FATF is still widely criticised for diffusing the policy priorities of advanced Western States that control the global financial order.<sup>1313</sup> After three decades, the FATF has only expanded its membership from sixteen in 1989 to thirty-six in 2020. It is, therefore, still an exclusive club of major financial centres. This has naturally overshadowed its AML/CFTP decision-making processes and outputs, including the RBA. The FATF’s legitimacy has been undoubtedly derived from the hegemonic influence of the G7 and powerful OECD governments.<sup>1314</sup> Its role as a hegemonic ‘policy elite’ has also been reinforced by international institutions such as the United Nations Security Council (UNSC) and the International Monetary Fund (IMF), in which G7 and OECD States exert considerable influence. Unsurprisingly, power disparities and the control of access to the global financial and payment systems have been leveraged to secure regulatory compliance or, perhaps more appropriately, the “hegemonic subservience”<sup>1315</sup> of FATF non-member jurisdictions. Moreover, most States of the Global South have been marginalised from meaningful participation in the FATF’s standard-setting processes related to the development of the RBA. The adoption,

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<sup>1311</sup> ‘Remarks by FATF President Marshall Billingslea at the FATF Ministerial Meeting, Washington, D.C. on April 12, 2019’ <<http://www.fatf-gafi.org/publications/fatfgeneral/documents/speech-fatf-ministerial.html>> accessed 8 April 2020.

<sup>1312</sup> Helleiner, ‘Electronic Money’, 393.

<sup>1313</sup> Jose E. Alvarez, ‘Hegemonic International Law Revisited’, *The American Journal of International Law* 97, no. 4 (October 2003): 873, <https://doi.org/10.2307/3133686>; Ghoshray, ‘Compliance Coverage in FATF Rulemaking’, 2015 2014.

<sup>1314</sup> Gathii, ‘The Financial Action Task Force and Global Administrative Law FATF Symposium’; Ghoshray, ‘Compliance Coverage in FATF Rulemaking’, 2015 2014.

<sup>1315</sup> Ghoshray, ‘Compliance Coverage in FATF Rulemaking’, 2015 2014, 524–25.

in April 2019, of a new “open-ended mandate” for the FATF,<sup>1316</sup> will undoubtedly reproduce its ‘agency capture’ and authority as an unaccountable global AML/CFTP standard-setter. The discursive strategies used by the FATF to globally institutionalise the RBA are also problematic for Commonwealth Caribbean States’ sovereignty.

The FATF has no international legally binding authority, internal constitution, or charter.<sup>1317</sup> The FATF Recommendations are, therefore, supposed to be non-binding, international soft law standards. However, FATF non-member States have been expected to adjust their AML/CFTP legal, supervisory and regulatory frameworks in conformity with the same effectiveness standards expected of advanced Western economies, regardless of diverging capabilities.<sup>1318</sup> Most notably, the FATF and OECD countries’ extraterritorial surveillance of the implementation of the FATF’s Forty Recommendations and the RBA has been most intrusive and often reinforced by the threat of sanctions.<sup>1319</sup> Assessments of the application of the RBA, for instance, has been a core part of the technical compliance and effectiveness ratings of Commonwealth Caribbean countries even though it is technically not a ‘legal obligation’. Both the direct and indirect use of coercion by the FATF and OECD countries to diffuse the Forty Recommendations across the Global South have been recognised in the academic literature.<sup>1320</sup> These compliance-inducing strategies have included OECD countries leveraging technical assistance to the Caribbean Financial Action Task Force (CFATF) to ensure intrusive oversight of policy discussions and mutual evaluations processes, as observers. Discursive strategies have included “extraterritorial bullying,”<sup>1321</sup> reputational enforcement strategies such as ‘naming and shaming’ and blacklisting,<sup>1322</sup> as well as sanctions, and threatened exclusion

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<sup>1316</sup> ‘FATF Ministers Give FATF an Open-Ended Mandate’.

<sup>1317</sup> Halliday, ‘Plausible Folk Theories’; Halliday, Levi, and Reuter, ‘Disciplinary Transnational Legal Order’; Levi and Gilmore, ‘Terrorist Finance, Money Laundering and the Rise and Rise of Mutual Evaluation’.

<sup>1318</sup> Alvarez, ‘Hegemonic International Law Revisited’; Beekarry, *Combating Money Laundering and Terrorism Finance: Past and Current Challenges*; Ghoshray, ‘Compliance Convergence in FATF Rulemaking’, 2015 2014.

<sup>1319</sup> Karen E. Bravo, ‘Challenges to Caribbean Economic Sovereignty in a Globalizing World Symposium Articles’, *Michigan State University College of Law International Law Review* 20 (2012 2011): 33–56.

<sup>1320</sup> Drezner, *All Politics Is Global*; Mark T. Nance, ‘Re-Thinking FATF: An Experimentalist Interpretation of the Financial Action Task Force’, *Crime, Law and Social Change* 69, no. 2 (March 2018): 131–52, <https://doi.org/10.1007/s10611-017-9748-5>; Sharman, ‘The Bark Is the Bite’; Sharman, *The Money Laundry*.

<sup>1321</sup> Doyle, ‘Cleaning up Anti-Money Laundering Strategies’, 281.

<sup>1322</sup> Eggenberger, ‘When Is Blacklisting Effective?’; Hülse and Kerwer, ‘How International Organizations Rule the World: The Case of the Financial Action Task Force on Money Laundering’; Kudrle, ‘Did Blacklisting Hurt the Tax Havens?’; Morgan, ‘Dirty Names, Dangerous Money’.

from the global financial and payment systems.<sup>1323</sup> Moreover, mutual evaluation processes operate contrary to traditional prescription of territorial sovereignty that the implementation of international obligations was entirely a domestic matter.<sup>1324</sup> Although ‘peer review’ by experts from countries within a State’s geographic region might promote greater ‘buy in’, States must still submit to intrusive periodic onsite inspections that is an unusual practice even under ‘hard law’ multilateral treaties.<sup>1325</sup> Furthermore, the risk-based standards to be implemented are still extraterritorially set and imposed. Thus, in addition to being ‘crowded out’ of FATF transnational AML/CFT rulemaking, small developing States have been powerless to resist extraterritorial pressures to unreservedly comply with FATF International Standards due to their dependence on access to global financial markets, and the risk of economic sanctions. In effect, this has undermined the independence of their legal, regulatory and enforcement decision-making authority in respect of combating ML/FTP risks domestically.

In addition to intrusive global surveillance practices, there has been a noticeable hardening of the FATF international soft law standards, in which the RBA has been streamlined. The FATF Recommendations now *de facto* have the effect of legally enforceable commitments.<sup>1326</sup> Careful linguistic analysis of the FATF Recommendations have revealed that many of the standards have conferred prescriptive and prohibitive obligations on sovereign States with a particular “legal potency”, as they require legislative and regulatory actions to satisfy stringent compliance standards.<sup>1327</sup> Although *prima facie* not obligatory, the centrality of implementation of the RBA within mutual evaluation of technical compliance and effectiveness of national AML/CFT regimes,<sup>1328</sup> is a case in point. Another example is the language of paragraph 2, Interpretive Notes to the FATF Recommendation 1, which has provided that “countries may..., *in strictly limited* [low risk] *circumstances*... decide not to apply certain Recommendations” to specified FIs or activities.

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<sup>1323</sup> Ghoshray, ‘Compliance Covergence in FATF Rulemaking’, 2015 2014.

<sup>1324</sup> Levi and Gilmore, ‘Terrorist Finance, Money Laundering and the Rise and Rise of Mutual Evaluation’.

<sup>1325</sup> Levi and Gilmore.

<sup>1326</sup> Ghoshray, ‘Compliance Covergence in FATF Rulemaking’, 2015 2014.

<sup>1327</sup> Ghoshray, 541.

<sup>1328</sup> Ross and Hannan, ‘Money Laundering Regulation and Risk-Based Decision-Making’.

At the national level, the FATF has sought to discursively normalise private sector-led ideas of ‘financial crime risk management’, as part of its efforts to transnationally institutionalise the RBA to curb the facilitation of financial crime in the formal financial sector.<sup>1329</sup> The RBA appears to have transferred the bulk of responsibilities from regulatory public authorities to FIs, which are purportedly already versed in the identification and management of ML/TF risks and sufficiently capable of self-regulation.<sup>1330</sup> Yet, financial service providers within Commonwealth Caribbean jurisdictions, for example, save for those with relatively large international financial centres, are usually under-capitalised. As with the resource disparities among States across the Global North-South divide, they also lag behind FIs in large onshore financial centres in terms of technological capabilities for effective regulatory compliance. Governments in the region are, therefore, still required to divert financial resources from critical areas of national development to strengthen their respective national AML/CFTP regimes and proactively monitor the compliance of FIs in order to retain access to global payment and financial systems. This empirical observation has been supported by findings within the literature that the FATF Recommendations have been more onerous for developing countries due to their lack of resources to ensure effective regulatory compliance.<sup>1331</sup> At the technical level, there are also fundamental conceptual issues with the RBA that are injurious to the sovereignty and sustainable development of Commonwealth Caribbean jurisdictions.

### **7.1.2. Problematising the Risk-based Approach: Conceptual Challenges and Implications for National Risk Assessments**

There has been a general sense of scepticism within the literature about the appropriateness of transferring risk-based theoretical frameworks to the AML/CFT context.<sup>1332</sup> Since the introduction of the RBA, States, regulatory agencies, LEAs as well

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<sup>1329</sup> Levi and Gilmore, ‘Terrorist Finance, Money Laundering and the Rise and Rise of Mutual Evaluation’.

<sup>1330</sup> Ross and Hannan, ‘Money Laundering Regulation and Risk-Based Decision-Making’.

<sup>1331</sup> Ghoshray, ‘Compliance Convergence in FATF Rulemaking’, 2015 2014.

<sup>1332</sup> Bello and Harvey, ‘From a Risk-Based to an Uncertainty-Based Approach to Anti-Money Laundering Compliance’; Dionysios S. Demetis and Ian O. Angell, ‘The Risk-Based Approach to AML:

as regulated entities, have struggled to respond proportionately to ML/FTP threats because of the vague conceptualisation of risks by the FATF. While the FATF has sought to clarify the application of the RBA,<sup>1333</sup> it is yet to provide a standardised definition of ML/FTP risk. The FATF has merely suggested that ‘risk’ is a function of three factors: threat, vulnerability and consequence.<sup>1334</sup> Resultantly, efforts to develop empirical models for risk-based decision-making capable of accurately distinguishing “high(er) risk” from “low(er) risk” have been fraught with difficulties.<sup>1335</sup> The secretive nature of ML/TF phenomena and the resulting lack of systematically collected empirical data in most jurisdictions,<sup>1336</sup> have significantly inhibited universally harmonised risk-judgements. Consequently, there has been a heavy reliance on anecdotal evidence and subjective weighing of ML/FTP risks, rather than on probabilistic risk models.<sup>1337</sup> The 2013 *FATF Guidance on National Money Laundering and Terrorist Financing Risk Assessment (NRA)* has directed efforts to identify, analyse, understand, and prioritise country-specific ML/TF risks, for proportionate preventative and mitigation interventions. However, NRAs continue to involve subjective risk judgments, especially in assigning value or importance to identified ML/TF risks. Cross-jurisdictional comparisons of ML/TF risk profiles are therefore equally subjective. In the case of Commonwealth Caribbean jurisdictions, which are subject to severe external AML/CFTP scrutiny, these conceptual and methodological issues have reproduced heightened ML/FTP risks perceptions of the region. The national approaches to ML/TF risk analysis used by The Bahamas, Jamaica and Trinidad and Tobago usefully illustrate how these issues manifest.

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Representation, Paradox, and the 3rd Directive’, *Journal of Money Laundering Control*; London 10, no. 4 (2007): 412–28, <http://dx.doi.org/10.1108/13685200710830907>; Simonova, ‘The Risk-Based Approach to Anti-Money Laundering’; Dalla and Masciandaro, ‘The Risk-Based Approach in the New European Anti-Money Laundering Legislation’.

<sup>1333</sup> Financial Action Task Force, ‘FATF RBA High Level Principles’.

<sup>1334</sup> Financial Action Task Force, ‘National Money Laundering and Terrorist Financing Risk Assessment’, FATF Guidance (Paris, France: FATF/OECD, February 2013), 7, [http://www.fatf-gafi.org/media/fatf/content/images/National\\_ML\\_TF\\_Risk\\_Assessment.pdf](http://www.fatf-gafi.org/media/fatf/content/images/National_ML_TF_Risk_Assessment.pdf).

<sup>1335</sup> Bello and Harvey, ‘From a Risk-Based to an Uncertainty-Based Approach to Anti-Money Laundering Compliance’; de Koker, ‘Identifying and Managing Low Money Laundering Risk’; Simonova, ‘The Risk-Based Approach to Anti-Money Laundering’.

<sup>1336</sup> Dawe, ‘Conducting National Money Laundering or Financing of Terrorism Risk Assessment’.

<sup>1337</sup> Ferwerda and Kleemans, ‘Estimating Money Laundering Risks’; Halliday, Levi, and Reuter, ‘Global Surveillance of Dirty Money’; Ross and Hannan, ‘Money Laundering Regulation and Risk-Based Decision-Making’.

### 7.1.2.1. *Threats*

The FATF has defined a ML/FTP threat in terms of actors seeking to commit predicate offences and generate illicit proceeds; as well as objects or activities with the potential to cause harm to the state, society, or the economy.<sup>1338</sup> Thus, ML/TFP threats would include lone criminals, transnational organized crime and terrorist networks and their professional enablers; illicit funds, licit funds intended to finance terrorism, as well as past, present and future ML/FTP activities.<sup>1339</sup> Narcotics trafficking is considered a ML/TF threat for The Bahamas, Jamaica and Trinidad and Tobago. The Bahamas' proximity to the southern tip of United States and composition of approximately 700 islets have been exploited by drug traffickers using go-fast boats, small commercial freighters and, increasingly, light commercial aircrafts.<sup>1340</sup> These activities have been linked to organised criminal groups in Haiti, Jamaica, Panama, Turks and Caicos and the United States.<sup>1341</sup> Domestic organised criminal activities linked to the drug trade are also considered ML threats. Jamaica has one of the highest per capita levels of homicide and violent crimes in the world,<sup>1342</sup> linked in some instances to economic crimes. There are an estimated 89 listed gangs operating in Trinidad and Tobago, some of which have reportedly used legitimate business activities as a front for their illicit activities.<sup>1343</sup>

The prevalence of fraud and the laundering of its proceeds is considered a ML threat for all three jurisdictions. The Bahamas' national risk analysis highlighted the laundering of the illicit proceeds of frauds committed in Canada, the United Kingdom, and the United States.<sup>1344</sup> Furthermore, over the period 2011-2016, an estimated 2747 cases of fraud were reported, and possible cases of internet fraud featured prominently in STRs.<sup>1345</sup> Violent Jamaican gangs, which have networks in the United States, have been increasingly linked to advanced fee frauds or "scamming" targeting American senior

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<sup>1338</sup> Financial Action Task Force, 'FATF Guidance on National Risk Assessment'.

<sup>1339</sup> Financial Action Task Force.

<sup>1340</sup> Central Bank of the Bahamas, 'Commonwealth of the Bahamas National Money Laundering and Terrorist Financing Risk Assessment Summary 2015/2016', 2017; Caribbean Financial Action Task Force, 'Fourth Round Mutual Evaluation Report: The Bahamas'.

<sup>1341</sup> Caribbean Financial Action Task Force, 'Fourth Round Mutual Evaluation Report: The Bahamas'.

<sup>1342</sup> Caribbean Financial Action Task Force, 'Fourth Round Mutual Evaluation Report (MER): Jamaica'.

<sup>1343</sup> Caribbean Financial Action Task Force, 'Trinidad & Tobago 4th Round MER'.

<sup>1344</sup> Central Bank of the Bahamas, 'Bahamas National Risk Assessment'.

<sup>1345</sup> Central Bank of the Bahamas.

citizens. Between 2009 and 2014, 1,070 illegal lottery related investigations were conducted among five CFATF members but only twenty-five convictions were reported, and by Jamaica.<sup>1346</sup> Of the total of 677,675 victims identified by eight (8) CFATF countries, 99% were defrauded by Jamaican criminal groups.<sup>1347</sup>

The Bahamas has one of the lowest corruption perception indices in the region. However, Jamaica and Trinidad and Tobago have designated corruption as a major ML threat. Jamaica has identified corruption in state institutions, among politically exposed persons (PEPs) and incidence of public work contracts being awarded to known criminals, as a ML threat.<sup>1348</sup> Senior financial investigators interviewed during fieldwork reported that illicit proceeds derived from corruption has been channelled through the formal financial sector. They cited fear of victimisation among front line agents in banks (i.e., tellers), given the “degrees of proximity” in small societies like Jamaica, as a key reason why transaction of high profiled persons and domestic PEPs are not subject to proper scrutiny. In Trinidad ML threat linked to corruption is often related to irregularities in public procurement.<sup>1349</sup>

Risk analyses of the threat of terrorism and terrorist financing vary across all three jurisdictions. Jamaica’s TF threat assessment was linked only to the country’s status as a major tourist and cruise ship destination,<sup>1350</sup> rather than in relation to clandestine actors identified by intelligence and LEAs as operating in or likely to target the country, or the misuse of the non-profit sector. This threat was simply considered insignificant in The Bahamas’ NRA.<sup>1351</sup> However, in Trinidad and Tobago there are suspected links between criminal gangs and terrorism. Intelligence has revealed that persons from one of the major gangs have travelled to Syria and Iraq to fight with terrorist organisations such as ISIS/ISIL.<sup>1352</sup> The jurisdiction’s ethnic and religious landscape, and previous experience with Islamic radicalisation has magnified the threat of ML and TF activities, perhaps

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<sup>1346</sup> Caribbean Financial Action Task Force, ‘Illegal Lotteries Scheme: Typology Project Report of the CFATF Risks, Trends & Methods Group.’ (Port-of-Spain, Trinidad & Tobago: Secretariat, Caribbean Financial Action Task Force, 2016), <https://cfatf-gafic.org/documents/typologies/6949-illegal-lotteries-typology-project-report/file>.

<sup>1347</sup> Caribbean Financial Action Task Force.

<sup>1348</sup> Caribbean Financial Action Task Force, ‘Fourth Round Mutual Evaluation Report (MER): Jamaica’.

<sup>1349</sup> Caribbean Financial Action Task Force, ‘Trinidad & Tobago 4th Round MER’.

<sup>1350</sup> Caribbean Financial Action Task Force, ‘Fourth Round Mutual Evaluation Report (MER): Jamaica’, 20.

<sup>1351</sup> Central Bank of the Bahamas, ‘Bahamas National Risk Assessment’.

<sup>1352</sup> Caribbean Financial Action Task Force, ‘Trinidad & Tobago 4th Round MER’.

more than in any other Commonwealth Caribbean country. The ML/TF threat landscape in region is therefore undeniably concerning.

### 7.1.2.2. *Vulnerabilities*

Vulnerabilities, on the other hand, have been defined as things that can be exploited by ML/FTP threats or that may support or facilitate their activities.<sup>1353</sup> They usually reflect weaknesses in AML/CFT systems or certain features of a country, sector, financial product or service, which make them attractive for ML or FTP purposes.<sup>1354</sup> Thus, the very presence of a significant offshore sector in the Caribbean is considered a ML/TFP vulnerability.<sup>1355</sup> For example, the most vulnerable Bahamian sectors are deemed to be those that are internationally- oriented, such as the international banking and offshore trust and company services sectors. This is on account of the offshore sector’s high transaction volumes, wealth management services for high-net-worth individuals; use of legal persons and arrangements, wire transfers, and non-face-to-face delivery channels with varying levels of anonymity and complexity.<sup>1356</sup> Notwithstanding, the Bahamian banking sector had the lowest vulnerability score (medium), compared to securities and insurance sectors (medium-high) and DNFBPs (high).<sup>1357</sup> The Bahamian money transmission sector was rated highly vulnerable to ML/TF risk but based on the “substantial number of transactions involving small amounts of physical cash, high numbers of walk-in one-off [transactions] by non-resident customers...[especially] cruise ship personnel.”<sup>1358</sup> Trinidad and Tobago having one of the largest financial centres within the region is considered a ML/TFP vulnerability,<sup>1359</sup> despite not being an offshore financial centre. Insufficient regulatory oversight of the MVTs sector, which

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<sup>1353</sup> Financial Action Task Force, ‘FATF Guidance on National Risk Assessment’.

<sup>1354</sup> Financial Action Task Force.

<sup>1355</sup> World Bank Group, ‘Withdraw from Correspondent Banking : Where, Why, and What to Do about It’ (Washington, DC, USA: The World Bank, 1 November 2015), <http://documents.worldbank.org/curated/en/113021467990964789/Withdraw-from-correspondent-banking-where-why-and-what-to-do-about-it>; McLean et al., ‘Economic Impact of De-Risking on the Caribbean’.

<sup>1356</sup> Central Bank of the Bahamas, ‘Bahamas National Risk Assessment’.

<sup>1357</sup> Central Bank of the Bahamas, 25.

<sup>1358</sup> Central Bank of the Bahamas, 13–14.

<sup>1359</sup> Caribbean Financial Action Task Force, ‘Trinidad & Tobago 4th Round MER’.

has filed large amounts of STRs/SARs,<sup>1360</sup> was also identified as a ML vulnerability in Trinidad and Tobago.

Jamaica was found to have a robust AML/CFT supervisory regime for FIs.<sup>1361</sup> FIs were found to have group compliance programmes approved by their board of directors and were subject to a stringent licensing regime.<sup>1362</sup> However, the MVTs sector was considered vulnerable because of deficiencies in know your customer (KYC), source of funds and threshold reporting practices. For example, of 63 onsite examinations conducted on money remitters between 2010 to 2014, 44.1% of cases showed missing information on customers' address; discrepancies in customer identification (20.5%); lack of source of funds information (14.7%); and failure to submit threshold reports (11.8%).<sup>1363</sup> Furthermore, it was found that the RBA had not been fully applied to AML/CFT supervision of MVTs operators.<sup>1364</sup> Jamaica's remittance sector, flows through which account for an estimated 14% of GDP, has been considered vulnerable to ML/FT.<sup>1365</sup> The fact that Jamaican attorneys are not subject to the national AML/CFT regime, albeit due to an injunction awarded to the Jamaica Bar Association challenging the constitutionality of the Proceeds of Crime Act (2007),<sup>1366</sup> is considered a significant ML vulnerability. Attorneys function as trust and company service providers (TCSPs), which were not specifically designated as DNFI/DNFBPs.<sup>1367</sup> Attorneys are thought to be high-risk enablers of ML to the extent that they have established businesses for individuals connected to organised crime.<sup>1368</sup> In Trinidad and Tobago, attorneys were found to have not been complying with AML/CFT measures.<sup>1369</sup> This was considered to be particularly serious given their role as financial intermediaries or gatekeepers to the country's relatively large financial services sector. STRs/SARs filed with the Financial Intelligence Unit of Trinidad and Tobago (FIUTT) have indicated that some legal entities

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<sup>1360</sup> Caribbean Financial Action Task Force, '4th Round Mutual Evaluation Report- Trinidad & Tobago' (n 56).

<sup>1361</sup> Caribbean Financial Action Task Force, 'Fourth Round Mutual Evaluation Report (MER): Jamaica'.

<sup>1362</sup> Caribbean Financial Action Task Force.

<sup>1363</sup> Caribbean Financial Action Task Force.

<sup>1364</sup> Caribbean Financial Action Task Force, 85.

<sup>1365</sup> Caribbean Financial Action Task Force, 'Fourth Round Mutual Evaluation Report (MER): Jamaica'.

<sup>1366</sup> Caribbean Financial Action Task Force.

<sup>1367</sup> Caribbean Financial Action Task Force.

<sup>1368</sup> Caribbean Financial Action Task Force.

<sup>1369</sup> Caribbean Financial Action Task Force, '4th Round Mutual Evaluation Report- Trinidad & Tobago' (n 56).

might be misusing the financial services sector to conduct business with entities linked to terrorist activities.<sup>1370</sup>

### 7.1.2.3. *Consequences*

The FATF has defined a consequence as the impact or harm that ML or TF may cause. The more significant the consequences of the interaction of threats and vulnerabilities, the higher the ML/TF risks.<sup>1371</sup> Consequences may include the effect of predicate criminal and terrorist offences on the integrity of national financial systems and institutions, national or international interests, the country's reputation, and the attractiveness of its financial services sector.<sup>1372</sup> They may be either short or long term. Given the expansive definition of ML/TF threats, vulnerabilities, and consequences, accurately assessing the significance of consequences relative to the probability or likelihood that they will materialise,<sup>1373</sup> is notoriously difficult. For example, the speculated direct relationship between establishing effective national AML/CFT regimes and domestic and global financial stability has been empirically unconfirmed.<sup>1374</sup> It is difficult to predict the probability of exposure to ML/TF threats, with any appreciable degree of certainty, or clearly measure the consequences of such exposure. For these reasons, some scholars consider the RBA ill-suited to the AML/CFT regulatory context.<sup>1375</sup> In commercial risk-based decision-making contexts, there is usually a more appreciable degree of certainty of the precise consequences exposure to a particular threat.<sup>1376</sup> The FATF's conceptualisation of ML/TFP risk, is therefore, widely criticised as unhelpful in AML/CFT risk-based decision-making.<sup>1377</sup> AML/CFT scholars have not

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<sup>1370</sup> Caribbean Financial Action Task Force.

<sup>1371</sup> Financial Action Task Force, 'FATF Global ML/TF Threat Assessment'.

<sup>1372</sup> Financial Action Task Force, 'FATF Guidance on National Risk Assessment'.

<sup>1373</sup> Financial Action Task Force.

<sup>1374</sup> Halliday, Levi, and Reuter, 'Global Surveillance of Dirty Money'; Halliday, 'Plausible Folk Theories'.

<sup>1375</sup> Bello and Harvey, 'From a Risk-Based to an Uncertainty-Based Approach to Anti-Money Laundering Compliance'.

<sup>1376</sup> Bello and Harvey.

<sup>1377</sup> Bello and Harvey; de Koker, 'Identifying and Managing Low Money Laundering Risk'; Levi and Gilmore, 'Terrorist Finance, Money Laundering and the Rise and Rise of Mutual Evaluation'; Ross and Hannan, 'Money Laundering Regulation and Risk-Based Decision-Making'; Savona and Riccardi, 'Assessing the Risk of Money Laundering'.

managed to standardise the definition either.<sup>1378</sup> These empirical difficulties in measuring and predicting ML/TF consequences,<sup>1379</sup> have led the FATF to permit States to focus NRAs on comprehensively understanding threats and vulnerabilities only.<sup>1380</sup> These conceptual issues often affect NRAs.

### 7.1.3. Implications of Conceptual Challenges for National Risk Assessments

Risk-based analytical methods related to ML and TF are relatively underdeveloped.<sup>1381</sup> This has been exacerbated by the unavailability of systematically collected ML/TF data in most Commonwealth Caribbean countries. Yet, over-reliance on anecdotal evidence may affect the accuracy of NRAs and cross-jurisdictional comparisons of ML/TF risk profiles. Inaccurate risk assessments could also carry serious reputational consequences. The Bahamas and Trinidad and Tobago have used the World Bank ML/TF risk assessment tool in their NRAs.<sup>1382</sup> This mixed-methods approach has combined the use of available statistical data from law enforcement agencies (LEAs), surveys and workshops with local experts to collect industry data on national threats and vulnerabilities. However, qualitative ratings are assigned to threats and vulnerabilities. Furthermore, owing to technical constraints, Trinidad and Tobago only finalised its first NRA in 2016, but using data from 2011-13.<sup>1383</sup> This serious lack of ML/TF data and statistics, was openly acknowledged by Trinidad and Tobago as having conceivably affected the NRA findings.<sup>1384</sup>

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<sup>1378</sup> Dionysios S. Demetis, *Technology and Anti-Money Laundering: A Systems Theory and Risk-Based Approach* (Cheltenham: Edward Elgar, 2010); de Koker, 'Identifying and Managing Low Money Laundering Risk'.

<sup>1379</sup> Bello and Harvey, 'From a Risk-Based to an Uncertainty-Based Approach to Anti-Money Laundering Compliance'; Ross and Hannan, 'Money Laundering Regulation and Risk-Based Decision-Making'; de Koker, 'Identifying and Managing Low Money Laundering Risk'; Savona and Riccardi, 'Assessing the Risk of Money Laundering'.

<sup>1380</sup> Financial Action Task Force, 'FATF Guidance on National Risk Assessment'.

<sup>1381</sup> Halliday, Levi, and Reuter, 'Global Surveillance of Dirty Money'.

<sup>1382</sup> Central Bank of the Bahamas, 'Bahamas National Risk Assessment'.

<sup>1383</sup> Caribbean Financial Action Task Force, 'Anti-Money Laundering and Counter-Terrorist Financing Measures-Trinidad and Tobago 3rd Enhanced Follow-up Report & Technical Compliance Re-Rating (FUR)', CFATF FUR (Port-of-Spain, Trinidad & Tobago: CFATF Secretariat, June 2019), <https://www.cfatf-gafic.org/documents/4th-round-follow-up-reports/trinidad-and-tobago-3/11799-trinidad-and-tobago-3rd-fur/file>.

<sup>1384</sup> Caribbean Financial Action Task Force.

The methodology that was used to develop and implement the first stages of Jamaica's NRA is similar to that used to assess security threats and vulnerabilities under the National Security Policy (NSP).<sup>1385</sup> A source from the Ministry of National Security in Jamaica, interviewed in March 2020 during fieldwork, confirmed that the NRA report was still being finalised. In the absence of a completed NRA at the time of Jamaica's mutual evaluations, the CFATF assessed the country's understanding of ML/TF risks based on the NSP.<sup>1386</sup> Unlike the NRA methods used by the Bahamas and Trinidad, the four-tiered risk ranking systems used by Jamaica placed a high value on consequences/outcomes, contrary to the FATF guidance. Methodologically, the NSP used a Probability-Impact Matrix that weighed and ranked identified risks and threats from horizon scanning.<sup>1387</sup> Tier 1 threats (high impact, high probability) were prioritised and deemed to require active responses, and included corruption, money laundering and frauds. Tier 2 threats (high impact, low probability) required constant monitoring and included terrorism and TF. Tier 3 threats (high probability, low impact) were considered potentially serious but only required preventative measures, while Tier 4 threats (low probability, low impact) were low priority. Moreover, risk was defined as a percentage on a scale of zero (impossible) to one (certain) and threats that were actually affecting Jamaica were assigned a probability of 1 or 100%.<sup>1388</sup> Although the use of such ordinal scales and subjective risk assessment matrices is common where anecdotal outcomes are not immediately apparent or precisely measurable, they have been found to be of questionable usefulness and empirical rigour.<sup>1389</sup> While Jamaica has focused the bulk of its resources on Tier 1 threats (high impact, high probability), there is an alternative view that these risks can never be fully mitigated even with the most extreme and disruptive controls measures.<sup>1390</sup> Instead, it has been suggested that resources and mitigation efforts

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<sup>1385</sup> Caribbean Financial Action Task Force, 'Fourth Round Mutual Evaluation Report (MER): Jamaica', 19.

<sup>1386</sup> Caribbean Financial Action Task Force, 'Fourth Round Mutual Evaluation Report (MER): Jamaica'.

<sup>1387</sup> Ministry of National Security of Jamaica, 'Jamaica's National Security Policy 2014'.

<sup>1388</sup> Ministry of National Security of Jamaica.

<sup>1389</sup> J. Edward Jackson and William H. Lawton, 'Some Probability Problems Associated with Cross-Impact Analysis', *Technological Forecasting and Social Change* 8, no. 3 (1 January 1976): 263–73, [https://doi.org/10.1016/0040-1625\(76\)90004-4](https://doi.org/10.1016/0040-1625(76)90004-4); Douglas Hubbard and Dylan Evans, 'Problems with Scoring Methods and Ordinal Scales in Risk Assessment', *IBM Journal of Research and Development* 54, no. 3 (May 2010): 2:1-2:10, <https://doi.org/10.1147/JRD.2010.2042914>.

<sup>1390</sup> Marcus Killick and David Parody, 'Implementing AML/CFT Measures That Address the Risks and Not Tick Boxes', *Journal of Financial Regulation and Compliance; London* 15, no. 2 (2007): 210–16, <https://dx.doi.org/10.1108/13581980710744093>.

are best targeted at high probability, low impact, and low probability, high impact threats to reduce the likelihood of those risking escalating into high-impact, high probability risks that might materialise. As with Trinidad and Tobago, gaps were identified in Jamaica's ML/TF risk assessment with respect to data capture as well as the need for formalised systems to keep statistics and qualitative data on financial intelligence, investigations, prosecutions and forfeiture and other relevant information for AML/CFT efforts.<sup>1391</sup>

Given the acknowledged inadequacy of the FATF's guidance on conducting NRA,<sup>1392</sup> if NRAs are not intelligence-driven or based on sufficient data, scales used could misrepresent ML/TFP risks.<sup>1393</sup> Significant divergences in overall technical compliance and effectiveness ratings across jurisdictions would result,<sup>1394</sup> and the RBA would be ineffective in rationalising resources. Even in onshore jurisdictions, significant divergences have been found in data and analytical methods used and the rigor of NRAs.<sup>1395</sup> Some jurisdictions have developed quantitative methods of ML/TFP risk estimations (e.g. The Netherlands),<sup>1396</sup> while others' risk ratings models have deliberately sought to reduce dependence on quantitative data (e.g. the UK).<sup>1397</sup> The unavailability of systematically collected ML/TF data in most countries and the potential empirical imprecision of NRAs would inevitably affect the accuracy of mutual evaluations of compliance and outcome effectiveness ratings.<sup>1398</sup> Based on how pronounced these challenges are in the Commonwealth Caribbean, they would have conceivably influenced ML/TF risks perceptions. Moreover, to the extent that NRAs are premised on self-evaluation, countries may choose to focus on factors that would assuage adverse reputational risks,<sup>1399</sup> or accommodate political concerns. Yet, this would most likely be done by powerful Western States for whom the FATF's scrutiny is inconsequential. Illustratively, where the NRAs of The Bahamas, Jamaica and Trinidad and Tobago were largely inward-looking, the United Kingdom adopted an extremely externalised approach

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<sup>1391</sup> Caribbean Financial Action Task Force, 'Fourth Round Mutual Evaluation Report (MER): Jamaica'.

<sup>1392</sup> Ferwerda and Reuter, 'Learning from Money Laundering National Risk Assessments'.

<sup>1393</sup> Ferwerda and Kleemans, 'Estimating Money Laundering Risks'.

<sup>1394</sup> Ferwerda and Kleemans.

<sup>1395</sup> Ferwerda and Reuter, 'Learning from Money Laundering National Risk Assessments'.

<sup>1396</sup> Ferwerda and Kleemans, 'Estimating Money Laundering Risks'.

<sup>1397</sup> Her Majesty Treasury/Home Office, 'UK National Risk Assessment'.

<sup>1398</sup> Halliday, Levi, and Reuter, 'Global Surveillance of Dirty Money'.

<sup>1399</sup> Halliday, Levi, and Reuter.

to its ML/TF risk analysis. This externalised narration of ML/TF risks was reproduced by the FATF in the United Kingdom's mutual evaluation report (MER), as follows:

The UK faces significant ML risks from overseas, in particular from other financial centres (including some of its Overseas Territories and Crown Dependencies), due to its position as ... the world's largest centre for cross-border banking. In particular, the UK is vulnerable and at risk of being used as a destination or transit location for criminal proceeds... faces particular and significant risks from laundering the proceeds of foreign predicate crimes, including transnational organised crime and overseas corruption.<sup>1400</sup>

In fact, the only reference to the domestic criminal economy in this section of the United Kingdom's MER was tempered by highlighting the decrease in crimes over the past two decades. Likewise, the conceptual and methodological framework used by the United Kingdom has been criticised for having not specified what data sources were used to assess ML/TF risks, the qualitative nature of data used to assess vulnerabilities, and hence the questionable validity of risk scores.<sup>1401</sup>

#### **7.1.4. Problematising the Risk-based Approach: Mutual Evaluations and Costs of Regulatory Compliance**

A country's application of the RBA and compliance with the FATF Forty Recommendations are assessed through 'peer review' or mutual evaluation processes. In the Commonwealth Caribbean, mutual evaluations are administered by the Caribbean Financial Action Task Force, a FATF regional-style body established in 1990. The most recent mutual evaluations (i.e., the fourth international round), have proceeded on the basis of the FATF's 2013 revised *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems*. The Bahamas, Jamaica and Trinidad and Tobago all had onsite-visits for their fourth-round mutual evaluations in 2015. This is significant because they would have been expected to meet the newly introduced requirement for conducting NRAs (2012) and be prepared for

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<sup>1400</sup> Financial Action Task Force, 'Anti-Money Laundering and Counter-Terrorist Financing Measures-United Kingdom Mutual Evaluation Report.' (Paris, France: FATF Secretariat, December 2018).

<sup>1401</sup> Hopkins and Shelton, 'Identifying Money Laundering Risk in the United Kingdom'.

assessment under the 2012 revised FATF Recommendations, within a three-year adjustment period. Yet the level of national coordination and resources required to conduct NRAs and meet newly introduced AML/CFT effectiveness standards are substantial. Likewise, implementing the FATF Forty Recommendations is notoriously expensive.<sup>1402</sup> Statistical analysis of thirty-six (36) 4<sup>th</sup> Round MERs found a positive relationship between a jurisdiction's income level and the level of effectiveness of their respective AML/CFT supervision.<sup>1403</sup> The operability of the RBA in small Caribbean States would be conceivably undermined given the historical resource constraints as fragile post-colonial economies. Mobilising resources to rationalise, in line with the RBA to combating ML/TFP threats would invariably require diverting resources from critical areas of national development. This may account for the noticeable gap between levels of technical compliance with FATF standards and effectiveness ratings of national AML/CFTP regimes, among Commonwealth Caribbean jurisdictions. It has been reasonably assumed that whereas technical compliance can be satisfied with less expensive legislative and supervisory adjustments,<sup>1404</sup> meeting effectiveness standards has been more resource intensive. At a more fundamental level, mutual evaluations suffer from the conceptual incoherence in the definition, prediction, and measurement of ML/TF risks. If country-specific ML/TF risks cannot be empirically assessed with any degree of certainty,<sup>1405</sup> it is conceivable that mutual evaluations would reproduce misperceptions of ML/TF threats. These dynamics will be examined in turn by a comparative analysis of technical compliance and effectiveness ratings of The Bahamas, Jamaica and Trinidad and Tobago in their most recent mutual evaluations.

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<sup>1402</sup> Geiger and Wuensch, 'The Fight against Money Laundering'; Halliday, Levi, and Reuter, 'Disciplinary Transnational Legal Order'; Killick and Parody, 'Implementing AML/CFT Measures That Address the Risks and Not Tick Boxes'; Lewisch, 'Money Laundering Laws as a Political Instrument'.

<sup>1403</sup> Sisira Dharmasri Jayasekara, 'Challenges of Implementing an Effective Risk-Based Supervision on Anti-Money Laundering and Countering the Financing of Terrorism under the 2013 FATF Methodology', *Journal of Money Laundering Control* 21, no. 4 (1 January 2018): 601–15, <https://doi.org/10.1108/JMLC-11-2017-0062>.

<sup>1404</sup> Durner and Shetret, *Understanding Bank De-Risking and Its Effects on Financial Inclusion*.

<sup>1405</sup> Sandra Edun-Watler, 'National Risk Assessment - Under the Microscope', *Mondaq Business Briefing*, 19 February 2016, <http://global.factiva.com/redirect/default.aspx?P=sa&an=BBPUB00020160219ec2j000h6&cat=a&ep=ASE>; Bello and Harvey, 'From a Risk-Based to an Uncertainty-Based Approach to Anti-Money Laundering Compliance'; Simonova, 'The Risk-Based Approach to Anti-Money Laundering'.

#### 7.1.4.1. Case study: Comparative Analysis of Technical Compliance

Technical compliance refers to the extent to which a country has implemented the specific requirements of the FATF Recommendations. It is assessed in relation to a country's domestic legal and institutional framework and the relevant powers and procedures of the competent authorities.<sup>1406</sup> During mutual evaluation, the onus is on the State being assessed to demonstrate that its AML/CFT regime is technically compliant. Assessors rate technical compliance with each of the FATF Recommendations on four possible levels. A compliant rating (C) indicates no significant deficiencies; largely compliant (LC) suggests only minor deficiencies while partially compliant (PC) indicate moderate shortcomings. A rating of non-compliant (NC) indicates that there are major deficiencies. For comparative purposes, if the technical compliance levels are each allocated a numerical value, then a weighted compliance average for each Recommendation could be computed in respect of each country. For current purposes, NC will be taken to be 0, PC (1), LC (2) and C (3).

Using the latest available ratings of the three case studies, as will be seen in the heatmap in *Table 4*, Jamaica had the lowest weighted score for technical compliance (1.5), which is midway between PC and LC. Trinidad and Tobago has the highest (2.5), which is midway between LC and C. The Bahamas has an overall rating of LC. It is worth highlighting that the only Recommendations that all three countries were rated compliant for are R.13 (Correspondent banking relationships) and R.20 (Reporting of suspicious transactions). While the Bahamas and Trinidad were rated C for R. 14 (Money or Value Transfer Services), Jamaica was rated PC. Jamaica was the only of the three case studies with a NC rating for R.6 (Target financing sanctions related to TF) and R.8 (Non-profit organisations).

The Bahamas, Jamaica and Trinidad and Tobago have made significant strides in technical compliance with the FATF international standards.<sup>1407</sup> However, the ML/TF

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<sup>1406</sup> Financial Action Task Force, 'Financial Action Task Force Methodology (2013-2019)' 5 <<http://www.fatf-gafi.org/media/fatf/documents/methodology/FATF%20Methodology%202022%20Feb%202013.pdf>>.

<sup>1407</sup> Caribbean Financial Action Task Force, 'Anti-Money Laundering and Counter-Terrorist Financing Measures - The Bahamas, 1st Enhanced Follow-up Report & Technical Compliance Re-Rating' (Port-of-Spain, Trinidad & Tobago: CFATF Secretariat, December 2018); Caribbean Financial Action Task Force, 'Anti-Money Laundering and Counter-Terrorist Financing Measures- Trinidad and Tobago's 3rd

risk profiles of most Commonwealth Caribbean jurisdictions, whether real or perceived, have made achieving full technical compliance extremely difficult. Even if a country has met most of the specified assessment criteria in respect of each Recommendation, assessors are entitled to conclude that a single deficiency is sufficiently important to justify an NC rating.<sup>1408</sup> Such decision could be reached having regard to the country's risk profile or other structural or contextual factors. Furthermore, even if a ML/TF risk is not assessed as high in a country's NRA, it must be regarded as high-risk if designated as such by the FATF Recommendations. This has effectively undermined the objective of the RBA. With regard to the resource demands for technical compliance, ensuring that the requisite legislative and institutional frameworks are in place in respect of each of the Forty Recommendations is costly. The complex and constantly evolving nature of FATF Recommendations has further undermined the capacity of low-income jurisdictions to comply effectively and efficiently.<sup>1409</sup>

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Enhanced Follow-up Report & Technical Compliance Re-Rating' (Port-of-Spain, Trinidad & Tobago: CFATF Secretariat, June 2019), <https://cfatf-gafic.org/documents/4th-round-follow-up-reports/trinidad-and-tobago-3/11799-trinidad-and-tobago-3rd-fur/file>; Caribbean Financial Action Task Force, 'Fourth Round Mutual Evaluation Report (MER): Jamaica'.

<sup>1408</sup> Financial Action Task Force, 'Financial Action Task Force Methodology (2013-2019)'.

<sup>1409</sup> Jan Langthaler and Jonas López Niño, 'An Overview on De-Risking: Drivers, Effects and Solutions' (Mexico City, Mexico: Association of Supervisors of Banks of the Americas (ASBA), 2017), <http://www.asbasupervision.com/es/bibl/i-publicaciones-asba/i-2-otros-reportes/1598-an-overview-on-de-risking-drivers-effects-and-solutions/file>.

Table 3: Comparative Analysis of Technical Compliance with FATF International Standards- The Bahamas, Jamaica and Trinidad and Tobago

Policy Areas	Recommendations	The Bahamas	Jamaica	Trinidad & Tobago
		December 2018 (FUR)	2017 (4th Round MEVAL)	FUR June 2019
AML/CFT Policies and Coordination	R.1	Assessing risks & applying a RBA		
	R.2	National cooperation & coordination		
Mnoney Laundering and Confiscation	R.3 (formerly R.1 &R.2)	Money laundering offence		
	R.4 (R.3)	Confiscation provisional measures		
Terrorist Financing and the Financing of Proliferation of Weapons of Mass Destruction	R.5 (SR.II)	Terrorist financing offence		
	R.6 (SR.III)	Target financing sanctions related to TF		
	R.7 (new)	Target financial sanctions related to proliferation		
	R.8	Non-profit organisations		
Preventative Measures	R.9 (R.4)	Financial institution secrecy		
	R.10 (R.5)	Customer due diligence (CDD)		
	R.11	Record keeping		
	R.12 (R.6)	Politically exposed persons (PEPs)		
	R.13 (R.7)	Correspondent banking relations		
	R.14 (SR.VI)	Money or value transfer serices (MVTs)		
	R.15	New technologies		
	R.16 (SR.VII)	Wire transfers		
	R.17	Reliance on third parties		
	R.18	Internal controls and foreign branches and subsidiaries		
	R.19 (R.21)	Higher-risk countries		
	R.20	Reporting of suspicious transactions		
	R.21	Tipping-off and confidentiality		
	R.22	DNFBPs: CDD		
	R.23	DNFBP: Other measures		

<b>Transparency and Beneficial Ownership of Legal Persons and Arrangements</b>	R.24 (R.33)	Transparency and beneficial ownership of legal persons			
	R.25 (R.34)	Transparency and beneficial ownership of legal arrangements			
<b>Powers and Responsibilities of Competent Authorities and other Institutional Measures</b>	R. 26 (R.23)	Regulation and supervision of financial institutions			
	R.27	Powers of supervisors			
	R.28 (R.24)	Regulation and supervision of DNFBPs			
	R.29 (R.26)	Financial Intelligence Unit			
	R.30	Responsibilities of enforcement and investigative authorities			
	R.31 (R.28)	Powers of law enforcement and investigative authorities			
	R.32	Cash couriers			
	R.33	Statistics			
	R.34	Guidance and feedback			
	R.35 (R.17)	Sanctions			
<b>International Cooperation</b>	R.36 (R.35 & SR.I)	International instruments			
	R.37 (R.36 & SR.V)	Mutual legal assistance			
	R.38 (R..38)	Mutual legal assistance: freezing and confiscation			
	R.39 (R.39)	Extradition			
	R.40 (R.40)	Other forms of international cooperation			
	<b>Average</b>		<b>2.1</b>	<b>1.5</b>	<b>2.5</b>

#### **7.1.4.2. Case Study: Comparative Analysis of Effectiveness Ratings**

High levels of technical compliance do not necessarily equate to high levels of effectiveness of a country's AML/CFT regime.<sup>1410</sup> Effectiveness assessments involve an evaluation of the extent to which a country has achieved the pre-defined outcomes, which the FATF have established as central to a robust national AML/CFT.<sup>1411</sup> That is, the extent to which the domestic legal and institutional frameworks have mitigated ML/TFP risks, including through addressing any identified systemic deficiencies. Effectiveness ratings are premised on assessors' subjective judgements having regard to the evidence, of whatever availability and adequacy, supplied to them by the country being assessed.<sup>1412</sup> Poor data collections systems in Commonwealth Caribbean countries, could exacerbate these evidentiary issues and skew effectiveness ratings. There is a hierarchy of eleven Immediate Outcomes (IO) against which effectiveness assessments are made.<sup>1413</sup>

In table 4, the four possible FATF effectiveness ratings were allocated a numerical value to determine the weighted average for the FATF eleven Immediate Outcomes (IOs), for comparative case analysis. The effectiveness ratings of the United Kingdom and the United States have been juxtaposed with those of The Bahamas, Jamaica and Trinidad and Tobago. The most striking results highlighted by the generated heatmap is that the IOs for which The Bahamas, Jamaica and Trinidad and Tobago received to lowest effectiveness ratings (IOs 9-11), are the ones for which the United States and the United Kingdom had the highest effectiveness ratings. IO.9 assesses the extent to which TF offences are investigated and terrorist financiers prosecuted and subject to effective, proportionate, and dissuasive sanctions. IO.10 assesses the extent to which terrorists, terrorist organisations and terrorist financiers are prevented from moving and using funds and abusing non-profit organisations (NPO) sector. The extent to which persons and entities involved in the proliferation of weapons of mass destruction are prevented from

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<sup>1410</sup> Halliday, Levi, and Reuter, 'Global Surveillance of Dirty Money'.

<sup>1411</sup> Financial Action Task Force, 'Financial Action Task Force Methodology (2013-2019)'.

<sup>1412</sup> Financial Action Task Force.

<sup>1413</sup> Financial Action Task Force.

raising, moving, and using funds, pursuant to relevant United Nations Security Council resolutions are assessed by IO.11. One would assume that since TF and PF risks have been adjudged low in the NRAs of The Bahamas and Jamaica, and to a lesser extent Trinidad and Tobago, then on application of the RBA these countries would be justified in prioritising less resources to the TF and PF threats. Yet poor effectiveness ratings for IO.9-11 have had serious reputational consequences. In contrast, these issues are central to the national security policies and ML/TFP risks profiles of the United States and the United Kingdom and would conceivably be better financed.

However, during the mutual evaluation process, assessors found that The Bahamas was unable to demonstrate an effective system that had been addressing and mitigating TF and PF risks.<sup>1414</sup> Still, there had been no suspected TF and PF activities by the Bahamian Financial Intelligence Unit (BFIU) and the Royal Bahamian Police Force (RBPF). Hence findings of no investigations, prosecutions, or convictions, were in line with the assessed low risk in its NRA. Moreover, The Bahamas was rated poorly for having not demonstrated that LEAs and the judiciary had sufficient capacity, “should the need arise to investigate and prosecute TF” or that there are alternative criminal justice measures to disrupt TF.<sup>1415</sup> Furthermore, its targeted financial sanctions (TFS) regime was criticised as “basic”, and FIs and DNFBPs in that jurisdiction were found to have minimal knowledge of PF and related obligations. It was recommended that more resources were allocated to training staff of the LEAs and to monitoring the compliance of DNFBPs and NPO with TF and PF obligations.<sup>1416</sup> Intuitively, such resources could be better spent on mitigating assessed high ML risks.

Assessors concluded that apart from Jamaica having ratified all relevant international conventions, “it [does]... not appear that priority is given to TF related matters.”<sup>1417</sup> Additionally, it was reported that Jamaica had not taken any substantial steps to prevent the raising, movement and use of funds for PF and also lacked the capacity to implement UN Security Council resolutions pertaining to the identification and confiscation of resources for TF.<sup>1418</sup> Protracted delays were found in implementing a targeted financial

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<sup>1414</sup> Caribbean Financial Action Task Force, ‘Fourth Round Mutual Evaluation Report: The Bahamas’.

<sup>1415</sup> Caribbean Financial Action Task Force, 40.

<sup>1416</sup> Caribbean Financial Action Task Force, 40.

<sup>1417</sup> Caribbean Financial Action Task Force, ‘Fourth Round Mutual Evaluation Report (MER): Jamaica’, 61.

<sup>1418</sup> Caribbean Financial Action Task Force, ‘Fourth Round Mutual Evaluation Report (MER): Jamaica’.

sanctions (TFS) regime as well as a general lack of resource and specialised training in identifying, investigating and prosecuting transnational organised crimes, terrorism, TF and PF.<sup>1419</sup> FIs and DNFBPs compliance with TF and PF obligations were not being effectively monitored.<sup>1420</sup>

The assessors who conducted Trinidad and Tobago's mutual evaluation found that TF did not appear to be prioritised.<sup>1421</sup> However, unlike The Bahamas and Jamaica, suspicious transaction reports (STRs) related to terrorist activities had been filed by regulated entities and several Trinidadians had reportedly travelled to Syria to fight with ISIS/ISIL.<sup>1422</sup> However, there had neither been any domestic designation of persons or entities as terrorists or terrorist financiers, nor any arrests, prosecutions or convictions for terrorism related predicate offences.<sup>1423</sup> Poor effectiveness ratings were also influenced by the fact that the Financial Investigative Branch (FIB) and the Financial Intelligence Unit of Trinidad and Tobago were found to be under-resourced and intelligence authorities and other LEAs lacked adequate training in investigating TF and PF activities.<sup>1424</sup> Although there was no evidence that funds were being diverted from the NPOs, there was insufficient oversight of the sector.<sup>1425</sup>

It might be conceivably difficult to promote buy-in among sovereign States for whom terrorist and proliferation financing are low-risks to divert critical resources to suppress these threats that are tied to national security and foreign policy interests of superpowers.<sup>1426</sup> Such an expectation would run contrary to underlying objective of the RBA. Diverting resources to disrupt TF and PF threats would be especially difficult to justify, given the costs of achieving effectiveness in these IOs. Moreover, a growing body of evidence, based on cost- benefit analyses, has intimated that the benefits of AML/CFT enforcement typically materialise in onshore jurisdictions from which the illicit funds

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<sup>1419</sup> Caribbean Financial Action Task Force.

<sup>1420</sup> Caribbean Financial Action Task Force.

<sup>1421</sup> Caribbean Financial Action Task Force, 'Fourth Round Mutual Evaluation Report (MER): Trinidad and Tobago'.

<sup>1422</sup> Caribbean Financial Action Task Force.

<sup>1423</sup> Caribbean Financial Action Task Force.

<sup>1424</sup> Caribbean Financial Action Task Force.

<sup>1425</sup> Caribbean Financial Action Task Force.

<sup>1426</sup> Halliday, Levi, and Reuter, 'Disciplinary Transnational Legal Order'; Levi and Gilmore, 'Terrorist Finance, Money Laundering and the Rise and Rise of Mutual Evaluation'.

originated and where the predicate crimes have been committed.<sup>1427</sup> To the extent that effectiveness ratings are tied to the outcomes of national AML/CFTP laws, policies, programme implementation and enforcement actions, they weigh heavily on the resource capabilities of small Caribbean States. Governments, regulators and local FIs in Caribbean jurisdictions, have found it difficult to meet the costs for implementing enhanced training, staffing and operational risk management practices,<sup>1428</sup> without reputational fallouts. Yet, some of the most blatant and systematic violations of AML/CFT rules have been perpetrated by global banks in advanced financial centres, which are presumed to have the most effective AML/CFT regulatory frameworks.<sup>1429</sup>

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<sup>1427</sup> Geiger and Wuensch, 'The Fight against Money Laundering'; Levi and Gilmore, 'Terrorist Finance, Money Laundering and the Rise and Rise of Mutual Evaluation'; Lewisch, 'Money Laundering Laws as a Political Instrument'; Sharman, 'Power and Discourse in Policy Diffusion'.

<sup>1428</sup> James A Haley, 'De-Risking of Correspondent Banking Relationships: Threats, Challenges and Opportunities' (Washington, DC, USA: Woodrow Wilson International Centre for Scholars, January 2018); Gustavo Vasquez, 'Assessing the Impact of the De-Risking on Remittances and Trade Finance in Belize' (Washington, DC, USA: Inter-American Development Bank, December 2017), <https://publications.iadb.org/en/assessing-impact-de-risking-remittances-and-trade-finance-belize>.

<sup>1429</sup> Doyle, 'Cleaning up Anti-Money Laundering Strategies'; Gilmore, 'International Initiatives'; Halliday, Levi, and Reuter, 'Global Surveillance of Dirty Money'; Halliday, Levi, and Reuter, 'Disciplinary Transnational Legal Order'.

Table 4: Comparative Analysis of Effectiveness Outcomes- The Bahamas, Jamaica and Trinidad and Tobago

	IO1	IO2	IO3	IO4	IO5	IO6	IO7	IO8	IO9	IO10	IO11	
Jamaica	ME	ME	ME	LE	LE	ME	LE	SE	LE	LE	LE	CFATF MER Jan 2017
Bahamas	LE	ME	ME	ME	ME	ME	LE	LE	LE	LE	LE	CFATF MER+FUR Dec 2018
Trinidad & Tobago	ME	ME	ME	ME	ME	ME	LE	LE	LE	LE	LE	CFATF MER+FUR Jun 2019
Antigua & Barbuda	ME	ME	LE	ME	ME	ME	LE	ME	ME	LE	LE	CFATF MER Jul 2018
United States	SE	SE	ME	ME	LE	SE	SE	HE	HE	HE	HE	MER FATF/APG Dec 2016
United Kingdom	HE	SE	ME	ME	SE	ME	SE	SE	HE	HE	HE	FATF MER Dec 2018

Effectiveness descriptors and ratings based on the 2013 FATF Methodology		Effectiveness Scale
HE	High level of effectiveness- The immediate outcome is achieved to a very	4
SE	Substantial level of effectiveness- The immediate outcome is achieved to a	3
ME	Moderate level of effectiveness- The immediate outcome is achieved to a	2
LE	Low level of effectiveness- The Immediate Outcome is not achieved or to a low level of effectiveness	1

	IO1	IO2	IO3	IO4	IO5	IO6	IO7	IO8	IO9	IO10	IO11		Weighted Average
Jamaica	2	2	2	1	1	2	1	3	1	1	1	CFATF MER Jan 2017	1.5
Bahamas	1	2	2	2	2	2	1	1	1	1	1	CFATF MER+FUR Dec 2018	1.5
Trinidad & Tobago	2	2	2	2	2	2	1	1	1	1	1	CFATF MER+FUR Jun 2019	1.5
Antigua & Barbuda	2	2	1	2	2	2	1	2	2	1	1	CFATF MER Jul 2018	1.6
United States	3	3	2	2	1	3	3	3	3	3	3	MER FATF/APG Dec 2016	3.0
United Kingdom	4	3	2	2	3	2	3	3	3	3	3	FATF MER Dec 2018	3.1

### 7.1.4.3. *Reputational Costs*

The vague definition of ML/TFP risk and insufficiently empirical basis of the FATF's risk-based assessment framework,<sup>1430</sup> have played a major role in reinforcing findings of high ML/TF risks in mutual evaluations of Commonwealth Caribbean jurisdictions. Strides made by Commonwealth Caribbean jurisdictions in technical compliance with FATF Recommendations have been overshadowed by poor effectiveness ratings. The latter has often reflected implementation challenges due to resource constraints and underdeveloped technical and institutional capacities. This has been observed among low-capacity countries across the Global South.<sup>1431</sup> This further confirms that the RBA cannot function as effectively as presumed, in suppressing predicate ML/TF activities, in under-resourced contexts. It is the effectiveness of the national AML/CFT systems that often dictates perceptions of the degree of exposure of jurisdictions and their indigenous FIs to integrity/reputational risks.<sup>1432</sup> Being 'grey listed' by the FATF carries enormous reputational consequences. The FATF's 'grey list' or list of "high-risk and other monitored jurisdictions,"<sup>1433</sup> are those that have been deemed to have "strategic deficiencies" in their national AML/CFTP frameworks. Grey-listed jurisdictions must commit to remedy identified strategic deficiencies within agreed timeframes and are subjected to increased monitoring. Strikingly, while the EU has indicated its intention to increase scrutiny of 'blacklisted' countries that "pose significant threats to the financial system of the Union,"<sup>1434</sup> including Trinidad and Tobago, the country was removed from the FATF's 'grey list' on February 20, 2020. The Bahamas, Barbados and Jamaica are

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<sup>1430</sup> Bello and Harvey, 'From a Risk-Based to an Uncertainty-Based Approach to Anti-Money Laundering Compliance'; de Koker, 'Identifying and Managing Low Money Laundering Risk'; Savona and Riccardi, 'Assessing the Risk of Money Laundering'.

<sup>1431</sup> Durner and Shetret, *Understanding Bank De-Risking and Its Effects on Financial Inclusion*.

<sup>1432</sup> Simonova, 'The Risk-Based Approach to Anti-Money Laundering'.

<sup>1433</sup> Financial Action Task Force, 'Jurisdictions under Increased Monitoring – 21 February 2020', 20 February 2020, <http://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/increased-monitoring-february-2020.html>.

<sup>1434</sup> Francesco Guarascio, 'EU to Beef up Scrutiny of Money-Laundering Risks, Adds Panama to List', *Reuters, UK*, 5 May 2020, <https://uk.reuters.com/article/uk-eu-moneylaunders-blacklist-idUKKBN22H20K>.

the other Caribbean States grey-listed by the FATF. When juxtaposed with the other listed jurisdictions such as Albania, Myanmar, Pakistan, Panama, Syria, and Yemen,<sup>1435</sup> the reputational implications for these Caribbean jurisdictions become glaring. As of March 10, 2020, Iceland was the only Western European State on the FATF ‘grey list’. However, the Basel AML Index offers an interesting insight into how divorced perceptions of AML/CFTP risks in the Caribbean often are from reality.

The Basel Index’s composite risk scores are bounded between 1 and 10, with 1 indicating low ML/TFP risk and 10 indicating high risk.<sup>1436</sup> These scores were computed using 14 indicators across five broad categories namely ML/TF risk, corruption risk, financial transparency and standards, public transparency and accountability, and political risk.<sup>1437</sup> The highest weighting (35%) of the 14 indicators is derived from the FATF’s AML/CFT mutual evaluation assessment reports.<sup>1438</sup> Caribbean OFCs Dominica (101/125 or 4.4/10), Grenada (94/125 or 4.59/10), St. Vincent and the Grenadines (90/125 or 4.69/10), and St. Lucia (89/125 or 4.73/10), ranked more favourably than several OECD countries with advanced financial centres including Canada, Luxembourg, Switzerland and the United States. This infers that some Caribbean jurisdictions may have stronger AML/CFT systems than advanced financial centres. Moreover, while the aforementioned Caribbean jurisdictions had all improved their scores, and by extension their AML/CFT regimes, from the previous ranking, OECD countries with the lowest assessed composite AML/CFT risk scores such as the United Kingdom (106/125 or 4.13/10), France (108/125 or 4.9/10), Slovenia (117/125 or 3.7/10) and Estonia (125/125 or 2.68/10) all recorded deteriorations in their previous rankings. Jamaica and Guyana were the two lowest scoring Caribbean jurisdictions with 6.24/10 and 6.14/10 respectively. However, ‘fear-driven’ risk decision-making of banks in advanced financial centres, which has led to their termination of business relationships with indigenous Caribbean FIs,<sup>1439</sup> has not been attenuated by the findings of the Basel AML Index.

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<sup>1435</sup> Financial Action Task Force, ‘Jurisdictions under Increased Monitoring – 21 February 2020’.

<sup>1436</sup> Basel Institute on Governance, ‘Basel AML Index Public Ranking’, 2019, <https://www.baselgovernance.org/basel-aml-index/public-ranking>.

<sup>1437</sup> Basel Institute on Governance.

<sup>1438</sup> Basel Institute on Governance.

<sup>1439</sup> Allan Wright, Bradley Kellman, and Shaiiede Kallicharan, ‘CBR Withdrawals: Understanding the Uneven Occurrence Across the Caribbean’ (Inter-American Development Bank, April 2018), <https://doi.org/10.18235/0001084>.

Rather, it is the FATF technical compliance and effectiveness ratings and unilateral bilateral ‘backlisting’ that have guided onshore banks’ risk-based decision-making. This reflects a deep fragmentation in the global AML/CFT ranking and ratings culture. For example, at the bilateral level, the perception of heightened ML/TF risks among American regulators and FIs has been attributed to the practice of misreporting on the state of AML/CFT and tax transparency regulatory frameworks in Caribbean jurisdictions by the US State Department, in its International Narcotics Control Strategy Reports (INCSR).<sup>1440</sup> The INCSR has negligently used outdated references to already lifted sanctions on Caribbean jurisdictions.<sup>1441</sup> The practice of false reporting and misrepresentation of Caribbean jurisdictions’ strides in addressing strategic deficiencies in their domestic AML/CFTP regimes, has generally been reproduced by onshore news media, exacerbating the perception of heightened ML/TF risks.<sup>1442</sup> To be fair, the US State Department has maintained that “inclusion in Volume II is not an indication that a jurisdiction is not making strong efforts to combat money laundering or that it has not fully met relevant international standards. The INCSR is not a “black list” of jurisdictions, nor are there sanctions associated with it.”<sup>1443</sup>

#### **7.1.4.4. AML/CFT Regulatory Compliance Costs**

Paradoxically, by leveraging the application of the RBA, onshore jurisdictions have imposed increasingly stringent AML/CFTP regulatory requirements and onerous fines for breaches of AML/CFT standards, based on NRAs. No significant empirical evidence has been furnished to confirm that the imposition of excessively punitive fines and onerous regulatory standards reduce financial crimes.<sup>1444</sup> Yet they have proven to be

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<sup>1440</sup> McLean et al., ‘Economic Impact of De-Risking on the Caribbean’; Morvin Williams, ‘De-Risking/de-Banking: “The Reality Facing Caribbean Financial Institutions”’ (Annual Monetary Studies Conference, Port-of-Spain, Trinidad & Tobago, 2016).

<sup>1441</sup> McLean et al., ‘Economic Impact of De-Risking on the Caribbean’.

<sup>1442</sup> McLean et al.

<sup>1443</sup> United States Department of State, ‘International Narcotics Control Strategy Report Volume II- Money Laundering’.

<sup>1444</sup> Matthew Collin et al., ‘Unintended Consequences of Anti-Money Laundering Policies for Poor Countries- A CGD Working Group Report’, CGD Working Group Reports (Washington, DC, USA:

extremely disruptive for business relationships between onshore banks and FIs in the Commonwealth Caribbean. There has been a worrying trend in supervisory and enforcement actions, particularly in the United States, of regulators imposing hefty punitive fines on banks where no actual money laundering or terrorist financing activities had occurred. In 2013 a federal regulator fined Royal bank of Canada on the grounds that its AML controls were “unsafe and unsound.”<sup>1445</sup> In 2014 New York regulators fined Standard Charter Bank \$300 million because its monitoring system failed to flag “potentially high-risk transactions.”<sup>1446</sup> In 2015 Citigroup was fined \$140 million because Californian regulators reportedly had “reason to believe ... that there were weaknesses” in the risk-management framework of its Banamex USA subsidiary, including inadequate staff.<sup>1447</sup> Such enforcement actions have contributed to the wholesale retreat by global banks from geographic regions perceived as high-risk, because of cost-benefit analyses of profitability and risk-exposure. These onshore enforcement actions have made it impractical for international banks to adhere to the FATF’s guidance on the application of RBA. The latter prescribes that financial institutions should only terminate customer relationships, “...on a case-by-case basis, where the money laundering and terrorist financing risks cannot be mitigated.”<sup>1448</sup>

Moreover, regulators in advanced financial centres are not incentivised to conduct cost-benefit analyses when determining AML/CFT regulatory standards, because they do not have to bear the compliance costs and unintended harms caused by their decision-making.<sup>1449</sup> Consequently, regulatory expectations have become unduly onerous.<sup>1450</sup> This has been aggravated by constantly evolving regulatory expectations and standards against which the adequacy and robustness of the risk management systems of onshore FIs are

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Centre for Global Development, 2015); Saperstein, Sant, and Ng, ‘The Failure of Anti-Money Laundering Regulation’.

<sup>1445</sup> Saperstein, Sant, and Ng, ‘The Failure of Anti-Money Laundering Regulation’, 3–4.

<sup>1446</sup> Saperstein, Sant, and Ng, 2.

<sup>1447</sup> Saperstein, Sant, and Ng, 2.

<sup>1448</sup> Financial Action Task Force, ‘FATF Clarifies Risk-Based Approach: Case-by-Case, Not Wholesale de-Risking’, October 2014, <http://www.fatf-gafi.org/documents/news/rba-and-de-risking.html>.

<sup>1449</sup> Saperstein, Sant, and Ng, ‘The Failure of Anti-Money Laundering Regulation’.

<sup>1450</sup> Mahmood Bagheri and Chizu Nakajima, ‘Optimal Level of Financial Regulation under the GATS: A Regulatory Competition and Cooperation Framework for Capital Adequacy and Disclosure of Information’, *Journal of International Economic Law* 5, no. 2 (1 June 2002): 507–30, <https://doi.org/10.1093/jiel/5.2.507>; Saperstein, Sant, and Ng, ‘The Failure of Anti-Money Laundering Regulation’.

assessed, which have rendered effective compliance increasingly elusive.<sup>1451</sup> Such regulatory compliance costs and expectations have been transferred, extraterritorially, to Commonwealth Caribbean FIs that are dependent on access to the global payment system through onshore correspondent banks. Consequently, these jurisdictions and their financial services sectors have had to assume the added responsibility and cost of meeting the regulatory expectations of Governments from major onshore financial centres, outside of the FATF mutual evaluation process.

The recent tendency to represent onshore concerns about capital flight, whether resulting from legitimate tax planning offshore and tax evasion, as an emerging ML/TF risk, has also increased regulatory costs for Caribbean governments. The FATF has recently designated “serious tax crimes” among its list of “new threats and priorities.”<sup>1452</sup> FATF R.3 has encouraged the criminalisation of ML “with a view to including the widest range of predicate offences.”<sup>1453</sup> The Interpretive Note to R.3 has now included tax crimes within its “designated categories of offences,”<sup>1454</sup> to which the Forty Recommendations should extend. Both NRAs and AML/CFT controls of FIs must now take account of ML/TF risks associated with tax evasion, effectively expanding the application of the RBA. However, it is R.40 (Other forms of international cooperation), which appears to have been used as a pretext to link States obligation to “use clear channels or mechanisms for the effective transmission and execution of requests for information or other types of assistance” with financial intelligence gathering related to tax matters beyond their obligations to combat ML and FTP. Non-compliance with the United States’ Foreign Account Tax Compliance Act (FATCA) and failure to conclude bilateral tax information exchange agreements with the OECD have imposed an additional regulatory burden and compliance costs on Caribbean jurisdictions, which have increased transactions costs.<sup>1455</sup>

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<sup>1451</sup> Saperstein, Sant, and Ng, ‘The Failure of Anti-Money Laundering Regulation’.

<sup>1452</sup> Financial Action Task Force, ‘FATF Steps up the Fight against Money Laundering and Terrorist Financing’ (FATF/OECD Secretariat, 2012), <http://www.fatf-gafi.org/media/fatf/documents/Press%20handout%20FATF%20Recommendations%202012.pdf>.

<sup>1453</sup> Financial Action Task Force, ‘International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations’, 32.

<sup>1454</sup> Financial Action Task Force, 115.

<sup>1455</sup> Trevor Alleyne et al., ‘Loss of Correspondent Banking Relationships in the Caribbean: Trends, Impact, and Policy Options’, IMF Working Papers (Washington, DC, USA: International Monetary Fund, September 2017), <https://www.imf.org/en/Publications/WP/Issues/2017/09/29/Loss-of-Correspondent-Banking-Relationships-in-the-Caribbean-Trends-Impact-and-Policy-Options-45220>; Michaela Erbenova et al., ‘The Withdrawal of Correspondent Banking Relationships : A Case for Policy Action’, Staff

This “aggressive onslaught by onshore nations” against financial confidentiality,<sup>1456</sup> has been more pronounced among Caribbean jurisdictions that have legitimately relied on zero to nominal tax regimes to attract foreign direct investments. Their discursive stigmatisation as ‘tax havens’ under various international initiatives, which was reproduced by the “Panama Papers” scandal,<sup>1457</sup> reinforced their targeting as objects of extraterritorial regulation. In turn, this has undermined the sovereignty of these Caribbean small States.

It will be recalled that OFCs in the Caribbean were targeted by the IMF, European Union and the OECD under the Harmful Tax Competition Initiative.<sup>1458</sup> The lingering perceptions about lack of transparency in tax matters in the Caribbean have been exacerbated by blacklisting labelled ‘tax havens’, at the bilateral level. Onshore tax blacklists have notoriously prescribed punitive or more burdensome due diligence requirements on transactions from named foreign jurisdictions.<sup>1459</sup> Yet a majority of national blacklists in advanced onshore financial centres were found to be arbitrary and discriminatory.<sup>1460</sup> They have been recognised as discursively underhanded ‘naming and shaming’ campaigns against low-tax offshore jurisdictions to prevent capital flight from both tax avoidance and evasion.<sup>1461</sup> Authors writing on behalf of the United Nations

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Discussion Note No.16/6 (Washington, DC, USA: International Monetary Fund, June 2016), <https://www.imf.org/en/Publications/Staff-Discussion-Notes/Issues/2016/12/31/The-Withdrawal-of-Correspondent-Banking-Relationships-A-Case-for-Policy-Action-43680>; Haley, ‘De-Risking of CBRs: Threats, Challenges and Opportunities’; Williams, ‘De-Risking/de-Banking: “The Reality Facing Caribbean Financial Institutions”’.

<sup>1456</sup> Antoine, ‘The Caribbean Offshore Financial Services Revolution- A Bold, Futuristic Initiative Requiring Brave Leadership’.

<sup>1457</sup> Alleyne et al., ‘Loss of Correspondent Banking Relationships in the Caribbean’; Haley, ‘De-Risking of CBRs: Threats, Challenges and Opportunities’; Williams, ‘De-Risking/de-Banking: “The Reality Facing Caribbean Financial Institutions”’.

<sup>1458</sup> Gregory Rawlings, ‘Taxes and Transnational Treaties: Responsive Regulation and the Reassertion of Offshore Sovereignty’, *Law & Policy* 29, no. 1 (2007): 51–66, <https://doi.org/10.1111/j.1467-9930.2007.00245.x>; Jason C. Sharman and Gregory Rawlings, ‘Deconstructing National Tax Blacklists: Removing Obstacles to Cross-Border Trade in Financial Services- A Report Prepared for the Society of Trust and Estate Practitioners’ (‘Beyond the Level Playing Field?’ Symposium, London (UK): Society of Trust and Estate Practitioners, 2005); Sharman, ‘The Bark Is the Bite’; Unger and Ferwerda, ‘Regulating Money Laundering and Tax Havens: The Role of Blacklisting’.

<sup>1459</sup> Sharman and Rawlings, ‘Deconstructing National Tax Blacklists: Removing Obstacles to Cross-Border Trade in Financial Services- A Report Prepared for the Society of Trust and Estate Practitioners’.

<sup>1460</sup> Sharman and Rawlings.

<sup>1461</sup> Morgan, ‘Dirty Names, Dangerous Money’; Sharman and Rawlings, ‘Deconstructing National Tax Blacklists: Removing Obstacles to Cross-Border Trade in Financial Services- A Report Prepared for the Society of Trust and Estate Practitioners’; Jason C. Sharman and Gregory Rawlings, ‘National Tax

Office on Drugs and Crime have even gone as far as to pejoratively remark that the “sale or rental of sovereign status” by offshore jurisdictions, using banking secrecy and financial confidentiality laws, has deprived onshore economies of their sovereign prerogative to effectively tax their citizens.<sup>1462</sup> Somewhat disingenuously, said authors maintained that such offshore practices contravened the principle of ‘non-intervention in the internal affairs of other States’ and has inhibited the ‘development of an international rule of law’.<sup>1463</sup> Caribbean jurisdictions labelled as ‘tax havens’ have, therefore, been deemed ‘high-risk’ for ML/TF. Such onshore regulatory practices have, in turn, indirectly subverted the sovereign regulatory autonomy of Caribbean jurisdictions over their domestic FIs. Furthermore, these onshore AML/CFTP regulatory practices have had serious unintended development consequences including de-risking in the MVTs sector, on remittance flows and financial inclusion.

## **7.2. The Unintended Consequences of the RBA on the Sustainable Development of Commonwealth Caribbean Jurisdictions– De-risking and Financial Exclusion**

De-risking and financial exclusion as unintended consequences of global AML/CFTP regulation for developing countries, are now widely recognised.<sup>1464</sup> The FATF has defined de-risking as:

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Blacklists: A Comparative Analysis’, *Journal of International Taxation* 17, no. 9 (2006): 38–47; Unger and Ferwerda, ‘Regulating Money Laundering and Tax Havens: The Role of Blacklisting’.

<sup>1462</sup> Blum et al., ‘Financial Havens, Banking Secrecy and Money-Laundering’, 92.

<sup>1463</sup> Blum et al., 92.

<sup>1464</sup> Alleyne et al., ‘Loss of Correspondent Banking Relationships in the Caribbean’; Collin et al., ‘Unintended Consequences of Anti-Money Laundering Policies for Poor Countries- A CGD Working Group Report’; Halliday, Levi, and Reuter, ‘Global Surveillance of Dirty Money’; Robert Hopper, ‘Disconnecting from Global Finance: De-Risking- The Impact of AML/CFT Regulations in Commonwealth Developing Countries’ (London, UK: Commonwealth Secretariat, n.d.), <https://thecommonwealth.org/sites/default/files/inline/DisconnectingfromGlobalFinance2016.pdf>; Vijaya Ramachandran, ‘Mitigating the Effects of De-Risking in Emerging Markets to Preserve Remittance Flows’, *EMCompass, International Finance Corporation, Washington DC*, 2016, <https://openknowledge.worldbank.org/handle/10986/30348>; Schmid, ‘How Much Anti-Money Laundering Effort Is Enough? The Jamaican Experience’.

Situations where financial institutions terminate or restrict business relationships with entire countries or categories of customers in order to avoid, rather than manage, risks in line with the FATF's risk-based approach.<sup>1465</sup>

These business arrangements, which are commonly referred to as correspondent banking relationships (CBRs), involve the provision of cross-border banking services by one bank (the correspondent bank) to another (the respondent bank).<sup>1466</sup> Correspondent banking services are usually provided through three modalities.<sup>1467</sup> A respondent bank may enter into an agreement with the correspondent bank to execute payments on behalf of the respondent bank and its customers.<sup>1468</sup> Alternatively, a correspondent onshore bank would open a 'nested' or master correspondent banking account that would be made available for use by several smaller respondent banks.<sup>1469</sup> A third arrangement would be the use of payable-through accounts, whereby the respondent bank would allow its customers to access the correspondent account directly to conduct business on their own behalf.<sup>1470</sup> These transactions would include cash management, international wire transfers, cheque clearing and foreign exchange services.<sup>1471</sup> They have facilitated foreign direct investments; trade financing, and even credit card payments in the tourism and gaming sectors.<sup>1472</sup> CBRs are the primary mechanisms through which Caribbean FIs access the global payment and clearing system without the need to establish physical presence or obtaining bank licenses in onshore financial centres.<sup>1473</sup> However, since correspondent banks generally process or execute transactions for respondent banks in foreign jurisdictions, and their customers with whom the correspondent banks have no

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<sup>1465</sup> Financial Action Task Force, 'Guidance on Correspondent Banking Services', FATF Guidance (Paris, France, October 2016), 4, <http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-Correspondent-Banking-Services.pdf>.

<sup>1466</sup> Hopper, 'Disconnecting from Global Finance: De-Risking'.

<sup>1467</sup> Erbenova et al., 'The Withdrawal of Correspondent Banking Relationships'.

<sup>1468</sup> Erbenova et al.

<sup>1469</sup> Erbenova et al.

<sup>1470</sup> Erbenova et al.

<sup>1471</sup> Acosta et al., 'De-Risking in the Caribbean Region- A CFATF Perspective'; Hopper, 'Disconnecting from Global Finance: De-Risking'.

<sup>1472</sup> Acosta et al., 'De-Risking in the Caribbean Region- A CFATF Perspective'; Alleyne et al., 'Loss of Correspondent Banking Relationships in the Caribbean'; Caribbean Policy Research Institute (CAPRI), 'The Correspondent Banking Problem: Impact of de-Banking Practices on Caribbean Economies'.

<sup>1473</sup> Acosta et al., 'De-Risking in the Caribbean Region- A CFATF Perspective'; Erbenova et al., 'The Withdrawal of Correspondent Banking Relationships'; Hopper, 'Disconnecting from Global Finance: De-Risking'; Langthaler and Niño, 'An Overview on De-Risking: Drivers, Effects and Solutions'.

direct relationship, correspondent banking is thought to be inherently high risk for ML and TF.<sup>1474</sup> De-risking has most visibly affected Commonwealth Caribbean money or value transfer services (MVTs) sectors.

MVTs providers rely heavily on CBRs to service their clients and connect Diasporas and low-income segments of developing societies who cannot afford commercial banking services. MVTs are financial services involving the acceptance of cash, cheques, or other monetary instruments from a client, on whose behalf payment of a corresponding sum is made to a third-party beneficiary whether through transfers, new payment methods or a clearing network.<sup>1475</sup> The impact of de-risking has been particularly severe on the MVTs sectors across the Global South due to greater dependence on private financial flows, such as remittances, to help finance sustainable development and poverty eradication.<sup>1476</sup> Remittance flows to low- and middle-income countries were valued at \$551 bn in 2019 and are projected to reach \$597 billion by 2021.<sup>1477</sup> Remittances as a percentage of GDP is significantly higher in the Caribbean than the global average of 4.8%.<sup>1478</sup> In Jamaica remittances account for as much as 15% of GDP, 13% in Guyana and 22% in Haiti.<sup>1479</sup> These high volumes of remittance transactions are considered a geographic ML/TF risk factor, based on the FATF risk-assessment framework.<sup>1480</sup> In fact, ninety-five (95%) of respondents in a survey conducted by the World Bank in 2015 indicated that concerns about ML/TF risks were a top cause for CBR withdrawals in the MVTs sector by large international banks.<sup>1481</sup> The de-banking of MVTSPs, which tend to provide more

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<sup>1474</sup> Financial Action Task Force, 'Guidance on Correspondent Banking Services'; Schmid, 'How Much Anti-Money Laundering Effort Is Enough? The Jamaican Experience'.

<sup>1475</sup> Financial Action Task Force, 'FATF Guidance on RBA- MVTs'.

<sup>1476</sup> Collin et al., 'Unintended Consequences of Anti-Money Laundering Policies for Poor Countries- A CGD Working Group Report'.

<sup>1477</sup> KNOMAD, 'Migration and Remittance Data Update: Remittances to Low- and Middle-Income Countries on Track to Reach \$551 Billion in 2019 and \$597 Billion by 2021', accessed 30 March 2020, <https://www.knomad.org/publication/migration-and-remittance-data-update-remittances-low-and-middle-income-countries-track>.

<sup>1478</sup> Alleyne et al., 'Loss of Correspondent Banking Relationships in the Caribbean'.

<sup>1479</sup> Alleyne et al.

<sup>1480</sup> Alleyne et al.; Allan Wright, 'De-Risking and Its Impact: The Caribbean Perspective — Prepared by the CARICOM Central Bank Governors Technical Working Group on De-Risking' (Trinidad & Tobago: Caribbean Centre for Money and Finance, University of the West Indies, St. Augustine, 2016), <http://caribbean.eclac.org/content/de-risking-and-its-impact-caribbean-perspective>.

<sup>1481</sup> World Bank Group, 'Fact Finding Summary from De-Risking Surveys' (The World Bank, 1 November 2015), <http://documents.worldbank.org/curated/en/534371468197058296/Fact-finding-summary-from-de-risking-surveys>.

accessible and affordable financial services, has threatened to exacerbate financial exclusion of already unbanked and vulnerable segments of Caribbean societies that rely on remittances.<sup>1482</sup> De-risking in the MVTS sector also threatens to undermine the United Nations SDGs. For example, SDG 10.7 has set a global target of reducing remittance cost to 3% by 2030. Commercial banks have been found to be the most expensive remittance channels and transaction costs across remittance channels to the Global South sometimes exceed 10%.<sup>1483</sup>

### 7.2.1. The Nexus between the RBA and De-risking in Caribbean MVTS Sectors.

It is being submitted that the wholesale de-risking in the Caribbean's correspondent banking sector can be traced to the 2012 revised FATF Recommendations and the 2013 *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFTP Systems*. These policy instruments officially institutionalised the RBA. While this relationship has not be explicitly acknowledged in the AML/CFT literature, there are reasonable grounds on which it could be inferred. For instance, a large-scale survey, which included twelve Commonwealth Caribbean countries, found that 74% of developing country respondents recounted losses of CBRs since 2012, with an estimated 70% having reportedly occurred since 2015.<sup>1484</sup> Other large-scale surveys on de-risking by the World Bank,<sup>1485</sup> and the CFATF,<sup>1486</sup> have reached similar findings. Additionally, it has been observed that meeting the revised

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<sup>1482</sup> Caribbean Policy Research Institute (CAPRI), 'The Correspondent Banking Problem: Impact of de-Banking Practices on Caribbean Economies'; Erbenova et al., 'The Withdrawal of Correspondent Banking Relationships'; Scott B MacDonald, 'Is There a "New Normal" for De-Risking in the Caribbean?', n.d., 8.

<sup>1483</sup> World Bank Group, 'Record High Remittances Sent Globally in 2018', Text/HTML, World Bank, accessed 30 March 2020, <https://www.worldbank.org/en/news/press-release/2019/04/08/record-high-remittances-sent-globally-in-2018>.

<sup>1484</sup> Hopper, 'Disconnecting from Global Finance: De-Risking'.

<sup>1485</sup> World Bank Group, 'Fact Finding Summary from De-Risking Surveys'; Schmid, 'How Much Anti-Money Laundering Effort Is Enough? The Jamaican Experience'.

<sup>1486</sup> Acosta et al., 'De-Risking in the Caribbean Region- A CFATF Perspective'; Alleyne et al., 'Loss of Correspondent Banking Relationships in the Caribbean'; Erbenova et al., 'The Withdrawal of Correspondent Banking Relationships'; Hopper, 'Disconnecting from Global Finance: De-Risking'; Vasquez, 'Assessing the Impact of the De-Risking on Remittances and Trade Finance in Belize'; Wright, 'De-Risking and Its Impact'.

FATF standards significantly drove up customer due diligence (CDD) costs and exposed FIs to a variety of regulatory and compliance risks that reduced profitability of correspondent banking services.<sup>1487</sup>

#### **7.2.1.1. Regulatory Risks for MVTs and Remittance Service Operators**

Regulatory risks refer to the potential consequences of legal and regulatory changes on businesses, sectors, or markets, which often drive-up operational costs.<sup>1488</sup> The requirements of both FATF R.10 (CDD) and R.13 (correspondent banking) must be adhered to before cross-border correspondent banking services are provided to respondent institutions. On application of R.10, correspondent banks would be required to *inter alia* identify and verify the respondent institution's identity and relevant beneficial ownership information when establishing CBRs. Furthermore, correspondent banks would need to have regard to, *inter alia*, the jurisdiction in which the respondent operates, the products and services offered and its client base. These risk assessments have been problematic for the sovereignty and sustainable development of Commonwealth Caribbean countries, particularly given a proliferation in guidance issues by the FATF and other transnational supervisory bodies.

For instance, the *Wolfsberg Guidance on the Risk Based Approach* leaves on a discretionary basis, the weight that FIs should attach to specified risk categories (i.e., country risks, customer, and services risks etc), for the purposes of establishing or maintaining business relationships. It has provided that a country's risks should be determined by having regard to whether the jurisdiction has been identified by the FATF as 'non-cooperative' for the purposes of combating money laundering. Controversially, regard should also be had to whether a jurisdiction has been "identified by credible sources as lacking appropriate ML laws and regulations;"<sup>1489</sup> or as having high levels of

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<sup>1487</sup> Alleyne et al., 'Loss of Correspondent Banking Relationships in the Caribbean'; Vasquez, 'Assessing the Impact of the De-Risking on Remittances and Trade Finance in Belize'; Schmid, 'How Much Anti-Money Laundering Effort Is Enough? The Jamaican Experience'.

<sup>1488</sup> Acosta et al., 'De-Risking in the Caribbean Region- A CFATF Perspective'; Langthaler and Niño, 'An Overview on De-Risking: Drivers, Effects and Solutions'.

<sup>1489</sup> Wolfsberg Group, 'Wolfsberg Statement-Guidance on a Risk Based Approach for Managing Money Laundering Risks' (The Wolfsberg Group, 2012), 5, paragraph 5, <https://www.wolfsberg->

corruption. Thus, credible sources need not be accountable and transparent inter-governmental organisations but, may include non-government organisations and national government agencies that engage in international ratings and stigmatisation. This has subjected access of sovereign States to the global financial and payment systems to the whims of unaccountable ‘credible sources’. In the case of national government agencies in powerful Western financial centres, ‘credible sources’ may have conflicting regulatory interests or be inclined to use extraterritorial compliance ratings as a foreign policy tool. Similar language is found in FATF Interpretive Note to Recommendation 10 (CDD), section H (RBA), paragraph 15 (b).<sup>1490</sup> Additionally, correspondent banks would have to apply enhanced due diligence (EDD) measures for high-risk respondents, in line with the RBA, given the region’s stigmatisation for ML/TF threats. Thus, FATF Recommendation 13 has required the application of additional preventative CDD measures to cross-border CBRs. Furthermore, the FATF has presumed that cross-border CBRs are inherently higher risk than domestic CBRs.<sup>1491</sup> These formal requirements have driven up the operation costs for maintaining CBRs.

Implementing Know Your Customer (KYC) and CDD controls to prevent ML and FTP, even in line with the RBA, have been expensive and time-consuming and have consequently driven up operating costs.<sup>1492</sup> FIs, including in the MVTs sector, can no longer restrict CDD and KYC to source of funds controls to identify suspicious transactions. Since 2012, their responsibilities have been expanded by new terrorist and proliferation financing requirements, to cover the complete lifecycle of transactions.<sup>1493</sup> Commonwealth Caribbean FIs/MVTs providers must now account for risks of diversion of licit funds and instrumentalities for the financing of terrorism and the proliferation of weapons of mass destruction, however, improbable within their respective geographical risk contexts. It has been observed that this does not appear congruent with the risk-based

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[principles.com/sites/default/files/wb/pdfs/wolfsberg-standards/15.%20Wolfsberg\\_RBA\\_Guidance\\_%282006%29.pdf](https://www.fatf-principles.com/sites/default/files/wb/pdfs/wolfsberg-standards/15.%20Wolfsberg_RBA_Guidance_%282006%29.pdf).

<sup>1490</sup> Financial Action Task Force, ‘International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations’, 62.

<sup>1491</sup> Financial Action Task Force, ‘Guidance on Correspondent Banking Services’.

<sup>1492</sup> Acosta et al., ‘De-Risking in the Caribbean Region- A CFATF Perspective’.

<sup>1493</sup> Killick and Parody, ‘Implementing AML/CFT Measures That Address the Risks and Not Tick Boxes’.

ideas.<sup>1494</sup> Furthermore, increasingly stringent risk management requirements, escalating fines and aggressive AML/CFT enforcement actions have driven up AML/CFT remediation expenses for correspondent banks into the billions.<sup>1495</sup> Compliance costs incurred by international banks have been the most reported reason for decisions to withdraw or restrict CBRs.<sup>1496</sup> This was exacerbated by confusion as to whether the FATF Recommendations required FIs to apply Know-Your-Customer's Customers (KYCC) procedures to correspondent banking services offered to Caribbean jurisdictions stigmatised as 'high-risk'. KYCC due diligence practices, therefore, drove up operations costs of correspondent banks and contributed to the de-risking phenomenon.<sup>1497</sup> The FATF has since clarified that correspondent banks are not required to perform CDD on the customers of correspondent banks either when establishing CBRs or during in the course of those relationships.<sup>1498</sup> Correspondent banks are only required to monitor the correspondent institution's transactions to detect, changes in the latter's risk profile and implementation of risk mitigation measures; any unusual transactions or any deviations from the agreed terms of the arrangements governing the CBR.<sup>1499</sup> Pursuant to R.13 (correspondent banking), such CDD measures are intended to gather adequate information about the correspondent institution to assess its business, reputation and the quality of its supervisory framework and AML/CFT controls.<sup>1500</sup>

At the bilateral level, the United States Treasury has maintained that there is no "general requirement" for KYCC measures.<sup>1501</sup> Such qualified language has not assuaged the fears of American correspondent banks of exposure to fines,<sup>1502</sup> or assisted in reducing operational costs. Rather than on a case-by-case client basis as recommended by the

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<sup>1494</sup> Killick and Parody.

<sup>1495</sup> Acosta et al., 'De-Risking in the Caribbean Region- A CFATF Perspective'; Haley, 'De-Risking of CBRs: Threats, Challenges and Opportunities'; Langthaler and Niño, 'An Overview on De-Risking: Drivers, Effects and Solutions'.

<sup>1496</sup> Alleyne et al., 'Loss of Correspondent Banking Relationships in the Caribbean'.

<sup>1497</sup> McLean et al., 'Economic Impact of De-Risking on the Caribbean'; Williams, 'De-Risking/de-Banking: "The Reality Facing Caribbean Financial Institutions"'.

<sup>1498</sup> Financial Action Task Force, 'Guidance on Correspondent Banking Services'.

<sup>1499</sup> Financial Action Task Force.

<sup>1500</sup> Financial Action Task Force.

<sup>1501</sup> Jim Woodsome et al., 'Policy Responses to De-Risking: Progress Report on the CGD Working Group's 2015 Recommendations' (Washington, DC, USA: Centre for Global Development, 2018), <https://www.cgdev.org/sites/default/files/policy-responses-de-risking.pdf>.

<sup>1502</sup> Woodsome et al.

FATF,<sup>1503</sup> correspondent banks have applied the RBA on sectoral and geographic bases. Within the Commonwealth Caribbean, unclear regulatory positions of onshore supervisors, such as the United States Treasury, are sources of regulatory risks. Uncertainties created about the regulatory standards to be met by Caribbean banks and MVTS providers,<sup>1504</sup> in order to maintain CBRs, as well as the constantly evolving FATF standards in line with global risk assessments, has led to respondent banks over-investing in risk management measures and driving up operational costs.<sup>1505</sup> Regulators have, therefore, struggled to effectively assess ML/TFP risks and design cost-effective risk mitigation measures in the MVTS sector, which is crucial for driving national development,<sup>1506</sup> and financial inclusion in the Caribbean.

The FATF now maintains that ensuring both an effective AML/CFTP framework and financial inclusion are complementary policy objectives.<sup>1507</sup> Theoretically, the application of SDD measures to low-risk customers, in line with the RBA,<sup>1508</sup> could foster greater financial inclusion of the ‘unbanked’ who rely on remittances. Furthermore, financial inclusion could indirectly curtail illicit financial activities within the informal sector by expanding AML/CFT regulatory surveillance and financial intelligence collection by LEAs to mitigate ML/TF risks.<sup>1509</sup> However, the application of SDD measures to MVTS in line with the RBA has proven impractical in environments of heightened external ML/TFP risks perceptions. It is, therefore, difficult to reconcile the

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<sup>1503</sup> Schmid, ‘How Much Anti-Money Laundering Effort Is Enough? The Jamaican Experience’.

<sup>1504</sup> Acosta et al., ‘De-Risking in the Caribbean Region- A CFATF Perspective’.

<sup>1505</sup> James A. Haley, ‘De-Risking: Effects, Drivers and Mitigation’, 19 July 2017, <https://www.cigionline.org/publications/de-risking-effects-drivers-and-mitigation>; Haley, ‘De-Risking of CBRs: Threats, Challenges and Opportunities’; Langthaler and Niño, ‘An Overview on De-Risking: Drivers, Effects and Solutions’.

<sup>1506</sup> Collin et al., ‘Unintended Consequences of Anti-Money Laundering Policies for Poor Countries- A CGD Working Group Report’.

<sup>1507</sup> Financial Action Task Force, ‘FATF Guidance- Anti-Money Laundering and Terrorist Financing Measures and Financial Inclusion’ (Paris, France: FATF/OECD, 2013), [http://www.fatf-gafi.org/media/fatf/documents/reports/AML\\_CFT\\_Measures\\_and\\_Financial\\_Inclusion\\_2013.pdf](http://www.fatf-gafi.org/media/fatf/documents/reports/AML_CFT_Measures_and_Financial_Inclusion_2013.pdf).

<sup>1508</sup> Financial Action Task Force, ‘FATF Guidance- Anti-Money Laundering and Terrorist Financing Measures and Financial Inclusion with a Supplement on Customer Due Diligence’, FATF Guidance (Paris, France: FATF/OECD Secretariat, November 2017), <http://www.fatf-gafi.org/media/fatf/content/images/Updated-2017-FATF-2013-Guidance.pdf>.

<sup>1509</sup> Louis de Koker, ‘Aligning Anti-Money Laundering, Combating of Financing of Terror and Financial Inclusion’, *Journal of Financial Crime; London* 18, no. 4 (2011): 361–86, <http://dx.doi.org/10.1108/13590791111173704>; Louis de Koker and Nicola Jentzsch, ‘Financial Inclusion and Financial Integrity: Aligned Incentives?’, *World Development* 44 (1 April 2013): 267–80, <https://doi.org/10.1016/j.worlddev.2012.11.002>.

reputational damage suffered by Caribbean jurisdictions from the FATF’s blacklisting and grey-listing practices and pejorative labelling as tax havens, with the RBA promoting financial inclusion. The FATF’s stigmatisation practices have led to the “conservative interpretation” of, or overcompliance with, international AML/CFT standards by regulators out of fear of further reputational damage, which has amplified financial exclusion.<sup>1510</sup> For example, it has been observed that Caribbean FIs have often “overreacted to regulatory guidance” provided by the FATF related to CDD.<sup>1511</sup> With KYC and the source of funds risk management measures of remittance service providers under increased scrutiny,<sup>1512</sup> Caribbean MVTS providers have chosen to err on the side of caution. They have also attributed their “financial abandonment,”<sup>1513</sup> by correspondent banks to exaggerated external perceptions of ML/TF risks.<sup>1514</sup> Misgivings of about the quality of the CDD processes of respondent banks in the region have further prompted the withdrawal of CBRs.<sup>1515</sup> Additionally, correspondent banking fees have doubled or tripled in some Caribbean jurisdictions due to more robust CDD requirements, AML/CFT compliance costs and investments in training of employees.<sup>1516</sup>

Matters of financial inclusion typically relate to low threshold transactions and the use of low-risk products and services by underserved clients.<sup>1517</sup> The FATF’s decision to bring MVTS under its traditional focus on high-risk clients and transactions in the formal financial sector, appears to have been influenced by geopolitical concerns about TF among its powerful OECD member countries. While underserved clients have misused MVTS to engage in ML and TF in some geographic regions,<sup>1518</sup> save for Trinidad, TF concerns do not broadly reflect national security threat assessments in the Commonwealth Caribbean countries. Therefore, the FATF has presumed that the application of SDD

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<sup>1510</sup> de Koker, ‘Aligning Anti-Money Laundering, Combating of Financing of Terror and Financial Inclusion’, 371.

<sup>1511</sup> McLean et al., ‘Economic Impact of De-Risking on the Caribbean’, 6.

<sup>1512</sup> Ramachandran, ‘Mitigating the Effects of De-Risking’.

<sup>1513</sup> McLean et al., ‘Economic Impact of De-Risking on the Caribbean’; Vasquez, ‘Assessing the Impact of the De-Risking on Remittances and Trade Finance in Belize’.

<sup>1514</sup> Acosta et al., ‘De-Risking in the Caribbean Region- A CFATF Perspective’; Vasquez, ‘Assessing the Impact of the De-Risking on Remittances and Trade Finance in Belize’.

<sup>1515</sup> Alleyne et al., ‘Loss of Correspondent Banking Relationships in the Caribbean’.

<sup>1516</sup> Alleyne et al.

<sup>1517</sup> de Koker, ‘Aligning Anti-Money Laundering, Combating of Financing of Terror and Financial Inclusion’.

<sup>1518</sup> Financial Action Task Force, ‘FATF Global ML/TF Threat Assessment’.

measures to MVTs, in line with the RBA, could enhance financial inclusion,<sup>1519</sup> is arguably facile. For instance, whereas low value transactions are often presumed to carry low ML risks, TF could be conducted using low value transactions from licit sources of funds.<sup>1520</sup> External perceptions of the Commonwealth Caribbean as high-risk for ML/FT, will have rendered the application of simplified CDD measures based on the RBA impractical. Instead, it has simply added another layer of CDD costs to MVTs, which could exacerbate financial exclusion. In fact, the Wolfsberg Group outrightly rejected the usefulness of the RBA in identifying TF in FIs.<sup>1521</sup> This departure from the FATF's position has increased uncertainty about the regulatory expectations. It would be counterintuitive for regulators in some geographic regions to designate all underserved clients as low risk by virtue of their financial exclusion and the low value of their transactions.<sup>1522</sup> However, in most Caribbean countries, this would not be the case. It would be consistent with the ethos of the RBA.

#### **7.2.1.2. Compliance Risks for MVTs and Remittance Services Operators**

Compliance risk refers to exposure to legal or regulatory sanctions, material financial loss, or reputational loss by FIs for failure to comply with AML/CFTP rules, standards and procedures applicable to transactions and business relationships.<sup>1523</sup> Although correspondent banks need not apply KYCC due diligence measures, they would still be liable if the CBRs is misused for money laundering.<sup>1524</sup> With increased regulatory scrutiny onshore, the risk appetites of correspondent banks have declined since AML/CFT compliance failures, even if inadvertent, can result in onerous fines.<sup>1525</sup>

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<sup>1519</sup> de Koker, 'Aligning Anti-Money Laundering, Combating of Financing of Terror and Financial Inclusion'; de Koker and Jentsch, 'Financial Inclusion and Financial Integrity'.

<sup>1520</sup> de Koker, 'Aligning Anti-Money Laundering, Combating of Financing of Terror and Financial Inclusion'; de Koker and Jentsch, 'Financial Inclusion and Financial Integrity'.

<sup>1521</sup> Wolfsberg Group, 'Wolfsberg Guidance on the Risk Based Approach'.

<sup>1522</sup> de Koker, 'Aligning Anti-Money Laundering, Combating of Financing of Terror and Financial Inclusion'.

<sup>1523</sup> Acosta et al., 'De-Risking in the Caribbean Region- A CFATF Perspective'; Langthaler and Niño, 'An Overview on De-Risking: Drivers, Effects and Solutions'.

<sup>1524</sup> Schmid, 'How Much Anti-Money Laundering Effort Is Enough? The Jamaican Experience'.

<sup>1525</sup> Acosta et al., 'De-Risking in the Caribbean Region- A CFATF Perspective'.

Record-breaking fines for compliance breaches and risk management failures are increasingly being levied.<sup>1526</sup> Sanctions-related bank misconduct costs skyrocketed from just \$10 billion in 2009 to over \$200 billion in 2014.<sup>1527</sup>

Correspondent banks are also increasingly wary of exposure to reputational injury that may arise from CBRs with respondent banks in jurisdictions where the FATF has identified ‘strategic deficiencies’ in their supervisory and legal frameworks.<sup>1528</sup> Even if CBRs were to be inaccurately tainted by ML/TF scandals associated with a respondent bank’s AML/CFT framework, clients, or products or services, such adverse publicity could result in a loss of confidence in respondent banks’ integrity. This could have a ripple effect of borrowers, depositors and investors discontinuing their business relationships with the correspondent bank, potentially resulting in market loss.<sup>1529</sup> With respect to reputational concerns, Commonwealth Caribbean jurisdictions are perceived by North American and European banks, as well as their respective supervisory agencies as ‘high risk’ because they have been presumed to have weaker compliance and AML/CFT regimes.<sup>1530</sup> To avoid exposure to reputational risks, many correspondent banks have pre-emptively restricted their CBRs with FIs in the region, even if these perceptions are not empirically substantiated by evidence of actual ML/TF activities.<sup>1531</sup> In the context of either respondent banks having insufficient knowledge of country-specific regulatory environments or simply a lack of trust in effective enforcement of AML/CFT standards in the Caribbean,<sup>1532</sup> even robust domestic AML/CFT regimes and the RBA would not be sufficient to prevent de-risking. Illustratively, several correspondent banks interviewed could not identify any significant deficiencies in the Jamaica’s AML/CFT regulatory framework for MVTs that would have made the sector

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<sup>1526</sup> Schmid, ‘How Much Anti-Money Laundering Effort Is Enough? The Jamaican Experience’.

<sup>1527</sup> Erbenova et al., ‘The Withdrawal of Correspondent Banking Relationships’.

<sup>1528</sup> Alleyne et al., ‘Loss of Correspondent Banking Relationships in the Caribbean’.

<sup>1529</sup> Acosta et al., ‘De-Risking in the Caribbean Region- A CFATF Perspective’.

<sup>1530</sup> MacDonald, ‘Is There a “New Normal” for De-Risking in the Caribbean?’

<sup>1531</sup> Acosta et al., ‘De-Risking in the Caribbean Region- A CFATF Perspective’; Langthaler and Niño, ‘An Overview on De-Risking: Drivers, Effects and Solutions’; MacDonald, ‘Is There a “New Normal” for De-Risking in the Caribbean?’; Schmid, ‘How Much Anti-Money Laundering Effort Is Enough? The Jamaican Experience’.

<sup>1532</sup> Schmid, ‘How Much Anti-Money Laundering Effort Is Enough? The Jamaican Experience’.

particularly high-risk.<sup>1533</sup> However, this has not attenuated de-risking of in the Island's MVTs and remittance services sectors.

### **7.2.1.3. Profitability Concerns about CBRs**

Although de-risking is generally driven by concerns over ML/TF activities,<sup>1534</sup> indiscriminate de-marketing practices may contribute to de-risking. That is, the wholesale withdrawal from CBRs in a given sector or geographic region based on profitability concerns, and irrespective of the ML/TF risk context.<sup>1535</sup> To be profitable, CBRs require high transaction volumes.<sup>1536</sup> In the Caribbean, insufficient volumes of transactions due to the small size of these jurisdictions, low GDP growth rates that stagnates cross-border economic activities, and diseconomies of scale have resulted in low profitability of correspondent banks services amidst rising regulatory compliance costs.<sup>1537</sup> In practice, de-risking due to profitability concerns as opposed to AML/CFTP regulatory and compliance risks is not always clear. Both factors could be mutually reinforcing.

## **7.2.2. Magnitude of De-risking in the Commonwealth Caribbean- Implications for Financial Inclusion**

Dr Toussant Boyce, Head of the Office of Integrity, Compliance and Accountability, at the Caribbean Development Bank, captured the gravity of the de-risking situation, when he highlighted that:

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<sup>1533</sup> Schmid.

<sup>1534</sup> MacDonald, 'Is There a "New Normal" for De-Risking in the Caribbean?'

<sup>1535</sup> Financial Action Task Force, 'Guidance on Correspondent Banking Services'.

<sup>1536</sup> Langthaler and Niño, 'An Overview on De-Risking: Drivers, Effects and Solutions'.

<sup>1537</sup> Acosta et al., 'De-Risking in the Caribbean Region- A CFATF Perspective'; Alleyne et al., 'Loss of Correspondent Banking Relationships in the Caribbean'; Langthaler and Niño, 'An Overview on De-Risking: Drivers, Effects and Solutions'; McLean et al., 'Economic Impact of De-Risking on the Caribbean'; Schmid, 'How Much Anti-Money Laundering Effort Is Enough? The Jamaican Experience'.

Regionally, there is a looming risk of systemic economic and financial ... [fallouts, which was acknowledged by] ... the Financial Stability Board (FSB) in its recent report to the G20 on efforts to assess and address the decline of correspondent banking... It warned that by driving payment flows underground into the shadow banking sector, the decline in CBRs could exacerbate the region's challenges with being classified as 'high risk' for financial crimes, particularly money laundering and terrorist financing.<sup>1538</sup>

De-risking has become a major source of political contention between governments in the Commonwealth Caribbean and those of advanced financial centres in North America and Europe.<sup>1539</sup> Some Commonwealth Caribbean jurisdictions have experienced severe and unexpected termination of CBRs; while in others, it has been minimal or sufficiently progressive to allow time to consolidate alternative CBRs.<sup>1540</sup> In the MVTs sector, the operations of Western Union, MoneyGram, and PayPal have been severely disrupted. Whereas the Bank of America, Scotiabank, Royal Bank of Canada, and Canadian Imperial Bank of Commerce have been outrightly withdrawing from the region, banks from the Netherlands, Germany, and the United Kingdom have restricted their correspondent banking business with Caribbean jurisdictions.<sup>1541</sup> This is closing remittance channels that unbanked segments of Caribbean societies, and Diaspora communities, have come to rely upon.

Thus, for Commonwealth Caribbean States, de-risking and financial exclusion consequent to transnational AML/CFTP regulation now pose significant risks to their economic viability.<sup>1542</sup> Commonwealth Caribbean and the Pacific small island developing States (SIDS) were empirically found to have been exposed to the most destabilising economic risks from de-risking.<sup>1543</sup> This has been attributed to the relatively small size of their financial services sectors and consequent overreliance on a few CBRs.<sup>1544</sup> Developing Commonwealth African States perceive the greatest risk of AML/CFTP regulations almost exclusively in terms of the erosion of remittance transfers

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<sup>1538</sup> Boyce, 'Discussion Paper: Strategic Solutions to "de-Risking" and the Decline of Correspondent Banking Relationships in the Caribbean', 5.

<sup>1539</sup> MacDonald, 'Is There a "New Normal" for De-Risking in the Caribbean?'

<sup>1540</sup> Wright, Kellman, and Kallicharan, 'CBR Withdrawals'.

<sup>1541</sup> MacDonald, 'Is There a "New Normal" for De-Risking in the Caribbean?'

<sup>1542</sup> Hopper, 'Disconnecting from Global Finance: De-Risking'.

<sup>1543</sup> Hopper.

<sup>1544</sup> Hopper.

due to increasing transaction costs.<sup>1545</sup> South Asian Commonwealth countries identified high levels of financial exclusion and the consequent proliferation of informal financial flows as the most pressing risks arising from AML/CFT regulations.<sup>1546</sup> In May 2016, at least sixteen banks in the Commonwealth Caribbean had lost CBRs, including in Anguilla, Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Jamaica, Montserrat, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines. By October 2017, an estimated twenty-one (21) respondent banks in eighteen (18) Caribbean jurisdictions had lost a CBRs.<sup>1547</sup> A more recent exploratory survey was conducted by the CFATF Secretariat between June 2018 and April 2019 to assess the negative impact of de-risking on the Caribbean jurisdictions between 2015 and 2018. It involved 249 respondents (i.e., 22 central banks and 227 financial institutions).<sup>1548</sup> The most serious effects on FIs reported were escalations in operational costs, disruptive increases in the length of payment chains especially for wire transfers and a reduction in the volume of cross-border payments.<sup>1549</sup> Difficulties securing banking services as a result of increased expectations from overseas respondent banks and regulators and the termination of banking accounts by US correspondent banks were also reported.<sup>1550</sup> Approximately 68.2% of central banks reported that de-risking was increasingly threatening their respective jurisdictions, while 91.1% characterised de-risking as an ongoing threat to operational viability of financial services operators.<sup>1551</sup>

Arguably, de-risking and attendant financial exclusion could prove more destabilising for some Commonwealth Caribbean jurisdictions than empirically assessed ML/TF threats. The FATF has defined financial inclusion as “... providing access to an adequate range of safe, convenient and affordable financial services to disadvantaged and other vulnerable groups, ... who have been underserved or excluded from the formal financial sector.”<sup>1552</sup> However, for present purposes, financial inclusion will be taken to include

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<sup>1545</sup> Hopper.

<sup>1546</sup> Hopper.

<sup>1547</sup> Erbenova et al., ‘The Withdrawal of Correspondent Banking Relationships’; McLean et al., ‘Economic Impact of De-Risking on the Caribbean’; Vasquez, ‘Assessing the Impact of the De-Risking on Remittances and Trade Finance in Belize’.

<sup>1548</sup> Acosta et al., ‘De-Risking in the Caribbean Region- A CFATF Perspective’.

<sup>1549</sup> Acosta et al.

<sup>1550</sup> Acosta et al., 45.

<sup>1551</sup> Acosta et al., 44.

<sup>1552</sup> Financial Action Task Force, ‘FATF Guidance on Financial Inclusion’.

access of small Commonwealth Caribbean jurisdictions to global payment and financial systems. To the extent that blacklisting and stigmatisation campaigns against the region have increased the cost of access to the international financial system,<sup>1553</sup> this macro-level conceptual extension is appropriate. For instance, the effects of the termination or restriction of CBRs have been especially severe for the Caribbean States with offshore financial and corporate services sector whose core business hinge on cross-border transactions, particularly the Bahamas, Barbados, Belize and St. Lucia.<sup>1554</sup> It is a common regulatory requirement in jurisdictions across the region that offshore banks verify that they have active CBRs before their licenses are either granted or renewed.<sup>1555</sup> Unsurprisingly, the withdrawal of CBRs in the offshore sector has led to a corresponding decline in the number of license applications and the value of SWIFT transactions thereby casting uncertainty over the sector's future growth,<sup>1556</sup> and the economic prospects of these Caribbean States. This has marginalised both offshore banks and Caribbean jurisdictions from the global financial system.<sup>1557</sup> Furthermore, several countries listed as high-risk jurisdictions for ML/TF have experienced an average of ten percent (10%) decline in the volume of cross-border payments received from foreign jurisdictions.<sup>1558</sup> The IMF has warned that large-scale termination of CBRs could pose systemic risks to certain geographic regions by severely disrupting cross-border financial flows.<sup>1559</sup> In the Caribbean, there are real concerns that the loss of CBRs could cause financial instability.<sup>1560</sup>

At the micro-level, the main financial inclusion issues within the Caribbean related to the potential undermining of national development objectives and the proliferation of

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<sup>1553</sup> Collin et al., 'Unintended Consequences of Anti-Money Laundering Policies for Poor Countries- A CGD Working Group Report'.

<sup>1554</sup> Alleyne et al., 'Loss of Correspondent Banking Relationships in the Caribbean'; Haley, 'De-Risking of CBRs: Threats, Challenges and Opportunities'.

<sup>1555</sup> Alleyne et al., 'Loss of Correspondent Banking Relationships in the Caribbean'.

<sup>1556</sup> Alleyne et al.

<sup>1557</sup> Philippa Duncan, 'Isolating Small Belize Banks from the Global System', *Managerial Finance* 45, no. 2 (2019): 263–77, <http://dx.doi.org/10.1108/MF-11-2017-0475>.

<sup>1558</sup> Collin Matthew, Samantha Cook, and Kimmo Soramäki, 'The Impact of Anti-Money Laundering Regulation on Payment Flows: Evidence from SWIFT Data', Center for Global Development Working Paper (Washington, DC, USA: Center for Global Development, December 2016).

<sup>1559</sup> Erbenova et al., 'The Withdrawal of Correspondent Banking Relationships'.

<sup>1560</sup> Alleyne et al., 'Loss of Correspondent Banking Relationships in the Caribbean'; Boyce, 'Discussion Paper: Strategic Solutions to "de-Risking" and the Decline of Correspondent Banking Relationships in the Caribbean'.

illicit financial channels due to the de-banking of remittance and other MVTSPs. There is a symbiotic relationship between financial inclusion and sustainable development, which is reinforced by remittance flows.<sup>1561</sup> As one of the biggest drivers of financial inclusion in the Global South, remittance flows contribute half a trillion dollars per year to developing economies, a trend that is threatened by increasingly onerous AML/CFT regulatory expectations on financial services providers.<sup>1562</sup> This exceeds FDI to the Global South and represents more than three times the flow of official development assistance (ODA).<sup>1563</sup> Remittances allow Diaspora communities to leverage the development impact of private financial flows and promote financial inclusion by increasing the living standards of recipient families,<sup>1564</sup> whom are often vulnerable and unbanked in developing country contexts. De-risking in the MVTS and remittances sectors could, therefore, increase financial exclusion and undermine the strides made in poverty eradication and the realisation of national development objectives.<sup>1565</sup> The United Nations 2030 Sustainable Development Agenda and SDGs recognised the critical importance of remittances in eradicating poverty (SDG 1) and hunger (SDG 2); achieving greater gender equality (SDG 5) and reducing inequalities within and among nations (SDG 10). In this context, SDG 10 committed the international community to substantially reduce remittance transactions costs by three percent (3%) and eliminate remittance corridors with costs higher than five percent (5%), by 2030. Yet, de-risking

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<sup>1561</sup> Louis de Koker, 'Money Laundering Control and Suppression of Financing of Terrorism: Some Thoughts on the Impact of Customer Due Diligence Measures on Financial Exclusion', *Journal of Financial Crime* 13, no. 1 (1 January 2006): 26–50, <https://doi.org/10.1108/13590790610641206>; de Koker and Jentzsch, 'Financial Inclusion and Financial Integrity'; Asli Demirgüç-Kunt and Leora Klapper, 'Measuring Financial Inclusion: Explaining Variation in Use of Financial Services across and within Countries', *Brookings Papers on Economic Activity* 2013, no. 1 (31 October 2013): 279–340, <https://doi.org/10.1353/eca.2013.0002>; Abdullahi Y. Shehu, 'Promoting Financial Inclusion for Effective Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT)', *Crime, Law and Social Change* 57, no. 3 (1 April 2012): 305–23, <https://doi.org/10.1007/s10611-011-9351-0>.

<sup>1562</sup> Riki Fujii-Rajani, 'Money Remitters Left out in the Cold: Blanket De-Risking Policies, Counterterrorism and Government Intervention in New Zealand', *Auckland University Law Review* 23 (2017): 204–34; Raúl Hernández-Coss et al., 'AML/CFT Regulation: Implications for Financial Service Providers That Serve Low-Income People', *World Bank/Consultative Group to Assist the Poor*, n.d., 47; Stanley and Buckley, 'Protecting the West, Excluding the Rest'.

<sup>1563</sup> International Fund for Agricultural Development, 'Remittances, Investments and the Sustainable Development Goals' (IFAD, 2019), <https://www.ifad.org/documents/38714170/39148759/Remittances%2C+investments+and+the+Sustainable+Development+Goals.pdf/680f2e3f-38dc-42c2-9857-df9580d35a45>.

<sup>1564</sup> International Fund for Agricultural Development.

<sup>1565</sup> Haley, 'De-Risking'; Haley, 'De-Risking of CBRs: Threats, Challenges and Opportunities'.

has driven up the average cost of sending remittances, especially to Small Island Developing States.<sup>1566</sup>

In addition to marginalising Caribbean jurisdictions, their banks, MVTSPs, and nationals from access to financial services,<sup>1567</sup> there is growing concern that financial exclusion could lead to the proliferation of informal remittance channels and the growth of the cash-intensive informal financial sector. In turn, this could increase ML risks and undermine national security,<sup>1568</sup> in the Commonwealth Caribbean. Greater financial exclusion would also reinforce external perceptions that the region is high risk for ML/TF.<sup>1569</sup> By its own admission, the FATF has recognised that:

De-risking is having a significant impact in certain regions and sectors ... and... may drive financial transactions underground which creates financial exclusion and reduces transparency, thereby increasing money laundering and terrorist financing risks.<sup>1570</sup>

Financial exclusion of remittance service providers had led, in some cases to a resurgence of cash smuggling.<sup>1571</sup> In August 2019, it was reported that large amounts of currency, at least \$50 million monthly, were being shipped out of Jamaica and which, by the Bank of Jamaica's own admission "to a great extent ... cannot be explained."<sup>1572</sup> International correspondent banks have grown increasingly concerned about the questionable sources of these financial flows.<sup>1573</sup> From a national security perspective, financial intelligence gathered by correspondent and regional banks has proven useful for law enforcement and regulatory authorities in curbing ML/TF and other illicit financial

<sup>1566</sup> Stanley and Buckley, 'Protecting the West, Excluding the Rest'.

<sup>1567</sup> Hopper, 'Disconnecting from Global Finance: De-Risking', 6.

<sup>1568</sup> Acosta et al., 'De-Risking in the Caribbean Region- A CFATF Perspective'; Alleyne et al., 'Loss of Correspondent Banking Relationships in the Caribbean'; Collin et al., 'Unintended Consequences of Anti-Money Laundering Policies for Poor Countries- A CGD Working Group Report'; Financial Action Task Force, 'FATF Guidance on Financial Inclusion'; Haley, 'De-Risking'; Haley, 'De-Risking of CBRs: Threats, Challenges and Opportunities'.

<sup>1569</sup> Acosta et al., 'De-Risking in the Caribbean Region- A CFATF Perspective'; Alleyne et al., 'Loss of Correspondent Banking Relationships in the Caribbean'.

<sup>1570</sup> Financial Action Task Force, 'FATF Takes Action to Tackle De-Risking' (Paris, France: FATF Secretariat, 2015), <https://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-action-to-tackle-de-risking.html>.

<sup>1571</sup> Saperstein, Sant, and Ng, 'The Failure of Anti-Money Laundering Regulation'.

<sup>1572</sup> MacDonald, 'Is There a "New Normal" for De-Risking in the Caribbean?', 1.

<sup>1573</sup> MacDonald, 'Is There a "New Normal" for De-Risking in the Caribbean?'

flows. De-banking presumably high risk MVTSPs could undermine the collection of financial intelligence, efforts to suppress financial crimes and ultimately the national security,<sup>1574</sup> in the Commonwealth Caribbean countries. Disconcertingly, it has been observed that the RBA has often shifted ML/TF risks from formal to the informal channels or sectors rather than curtail ML/TF risks themselves.<sup>1575</sup>

### **7.2.3. Reflections on the RBA, De-risking, and Financial Inclusion in the Commonwealth Caribbean**

The FATF has attributed de-risking to ML/TF risk avoidance rather than risk management “in line the RBA.”<sup>1576</sup> Yet, despite the FATF’s efforts to criticism from the RBA, as discussed earlier, the need to strengthen the RBA by standardising the conceptualisation of ML/TF risk in line with private sector definitions remains problematic.<sup>1577</sup> The consequent methodological challenges with measuring and delineating high(er) from low(er) ML/FTP risks will presumably continue to reinforce skewed risk perceptions and de-risking in the Caribbean. These conceptual issues have led to uncertainties in regulatory expectations, increased regulatory risk exposure and reduced risk-appetites among onshore FIs, and have ultimately contributed to de-risking. Additionally, it could be argued that the non-application of the RBA by onshore FIs, on a case-by-case basis or in high-risk circumstances, in and of itself reflects the failure of the RBA as a globally ‘institutionalised AML/CFT regulatory strategy’.

Furthermore, insofar as the RBA has empowered States to set and enforce regulatory standards in line with NRAs, it has inadvertently enabled powerful advanced Western economies to aggressively leverage their AML/CFT remediation and enforcement actions

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<sup>1574</sup> Haley, ‘De-Risking of CBRs: Threats, Challenges and Opportunities’.

<sup>1575</sup> Collin et al., ‘Unintended Consequences of Anti-Money Laundering Policies for Poor Countries- A CGD Working Group Report’.

<sup>1576</sup> Financial Action Task Force, ‘FATF Guidance AML/CFT & Financial Inclusion- CDD’.

<sup>1577</sup> Bello and Harvey, ‘From a Risk-Based to an Uncertainty-Based Approach to Anti-Money Laundering Compliance’; Durner and Shetret, *Understanding Bank De-Risking and Its Effects on Financial Inclusion*; Jayasekara, ‘Challenges of Implementing an Effective Risk-Based Supervision on Anti-Money Laundering and Countering the Financing of Terrorism under the 2013 FATF Methodology’, 1 January 2018; Woodsome et al., ‘Policy Responses to De-Risking’.

to pursue ulterior policy objectives. The extraterritorial extension of AML/CFT regulatory measures by powerful OECD countries has been used to gather financial intelligence to prevent capital flight and pursue of foreign policy and geopolitical interests.<sup>1578</sup> Resultantly, onshore regulators have driven up regulatory expectations of less powerful, low-capacity jurisdictions that are stigmatised as high-risk for ML/TF, and compliance costs for their FIs. Discursively, rhetorical claims to ‘protecting the integrity of the global financial system’ from economic crimes have been advanced as the justificatory grounds.

The asymmetrical power context in which the globally institutionalised RBA policy has operated will inevitably lead to de-risking that disproportionately affects States in the Global South. For example, the US dollar has strategic value as a reserve and clearing currency in an estimated 87% of all forex transactions globally.<sup>1579</sup> Post 9/11 the United States has “weaponized” the denial of access to financial services and the use of reputational sanctions as the “instrument of choice,”<sup>1580</sup> for extraterritorial AML/CFTP regulation. The United States has self-proclaimed Section 311 of USA PATRIOT Act (2001) as a “powerful tool” to protect US national security and financial system.<sup>1581</sup> It has conferred far-reaching powers on the US Treasury to identify foreign jurisdictions, FIs, types of accounts and categories of transactions as primary money laundering concerns.<sup>1582</sup> Where appropriate, the US Treasury Department may impose regulatory requirements and deny access of foreign FIs to the US financial system.<sup>1583</sup> The US State Department’s INCSR has annually designated several Commonwealth Caribbean

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<sup>1578</sup> Juan C. Zarate, *Treasury’s War: The Unleashing of a New Era of Financial Warfare* (New York: PublicAffairs, 2013).

<sup>1579</sup> Joanna Diane Caytas, ‘Weaponizing Finance: U.S. and European Options, Tools, and Policies Student Notes’, *Columbia Journal of European Law* 23, no. 2 (2017 2016): 441–76.

<sup>1580</sup> Caytas, 441.

<sup>1581</sup> United States Department of the Treasury, ‘Treasury Department Implements Presidential Strategy to Disrupt Financial Networks of Transnational Organized Crime- Remarks by Secretary of Treasury, Tim Geithner before the Senate Committee on the Judiciary, Sub-Committee on Crime and Terrorism’, § Committee on the Judiciary, Sub-Committee on Crime and Terrorism (2011), <https://www.cambridge.org/core/journals/foreign-policy-bulletin/article/treasury-department-implements-presidential-strategy-to-disrupt-financial-networks-of-transnational-organized-crime/113CA4261CC296486303B1873DEDFE3C>.

<sup>1582</sup> United States Department of the Treasury.

<sup>1583</sup> United States Department of the Treasury.

countries as “major money laundering countries.”<sup>1584</sup> This continues to influence the dwindling risk appetite of American respondent banks in maintaining business relationships with indigenous Caribbean FIs. De-risking appears to be more connected to onerous onshore AML/CFTP regulatory pressures and the discursive stigmatisation of the region by powerful Western Governments, rather than to empirically assessed “strategic deficiencies” in the national AML/CFTP frameworks under mutual evaluation processes. Yet, ML/FTP risk perceptions of powerful onshore regulators have been shown to be biased against cross-border transactions.<sup>1585</sup> Still, there is no empirical evidence that cross-border transactions are more likely to involve illicit activities.<sup>1586</sup> Despite the recognised strides that Caribbean jurisdictions have made in strengthening their national AML/CFT frameworks, de-risking remains unabated.<sup>1587</sup> Heads of Governments of the Caribbean Community have helplessly bemoaned “the need for a regional approach ... to address .... de-risking strategies of the global banks ... [and] ... for continued urgent action to ... attenuate the perception of the Caribbean as a high-risk region.”<sup>1588</sup> If the effectiveness of the RBA is to be judged by how well it has ensured financial integrity and targeted high ML/TFP risks, without subverting legitimate financial and business activities,<sup>1589</sup> then it has failed on this account.

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<sup>1584</sup> Under s.481(e)(7) of the Foreign Assistance Act (FAA) 1961 (as amended), a “major money laundering country” is defined as one “whose financial institutions engage in currency transactions involving significant amounts of proceeds from international narcotics trafficking.” The United States has listed itself, along with a few other G7 countries. However, the United States’ self-listing is materially inconsequential given its control of the global financial and payment systems, as opposed to the harmful reputational consequences for small and powerless Commonwealth Caribbean States that rely on such access.

<sup>1585</sup> Collin et al., ‘Unintended Consequences of Anti-Money Laundering Policies for Poor Countries- A CGD Working Group Report’.

<sup>1586</sup> Collin et al.

<sup>1587</sup> Williams, ‘De-Risking/de-Banking: “The Reality Facing Caribbean Financial Institutions”’.

<sup>1588</sup> Caribbean Community (CARICOM) Secretariat, ‘COMMUNIQUE – 28th Inter-Sessional Meeting of CARICOM Heads of Government’, *CARICOM*, 18 February 2017, <https://caricom.org/communique-28th-inter-sessional-meeting-of-caricom-heads-of-government/>.

<sup>1589</sup> Barry R. Johnston and Ian Carrington, ‘Protecting the Financial System from Abuse: Challenges to Banks in Implementing AML/CFT Standards’, *Journal of Money Laundering Control* 9, no. 1 (2006): 48–61, <https://doi.org/info:doi/10.1108/13685200610645210>; Ross and Hannan, ‘Money Laundering Regulation and Risk-Based Decision-Making’.

### 7.3. A Development-Centric Approach to ML/FTP Risk Management: Towards a Framework of Common but Differentiated Responsibilities?

The RBA has not eased the resource needs of Commonwealth Caribbean jurisdictions for ensuring technical compliance with FATF Recommendations and the requisite level of effectiveness of national AML/CFP frameworks. Discursively constructed and reproduced objectification of the Caribbean Basin as a ‘high risk geographic space’, driven up operational costs in response to a burgeoning regulatory and compliance risk averse environment onshore. De-risking, as a result, has disrupted cross-border transactions in areas critical to regional development and undermined financial inclusion. Measures to mitigate de-risking must, therefore, reduce compliance costs,<sup>1590</sup> at both the national and regulated entities levels. Yet as has been demonstrated the RBA has not remedied this seemingly insurmountable challenge because of the historical ‘development deficit’ in the FATF policymaking. The FATF has recently recognised the need for both “countries and their financial institutions ... [to be] provided with support in designing AML/CFT measures that meet the goal of financial inclusion.”<sup>1591</sup> Furthermore, there is growing consensus that de-risking is a shared problem and that there is a collective responsibility to address its challenges, including by scaling up AML/CFT and supervisory capacity building in respondents jurisdictions to curb illicit financial flows.<sup>1592</sup> Given the recognised sustainable dimension of the de-risking as an unintended consequence of global AML/CFTP regulation, then an argument could be legitimately made for bringing equitable development principles such as ‘common but differentiated responsibility’ (CBDR) to bear on the AML/CFT discourse.

The utility of extending the principle of CBDR to the global AML/CFTP lies in its potential to correct the presumption that there are enough resources in underdeveloped jurisdictions of the Global South to rationalise in line with the RBA. That the resource plight of Caribbean jurisdictions has inhibited AML/CFTP regulatory compliance and

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<sup>1590</sup> Haley, ‘De-Risking of CBRs: Threats, Challenges and Opportunities’.

<sup>1591</sup> Financial Action Task Force, ‘FATF Clarifies Risk-Based Approach’; Financial Action Task Force, ‘FATF Guidance on Financial Inclusion’.

<sup>1592</sup> Haley, ‘De-Risking of CBRs: Threats, Challenges and Opportunities’; Hopper, ‘Disconnecting from Global Finance: De-Risking’.

effectiveness, was forcefully underscored at the 50th Caribbean Financial Action Task Force (CFATF) plenary and working group meetings, on November 27, 2019. Antigua and Barbuda's Prime Minister, Mr Gaston Browne, emphasised, that:

In many instances, [Commonwealth Caribbean countries] do not have the human or financial resources to carry out some of these recommendations but because ...[they] do not wish to be blacklisted, ... have to utilize resources that ordinarily would have been programmed to other aspects of our social and economic development, in order to put the necessary rules in place and the administrative arrangements to ensure compliance.<sup>1593</sup>

Prime Minister Browne advocated for the CFATF Secretariat to give greater visibility to special resource challenges of the region's vulnerable small island States. He further advocated that the CFATF adopted a more proactive role in mobilising financial resources for the implementation of FATF Recommendations and agreed action plans, including from among "the cooperating and supporting countries or nations,"<sup>1594</sup> which have been granted with observer status at the CFATF. A stock-taking exercise conducted by the CFATF Secretariat clearly revealed that there was an expectation that the CFATF Secretariat should demonstrate greater international leadership by lobbying for the "fair and equitable treatment of all members of the global [AML/CFTP regime and] that being a member of CFATF is equivalent to being a member of FATF."<sup>1595</sup> There was a recognised need to draw international attention to the resource constraints in meeting the FATF international standards and guidance. Moreover, there was a shared view that international AML/CFTP standards should be adapted to regional realities.<sup>1596</sup> These sentiments have underscored the disillusionment with the RBA delivering on its intended objective of tailored application of the FATF Forty Recommendations to national, and by implication regional, realities. Caribbean countries have further insisted on a more

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<sup>1593</sup> 'PM Browne Lobbies for CFATF to Assist Small Islands to Implement AML/CTF Policies', *Antigua Observer Newspaper* (blog), 28 November 2019, <https://www.antiguaobserver.com/pm-browne-lobbies-for-cfatf-to-assist-small-islands-to-implement-aml-ctf-policies/>.

<sup>1594</sup> 'PM Browne Lobbies for CFATF to Assist Small Islands to Implement AML/CTF Policies'.

<sup>1595</sup> Acosta et al., 'De-Risking in the Caribbean Region- A CFATF Perspective', 49.

<sup>1596</sup> Acosta et al., 'De-Risking in the Caribbean Region- A CFATF Perspective'.

consistent and transparent approach to placing countries on the FATF list of countries with ‘strategic deficiencies’ in their AML/CFTP regimes.<sup>1597</sup>

Most of the solutions advanced for de-risking and financial exclusion are resource intensive. Among those that have been tabled include collectively purchasing or establishing a bank in the United States; governments’ subsidizing the compliance costs of respondent banks; and greater deployment of financial technologies (FinTech) such as blockchain and machine learning to reduce compliance costs and increase the efficiency of AML/CFTP risk management.<sup>1598</sup> In this context, the application of the principle of CBDRs would call for a fundamental rationalisation of responsibilities conferred on categories of States for combating money laundering and the financing of terrorism and proliferation. Yet, two fundamental questions would have to be resolved. Firstly, is it morally justifiable to for advanced onshore States to assume greater responsibility for ML/TFP risk mitigation? Secondly, how would the principle of CBDRs be theoretically operationalised?

### 7.3.1. Theoretical Underpinnings of Common but Differentiated Responsibility

On the basis of sovereign equality, States traditionally assumed equal obligations under international law.<sup>1599</sup> However, with decolonisation and the subsequent emergence of States of disparate sizes, levels of development and resource capabilities, the idea of differentiated responsibilities in pursuing ‘common interests’, or combating common global risks, emerged within international normative discourse.<sup>1600</sup> Thus, CBDR is both a “normative constraint” on obligations conferred by formal sovereign equality,<sup>1601</sup> and

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<sup>1597</sup> Acosta et al., 50.

<sup>1598</sup> Alleyne et al., ‘Loss of Correspondent Banking Relationships in the Caribbean’; Williams, ‘De-Risking/de-Banking: “The Reality Facing Caribbean Financial Institutions”’.

<sup>1599</sup> Philippe Cullet, ‘Differential Treatment in International Law: Towards a New Paradigm of Inter-State Relations’, *European Journal of International Law* 10, no. 3 (1 January 1999): 549–82, <https://doi.org/10.1093/ejil/10.3.549>.

<sup>1600</sup> Cullet; Christopher D. Stone, ‘Common but Differentiated Responsibilities in International Law’, *The American Journal of International Law* 98, no. 2 (2004): 276–301, <https://doi.org/10.2307/3176729>.

<sup>1601</sup> Stone, ‘Common but Differentiated Responsibilities in International Law’, 285.

as well as a general principle of equity in international law.<sup>1602</sup> ‘Common responsibility’ denotes the shared obligation of all States affected by a particular threat to take appropriate mitigation steps, whether at the global, regional or national levels, and the universal applicability of relevant norms within a given multilateral regulatory regime.<sup>1603</sup> Yet, it is the differentiation of obligations, as a politically acceptable compromise, that has often secured the effective participation of developing countries.<sup>1604</sup> The concept of differentiated responsibility has, in effect, promoted sensitivity to developing countries’ pressing socio-economic concerns, such as the eradication of extreme poverty, which might affect their ability to contribute to effective solutions to common risks.<sup>1605</sup> In this regard, it has required the qualified allocation of international obligations of States or groups of participating in a relevant transnational normative regime, based on their technical, financial and technological capabilities to prevent, mitigate and manage common threats.<sup>1606</sup> Differentiated responsibilities was seen, therefore, as a way of achieving “substantive equality” among States and remedying the application of international rules that yield unjust or morally unsustainable results.<sup>1607</sup> Since the 1960s the principle of CBDRs has been applied in the areas of international trade under General Agreement on Trade and Tariffs (GATT); then to multilateral environmental treaties,<sup>1608</sup>

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<sup>1602</sup> Centre for International Sustainable Development Law, ‘The Principle of Common but Differentiated Responsibilities: Origins and Scope’, CISDL Legal Brief (Montreal, Canada: Centre for International Sustainable Development Law (CISDL), McGill University Faculty of Law., 2002), [https://cisdl.org/public/docs/news/brief\\_common.pdf](https://cisdl.org/public/docs/news/brief_common.pdf); Cullet, ‘Differential Treatment in International Law’; Stone, ‘Common but Differentiated Responsibilities in International Law’.

<sup>1603</sup> Centre for International Sustainable Development Law, ‘The Principle of Common but Differentiated Responsibilities’; Duncan French, ‘Developing States and International Environmental Law: The Importance of Differentiated Responsibilities’, *International & Comparative Law Quarterly* 49, no. 1 (January 2000): 35–60, <https://doi.org/10.1017/S0020589300063958>.

<sup>1604</sup> French, ‘Developing States and International Environmental Law’; Daniel Barstow Magraw, ‘Legal Treatment of Developing Countries: Differential, Contextual, and Absolute Norms Doman Colloquium on Global Change and International Law’, *Colorado Journal of International Environmental Law and Policy*, 1990, 69–100.

<sup>1605</sup> French, ‘Developing States and International Environmental Law’.

<sup>1606</sup> Centre for International Sustainable Development Law, ‘The Principle of Common but Differentiated Responsibilities’; French, ‘Developing States and International Environmental Law’; Magraw, ‘Legal Treatment of Developing Countries’.

<sup>1607</sup> Cullet, ‘Differential Treatment in International Law’.

<sup>1608</sup> Centre for International Sustainable Development Law, ‘The Principle of Common but Differentiated Responsibilities’; Stone, ‘Common but Differentiated Responsibilities in International Law’.

and now is being extended to regulatory discourses on nuclear non-proliferation and disarmament responsibilities.<sup>1609</sup>

### 7.3.2. Moral Justifications for Common but Differentiated Responsibilities

It is within the climate change regulatory discourse that concept of CBDRs have been most clearly articulated. Principle 7 of the 1992 Rio Declaration, adopted at the UN Conference on Environment and Development, in Rio de Janeiro, Brazil, declared that “States have common but differentiated responsibilities.” This was formally affirmed in Article 3.1 of the United Nations Framework Convention on Climate Change (UNFCCC) 1992, which rationalised responsibilities among States to combat climate change “on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.” Furthermore, CBDRs have been morally justified on harm-based and need-based grounds.

#### 7.3.2.1. Harm-based Justification

Harm-based differentiation is derived from the international customary ‘no harm’ obligation, which vests responsibility on States for trans-boundary harmful activities that emanate from within their jurisdiction or control.<sup>1610</sup> The allocation of remedial responsibilities among States implicated in causing the relevant harm has generally proceeded on the principle of proportionality.<sup>1611</sup> On application of this causal approach to differentiation, greater remedial responsibility would be conferred on States that have

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<sup>1609</sup> Sebastian Brixey-Williams, ‘Common but Differentiated Nuclear Responsibilities: Perspectives from Tokyo’ (Tokyo, Japan: Institute for Conflict Cooperation and Security, February 2019), <https://www.basicint.org/wp-content/uploads/2019/02/Brixey-Williams-Common-but-Differentiated-Nuclear-Responsibilities-February-2019-WEB-4.pdf>.

<sup>1610</sup> French, ‘Developing States and International Environmental Law’; Benoît Mayer, ‘The Relevance of the No-Harm Principle to Climate Change Law and Politics’, *Asia Pacific Journal of Environmental Law* 19 (2016): 79–104.

<sup>1611</sup> French, ‘Developing States and International Environmental Law’.

disproportionately contributed to the ML/TF risk landscape. Several provocative arguments could be advanced in this regard.

Firstly, while the notion of “offshore conjures up an imagine of unethical, illegal or criminal activity” due to “propaganda,”<sup>1612</sup> the sector’s development in the Commonwealth Caribbean was actively encouraged by advanced Western economies. As colonies, Caribbean jurisdictions, such as the Bahamas, were viewed as exotic locations for the establishment of offshore financial, investment and confidentiality arrangements by onshore FIs that effectively operated under the legal jurisdiction of United States and the United Kingdom.<sup>1613</sup> The United Kingdom, through the Foreign and Commonwealth Office provided technical assistance for the development of offshore financial sectors in the region.<sup>1614</sup> Especially after the collapse of the West Indies Federation, the United Kingdom viewed it’s continued economic stewardship over Caribbean jurisdictions that were agitating for political independence, as increasingly unjustifiable.<sup>1615</sup> Supporting the economic autonomy of Caribbean jurisdictions, including the development of offshore sectors, was a deliberate strategy to ‘wean’ them from UK financial support.<sup>1616</sup> The stigmatisation of Commonwealth Caribbean OFCs as ‘rogue’ and high-risk for ML/TF, has been a fairly recent development driven by fiscal, competitive and foreign policy developments. Secondly, save for the proceeds of tax evasion funnelled to some offshore jurisdictions in the region, it is undeniable that a significant amount of illicit financial flows laundered in the Caribbean is tied to uncontrolled arms trafficking from the United States and the demand-driven cocaine markets in North America and Europe.<sup>1617</sup> Thus, while Commonwealth Caribbean States have a common international responsibility for preventing their territories being misused for nefarious purposes, the region is generally a transshipment hub within the global supply chain.<sup>1618</sup> Thirdly, de-risking in the

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<sup>1612</sup> Rose-Marie Belle Antoine, *Confidentiality in Offshore Financial Law*, Second edition (Oxford, United Kingdom: Oxford University Press, 2014), 6.

<sup>1613</sup> Xabier Gorostiaga, *The Role of the International Financial Centres in Underdeveloped Countries* (London: Croom Helm, 1984); Antoine, *Confidentiality in Offshore Financial Law*.

<sup>1614</sup> European Business History Association, ‘The Formation of a British Tax Haven Policy, 1961-1971: Transit Capitalism in an Era of Decolonization’.

<sup>1615</sup> European Business History Association.

<sup>1616</sup> European Business History Association.

<sup>1617</sup> Jerome Bjelopera and Kristin Finklea, ‘Organized Crime: An Evolving Challenge for U.S. Law Enforcement’, CRS Report for Congress (Washington, DC, USA: Congressional Research Service, 6 January 2012).

<sup>1618</sup> Vasciannie, ‘Political and Policy Aspects of the Jamaica/United States Shiprider Negotiations’.

Commonwealth Caribbean and the growing phenomenon of financial exclusion are spill-over effects of aggressive AML/CFTP regulatory and enforcement actions in advanced financial centres.<sup>1619</sup> OECD countries seem more preoccupied with preventing capital flight rather than suppressing serious financial crimes. The United States' extraterritorial AML/CFT labelling of Commonwealth Caribbean States as "jurisdictions of concern for money laundering" has reproduced perceptions of the region as high-risk for ML/FT.<sup>1620</sup> Fourthly, there is some academic recognition, based on cost-benefit analyses, that the benefits of AML/CFT enforcement are intangible,<sup>1621</sup> and typically materialise in onshore jurisdictions from which the illicit funds originated and where the predicate crimes have been committed.<sup>1622</sup>

However, legitimate these arguments may appear, this 'blame game' approach to differentiating causal responsibility is unlikely to gain much traction within the global AML/CFT discourse. Principle 7 of the Rio Declaration justified CBDRs on the basis of the disproportionate contribution of developed countries to global climate risks and the technologies and financial resources that they command.<sup>1623</sup> Yet, even in the climate governance context, the United States was particularly careful to clarify that Principle 7 merely acknowledged "the special leadership role of developed countries," given their "wealth, technical expertise and capabilities" rather than a recognition of any international legal obligations arising from their industrialised status or any diminution of developing countries' responsibility.<sup>1624</sup> In fact, it has been observed that many transnational AML/CFT policy elites have been adamant that "to particularize

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<sup>1619</sup> Alleyne et al., 'Loss of Correspondent Banking Relationships in the Caribbean'; Erbenova et al., 'The Withdrawal of Correspondent Banking Relationships'; Haley, 'De-Risking of CBRs: Threats, Challenges and Opportunities'; Schmid, 'How Much Anti-Money Laundering Effort Is Enough? The Jamaican Experience'.

<sup>1620</sup> Schmid, 'How Much Anti-Money Laundering Effort Is Enough? The Jamaican Experience'.

<sup>1621</sup> Jackie Harvey, 'Compliance and Reporting Issues Arising for Financial Institutions from Money Laundering Regulations: A Preliminary Cost Benefit Study', *Journal of Money Laundering Control*; *London* 7, no. 4 (Spring 2004): 333–46.

<sup>1622</sup> Geiger and Wuensch, 'The Fight against Money Laundering', 91–105; Lewisch, 'Money Laundering Laws as a Political Instrument', 407; Sharman, 'Power and Discourse in Policy Diffusion'.

<sup>1623</sup> United Nations Secretariat, 'The United Nations Conference on Environment and Development- Rio Declaration', 1992, 2, [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_CONF.151\\_26\\_Vol.I\\_Declaration.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf).

<sup>1624</sup> French, 'Developing States and International Environmental Law'; Mayer, 'Relevance of the No-Harm Principle'.

recommendations for certain types of countries [would amount to the] ... revocation of the requirement that all countries conform to the global standards.”<sup>1625</sup> Furthermore, they have insisted that under no circumstances should categories of countries be given a “free ride” on any of the FATF Recommendations.<sup>1626</sup>

At the level of implementation of FATF Recommendations, differentiation of substantive obligations might also be problematic. The application of CBDRs through this modality generally carries the risk of States acting in bad faith and it would be difficult to distinguish legitimate compliance challenges from opportunistic rent-seeking.<sup>1627</sup> This was the justificatory basis for the rules-based, ‘one-size-fits-all’ approach, during the Third Round of mutual evaluations.<sup>1628</sup> These ethos have not changed materially after the institutionalisation of the RBA. Despite appearing as such, the RBA is not a contextual norm. That is, a norm that seems to be universally applicable to all States within a given regime but, in practice, permits regard to country-specific factors in their implementation and allows States the discretion to argue for compliance or selective non-compliance.<sup>1629</sup> The RBA does not provide a justificatory or excusatory basis for non-compliance with applicable standards that could de facto amount to a differentiation in compliance responsibilities. Irrespective of varying levels of relevance of particular recommendations for a country’s risk context, the RBA has only permitted the prioritisation of higher ML/TF risks and the rationalisation of resources in responding to those risks. In the final analysis, it seems unlikely that causal attribution of differentiated AML/CFTP responsibilities would be embraced in the global AML/CFTP discourse given its political sensitivity that goes to the core of powerful States’ national security and foreign policies.

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<sup>1625</sup> Halliday, Levi, and Reuter, ‘Global Surveillance of Dirty Money’, 39.

<sup>1626</sup> Halliday, Levi, and Reuter, ‘Global Surveillance of Dirty Money’.

<sup>1627</sup> Stone, ‘Common but Differentiated Responsibilities in International Law’.

<sup>1628</sup> Halliday, Levi, and Reuter, ‘Global Surveillance of Dirty Money’.

<sup>1629</sup> French, ‘Developing States and International Environmental Law’; Magraw, ‘Legal Treatment of Developing Countries’; Stone, ‘Common but Differentiated Responsibilities in International Law’.

### 7.3.2.2. *Needs-based Justification*

The effectiveness of AML/CFTP regimes hinge on state capacity, levels of economic development and resources as well as the robustness on governance institutions and rule of law frameworks. In developing country contexts, these structural factors have made achieving complete effectiveness virtually impossible.<sup>1630</sup> To the extent that meeting the FATF, and OECD's regulatory expectations is largely a resource issue, a needs-based moral justification of differentiated AML/CFTP responsibilities might be more agreeable. The needs-based moral justification would presume that despite shared risks, some States need greater assistance than others in risk management, mitigation, and adaptation.<sup>1631</sup> This was the moral justification for differentiation of responsibilities, on which international consensus was reached in the 1992 Rio Declaration. Principle 6 of the Rio Declaration prescribed that the "special situation and needs of developing countries ... and those most ...vulnerable...shall be given special priority."<sup>1632</sup> The differentiation of developing countries responsibilities for preventing and mitigating shared risks on the basis of their limited resources and need of adaptive assistance, is easily transferrable to the AML/CFTP regulatory context. In fact, the FATF recognised that Low-Capacity Countries (LCCs), needed support for the full and effective implementation of the Recommendations, based on their risk profiles, resource and technical capacities, and structural particularities and vulnerabilities.<sup>1633</sup> However, its classification of LCCs was restricted to "low-income countries." This effectively excluded most Commonwealth Caribbean jurisdictions, which are classified by the World Bank as upper middle-income countries (MICs). While Caribbean jurisdictions have fairly strong legal institutions and financial sectors with significant exposure to the international financial system, they nonetheless are almost as characteristically vulnerable as LCCs. Most Commonwealth

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<sup>1630</sup> Halliday, Levi, and Reuter, 'Global Surveillance of Dirty Money'; Concepcion V. Yepes, 'Compliance with the AML/CFT International Standard: Lessons from a Cross-Country Analysis', IMF Working Papers (Washington, DC, USA: International Monetary Fund, 2011).

<sup>1631</sup> Stone, 'Common but Differentiated Responsibilities in International Law'.

<sup>1632</sup> United Nations Secretariat, 'Rio Declaration 1992', 2.

<sup>1633</sup> Financial Action Task Force, 'Guidance on Capacity Building for Mutual Evaluations and Implementation of the FATF Standards within Low Capacity Countries' (Paris, France: FATF/OECD, 29 February 2008), <http://www.fatf-gafi.org/media/fatf/documents/reports/Capacity%20building%20LCC.pdf>.

Caribbean countries have dominant informal sectors, cash-based economies, scarce governmental resources due to small size, high indebtedness, low human development indices and are increasingly exposed to catastrophic natural hazards. The structural and resource constraints inhibit their ability to meet AML/CFTP technical compliance and effectiveness standards on par with onshore economies.

The principle of CBDRs, at its core, was intended to establish “solidarity and partnership” as the basis for effective international cooperation, including in the implementation of international normative standards.<sup>1634</sup> The argument being advanced is that differentiation could be operationalised in the restricted sense of recognising that richer countries have a greater moral responsibility to build developing countries capacities to combat the shared threat of ML and FTP. Thus, a ‘differential norm’ could be explicitly incorporated into the FATF’s ‘soft law’ standards on international cooperation. In practice, differential international norms often make explicit reference to the special needs, concerns or vulnerabilities of developing countries to a particular shared risk; or provide for targeted financial or technical assistance or other forms of international cooperation.<sup>1635</sup> Other differential norms such as flexible timeframes for compliance,<sup>1636</sup> could give practical effect to CBDR in the case of small Commonwealth Caribbean jurisdictions. For instance, following the revision of the FATF Recommendations in 2003 and the addition of the Nine Special Recommendations on the financing of terrorism, reported compliance levels among FATF member states, during the 3<sup>rd</sup> round of mutual evaluations, had significantly declined from the pre-2003 levels.<sup>1637</sup> This suggests that even among richer countries a significant adjustment period is required to comply with changes in FATF standards.

It is not uncommon in international praxis, where collective action is essential to achieving common public goods, that the participation of weaker States is sometimes

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<sup>1634</sup> Cullet, ‘Differential Treatment in International Law’; Stone, ‘Common but Differentiated Responsibilities in International Law’.

<sup>1635</sup> Centre for International Sustainable Development Law, ‘The Principle of Common but Differentiated Responsibilities’; French, ‘Developing States and International Environmental Law’; Magraw, ‘Legal Treatment of Developing Countries’.

<sup>1636</sup> Magraw, ‘Legal Treatment of Developing Countries’.

<sup>1637</sup> Jackie Johnson, ‘Third Round FATF Mutual Evaluations Indicate Declining Compliance’, *Journal of Money Laundering Control*; London 11, no. 1 (2008): 47–66, <http://dx.doi.org/10.1108/13685200810844497>.

“purchased through side payments,” such as technical assistance, rather than differentiated obligations that might dilute substantive international rules.<sup>1638</sup> Thus, save for formalising the obligation of developed countries to assume greater burdens for building the adaptive capabilities of poorer countries, the need-based moral justification for CDBRs should be unproblematic. In fact, international cooperation is a standard provision in most multilateral conventions targeted at combating transnational organised crimes, including money laundering, terrorism, and terrorist financing. While developed countries have committed adaptive assistance to developing countries to finance various aspects of their sustainable development, the delivery of that assistance is often underwhelming. The need for stronger international commitment to financing AML/CFTP capacity building in the Commonwealth Caribbean is shared among members countries of the CFATF.<sup>1639</sup>

#### **7.4. Critical Observations on the Policy Coherence of the RBA in Commonwealth Caribbean Contexts**

One of the most compelling developments within the global AML/CFT discourse, has been the construction, narration, and reproduction of ML/TFP risk. These discursive practices have been driven by powerful G7 and OECD governments that control access to the global financial and payment system, as well as by the FATF and other international institutions that they finance and hegemonically dominate. The institutionalisation of the RBA for the identification, assessment, and mitigation of ML/TFP risks, at both the country and regulated sector levels, has been one of the most disruptive discursive constructs. At the global AML/CFT policy level, there has been an observed proclivity for deploying discursive and rhetorical strategies in transnational norm-making.<sup>1640</sup> The FATF predicated the institutionalisation of the RBA on ‘plausible rhetoric’. Thus, the

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<sup>1638</sup> Stone, ‘Common but Differentiated Responsibilities in International Law’, 283.

<sup>1639</sup> Acosta et al., ‘De-Risking in the Caribbean Region- A CFATF Perspective’.

<sup>1640</sup> Halliday, Levi, and Reuter, ‘Disciplinary Transnational Legal Order’; Terence C. Halliday, Susan Block-Lieb, and Bruce G. Carruthers, ‘Rhetorical Legitimation: Global Scripts as Strategic Devices of International Organizations’, SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 20 September 2009), <https://doi.org/10.2139/ssrn.1476370>; Halliday, ‘Plausible Folk Theories’.

RBA has promised to deliver more efficient use and targeting of resources to high-risk ML/TFP issues, more flexible AML/CFT control measures and more confiscation of illicit proceeds and instrumentalities of ML/TFP. Taken at face value, these objectives seem justificatory of the adoption and implementation of the RBA. Yet, as demonstrated, the empirical difficulties of conceptualising and measuring ML/TF risks reveal a fundamental incoherence in the underlying logic of the RBA. These conceptual incoherencies have proven that the RBA's assumptions and formulation were not based on empirically grounded and tested theories. Several observations have been made, in this regard.

At the technical level, there is little optimism as to whether the RBA will change the expensive nature of AML/CFT efforts,<sup>1641</sup> especially for jurisdictions that have been discursively stigmatised as 'high risk' or 'non-cooperative'. Despite limited resources, these jurisdictions and their FIs and DNFBPs must strive to 'over-comply' with FATF requirements to avoid further reputational injury from adverse rankings and ratings. Furthermore, neither the unwilling co-option of the financial services sectors into privatised AML/CFT policing,<sup>1642</sup> nor the RBA as a conceptual framework has mitigated the resource demands for achieving technical compliance and regulatory effectiveness in developing countries. Far from shifting responsibilities to the FIs and DNFBPs, the RBA has expanded the state's regulatory responsibilities albeit in a more diffused away across supervisory agencies, at the sectoral level. Under the rules-based approach, regulators used 'tick-the box' measures to monitor AML/CFT compliance with legally prescribed requirements applicable to every scenario.<sup>1643</sup> However, regulators have now had to invest heavily in expert staff and divert critical resources to monitor and assess regulated entities' compliance with customised AML/CFT control measures.<sup>1644</sup> Supervisory authorities must now ensure that AML/CFT mitigation controls of regulated entities are

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<sup>1641</sup> Killick and Parody, 'Implementing AML/CFT Measures That Address the Risks and Not Tick Boxes'.

<sup>1642</sup> Bello and Harvey, 'From a Risk-Based to an Uncertainty-Based Approach to Anti-Money Laundering Compliance'; Maria Bergström, Karin Svedberg Helgesson, and Ulrika Mörth, 'A New Role for For-Profit Actors? The Case of Anti-Money Laundering and Risk Management', *Journal of Common Market Studies* 49, no. 5 (2011): 1043–64, <https://doi.org/10.1111/j.1468-5965.2010.02167.x>.

<sup>1643</sup> Killick and Parody, 'Implementing AML/CFT Measures That Address the Risks and Not Tick Boxes'.

<sup>1644</sup> Killick and Parody.

proportionate to risks identified across sectors, product and services, delivery channels and, where appropriate, foreign jurisdictions. At the regulated banking and financial services level, the RBA has not mitigated over-reporting.<sup>1645</sup> The incoherent conceptualisation of risks has made risk-based decision-making notoriously difficult. FIs and DNFBPs have not been able to apply sound conventional financial risk measurement techniques to assess ML/TFP risk.<sup>1646</sup> On the contrary, they have had to cast a wider net on customer transactions to detect suspicious activities and have spent billions on compliance training and programmes to avoid risk exposure and escalating fines. Thus, because the bulk of compliance costs of AML/CFT regulation is no longer exclusively borne by States, the expensive nature of establishing and maintaining effective AML/CFT regimes is more hidden.<sup>1647</sup> Hidden, they no longer provoke the required level of outrage within the international community. In particular, there has been little sensitivity to the plight of small Commonwealth Caribbean jurisdictions, especially those whose OFCs and liberal tax regimes continue to legitimately attract mobile capital from large multinational corporations from advanced Western economies.

By permitting countries the discretion to rationalise resources according to NRAs, the RBA has managed to foreclose critical engagement with asymmetries in responsibilities in combating ML/TFP, as a result of disparities in resource and technical AML/CFT capabilities. These disparities are particularly acute in Commonwealth Caribbean jurisdictions that are increasingly being graduated from official development assistance because of their middle-income status. These small jurisdictions can no longer afford the financial and sustainable development costs of blind compliance with international AML/CFT standards. Their economic systems and stability have been increasingly threatened by de-risking and financial exclusion, perhaps even more than by predicate ML/TFP crimes. Yet, their dependence on access to the global financial and payment

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<sup>1645</sup> Bello and Harvey, 'From a Risk-Based to an Uncertainty-Based Approach to Anti-Money Laundering Compliance'; Demetis and Angell, 'The Risk-Based Approach to AML'; Dalla and Masciandaro, 'The Risk-Based Approach in the New European Anti-Money Laundering Legislation'.

<sup>1646</sup> Bello and Harvey, 'From a Risk-Based to an Uncertainty-Based Approach to Anti-Money Laundering Compliance'; Dalla and Masciandaro, 'The Risk-Based Approach in the New European Anti-Money Laundering Legislation'; Előd Takáts, 'A Theory of "Crying Wolf": The Economics of Money Laundering Enforcement', *The Journal of Law, Economics, and Organization* 27, no. 1 (1 April 2011): 32–78, <https://doi.org/10.1093/jleo/ewp018>.

<sup>1647</sup> Killick and Parody, 'Implementing AML/CFT Measures That Address the Risks and Not Tick Boxes'.

systems have made them powerless to resist extraterritorially imposed regulatory expectations. It seems counter-intuitive that the RBA has promised to ‘level the playing field’ in terms of technical compliance and effectiveness standards among States of diverging capabilities and resources. The FATF has paid scant regard to the structural factors which could prevent its rules from being effective,<sup>1648</sup> such as chronic resource constraints in developing countries. Nor has the FATF given any serious attention to systematically streamlining cost-benefit assessments into the evaluation of AML/CFT regimes.<sup>1649</sup> Commonwealth Caribbean jurisdictions must strive to meet AML/CFTP technical compliance and effectiveness standards on par with wealthy developed countries, as failure would result in further stigmatisation and the reproduction of ML/TF risk perceptions that would cyclically marginalise them from the global financial system. Paradoxically, it is this discursive stigmatisation and problematisation of under-resourced States as the ‘weakest links’ in the global AML/CFT regime, which has effectively foreclosed critical engagement with the conceptual and methodological assumptions of the RBA.

The discursive reproduction of potent rhetorical references to ‘dirty money’, ‘war on terrorism’ and ‘war on drugs’,<sup>1650</sup> have successfully elicited moral repudiation of ML/TF,<sup>1651</sup> and of Commonwealth Caribbean jurisdictions that have been blacklisted and stigmatised as ‘tax havens’. These discursive practices have been used as a pretext to justify financial intelligence gathering to curb tax avoidance, tax evasion and capital flight generally. They have legitimised the conferral of ‘common’ and undifferentiated AML/CFTP responsibilities on resource-strapped Commonwealth Caribbean jurisdictions that are forced to assume the exorbitant regulatory and compliance costs. Additionally, these discursive practices have trivialised the sustainable development consequences of diverting critical resources from national development priorities to respond to the urgency of making institutional adjustments to fight financial crimes to avoid reputational injury. Furthermore, these discursive and rhetorical practices have

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<sup>1648</sup> Halliday, Levi, and Reuter, ‘Global Surveillance of Dirty Money’.

<sup>1649</sup> Halliday, Levi, and Reuter.

<sup>1650</sup> Doyle, ‘Cleaning up Anti-Money Laundering Strategies’.

<sup>1651</sup> Halliday, ‘Plausible Folk Theories’; Halliday, Block-Lieb, and Carruthers, ‘Rhetorical Legitimation’; Peter Reuter and Edwin M. Truman, *Chasing Dirty Money: The Fight against Money Laundering* (Washington, DC: Institute for International Economics, 2004).

been used to reinforce intrusive extraterritorial AML/CFT surveillance, ‘naming and shaming’, injurious ratings strategies by the FATF and OECD countries.<sup>1652</sup> They have also proven effective at assuaging deliberative concerns about ‘agency capture’, and the FATF’s institutional legitimacy and accountability, as well as at appearing to have transcended disparate States interests with universally applicable policy prescriptions.<sup>1653</sup> However, these practices derogated the national sovereignty of Commonwealth Caribbean jurisdictions. To remedy the issue of de-risking as an inadvertent consequence of global AML/CFTP regulation, the Commonwealth Secretariat has proposed “the creation of a global forum for regulators to ensure the incorporation of developing country perspectives in the development of international standards and regulation.”<sup>1654</sup> Establishing a new global forum might be politically expedient. However, unless the FATF is legitimised and democratised as an inclusive multilateral institution, and on an international legal basis, the hegemonic leadership of the OECD within the current transnational AML/CFT normative order and its domination of AML/CFT agenda setting, are unlikely to be disrupted.

Whether the principle of CBDR will gain any traction in global AML/CFT discourse remains to be seen. It’s utility as a conceptual framework for reconstituting the global AML/CFT discourse, as development discourse, lies in its ability to mobilise, scale up, and systematically target development financing and AML/CFTP technology transfer to the Global South to curb illicit financial flows related to ML and FTP. The need-based moral jurisdictions for CBDRs has an alluring potency, in this regard. In the final analysis, the RBA has not mitigated the overall capacities challenges of small Commonwealth Caribbean jurisdictions in establishing truly effective national AML/CFT regimes. These acute capacity challenges are likely to become more extenuating in view of reports on the destabilising financial consequences that the Covid-19 pandemic is already wreaking on jurisdictions within the region. Their societies already trail other regions in terms of the penetration of affordable mobile technologies for remittance transfers that promote

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<sup>1652</sup> Halliday, ‘Plausible Folk Theories’; Halliday, Levi, and Reuter, ‘Disciplinary Transnational Legal Order’; Killick and Parody, ‘Implementing AML/CFT Measures That Address the Risks and Not Tick Boxes’.

<sup>1653</sup> Halliday, ‘Plausible Folk Theories’; Killick and Parody, ‘Implementing AML/CFT Measures That Address the Risks and Not Tick Boxes’.

<sup>1654</sup> Hopper, ‘Disconnecting from Global Finance: De-Risking’, 5.

financial inclusion. They still rely heavily on FIs and especially the MVTs sector with relatively expensive transaction costs. Their financial services sectors as well as state supervisory agencies and LEAs lag behind their counterparts in advanced financial centres in the diffusion of AML/CFT regulatory technologies (RegTech), and financial technologies (FinTech), including the increasing application of artificial intelligence and machine learning to combat ML/TF. Since gaining political independence, advocacy for greater technology transfer for adaptation to various global risks has been high on agenda of small developing jurisdictions. Yet, despite commitments by the international community to financing sustainable development, the delivery of such resources has been underwhelming. Only through strengthened AML/CFT capacities could the sovereignty and sustainable development of Commonwealth Caribbean States be reaffirmed. However, in the short term, international moral leadership is needed to increasingly streamline development-centric principles within the global AML/CFT discourse.

International moral leadership is needed to move the global AML/CFTP discourse from being, the “most deeply penetrating” and the “most punitive”, “disciplinary transnational legal order,”<sup>1655</sup> to a truly development-centric, global partnership. This should be principled by the UN Sustainable Development Agenda and SDGs. Collectively, they have established a robust and equitable framework for joint ownership of global public goods, including in relation to the suppression of economic crimes. Important in this regard, is that the SDGs address the need for the delivery of more effective, credible, accountable, and legitimate institutions by enhancing representation for developing countries in decision-making processes for global economic and financial governance. This has been explicitly provided for as Target 10.6, SDG.10 (Reducing inequality within and among nations). Furthermore, Target 16.6, SDG.16 (Peace, justice, and strong institutions), has provided for the development of effective, accountable, and transparent institutions at all levels. Where the encroachment on small States sovereignty is concerned within the global AML/CFTP regime, SDG.17 is relevant. It has underscored respect for each country’s policy space and leadership in establishing and implementing policies, as central to revitalizing the global partnership for sustainable development.

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<sup>1655</sup> Halliday, Levi, and Reuter, ‘Disciplinary Transnational Legal Order’, 3.

Unfortunately, these prospects appear bleak at best. Sovereign legislative and executive policy choices to have liberal tax and banking secrecy regimes in the Commonwealth Caribbean have been discursively labelled by the FATF as “strategic deficiencies.”<sup>1656</sup> Perceived shortcomings in technical compliance and effectiveness in AML/CFT regimes have been reduced to a lack of political will among governments within the region.<sup>1657</sup> The EU recently announced its intention to intensify its scrutiny of States that are high risk for ML/FTP. It recently added The Bahamas, Barbados, and Jamaica to its ‘blacklist’ of 22 countries that “pose significant threats to the financial system of the Union.”<sup>1658</sup> Trinidad and Tobago has been on the blacklist for a while. Banks and other financial and tax institutions will be obliged to apply enhanced due diligence to their clients who have dealings in these jurisdictions and companies operating in them have been banned from receiving new EU funding.<sup>1659</sup> The arbitrariness of categorising countries as high risk for ML/TF has long been recognised.<sup>1660</sup> What remains puzzling, however, is that while the hypocritical power politics that have permeated AML/CFT risk narratives are increasingly coming to the fore, small powerless jurisdictions are nonetheless being required to assume greater AML/CFT responsibilities without international outrage. For instance, the new EU blacklist omitted Saudi Arabia, the current holder of the G20 presidency, which had reportedly been included in the initial EU draft list in 2019.<sup>1661</sup> In what has been described as an unprecedented encroachment on the competency of the European Commission, that initial list was “struck down” by EU governments who allegedly caved to pressure from the “oil-rich kingdom.”<sup>1662</sup> Four United States territories- American Samoa, US Virgin Islands, Puerto Rico and Guam, which had also been reportedly placed on the earlier blacklist, were not relisted following criticisms from Washington.<sup>1663</sup> In this current AML/CFT discourse, the stigmatisation of Commonwealth Caribbean States as high-risk for ML and TFP purposes is unlikely to

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<sup>1656</sup> Antoine, ‘The Caribbean Offshore Financial Services Revolution- A Bold, Futuristic Initiative Requiring Brave Leadership’; Doyle, ‘Cleaning up Anti-Money Laundering Strategies’.

<sup>1657</sup> Yepes, ‘Compliance with the AML/CFT International Standard: Lessons from a Cross-Country Analysis’.

<sup>1658</sup> Guarascio, ‘EU to Beef up Scrutiny of Money-Laundering Risks, Adds Panama to List’.

<sup>1659</sup> Guarascio.

<sup>1660</sup> Sharman, ‘Power and Discourse in Policy Diffusion’ (n 142).

<sup>1661</sup> Guarascio, ‘EU to Beef up Scrutiny of Money-Laundering Risks, Adds Panama to List’.

<sup>1662</sup> Guarascio.

<sup>1663</sup> Guarascio.

be attenuated. Responding to ML/TFP activities commensurate with identified and assessed risks requires much-needed resources, which cannot be mobilised without a strong international commitment to financing AML/CFTP capacity building in the region.

## **8. Conclusion- Towards an Anti-Hegemonic Transnational Anti-Money Laundering Legal Order?**

This study posed the perplexing question of how a balance could be struck between safeguarding both the sovereignty and sustainable development of Commonwealth Caribbean States and ensuring their effective participation within the transnational AML/CFTP legal order. This was undertaken by tracing how their sovereignty and development sustainability have been discursively normalised as negligible along the trajectory of the transnational campaign against criminal finance. This process began, in the Caribbean Basin, with the United States' internationalised 'war on drugs' in the 1980s. Post-Cold War, it expanded into the campaign against the bribery of foreign senior public officials and the progressive use of AML laws to target 'suspect wealth' held offshore. The treatment of Caribbean States' sovereignty and development sustainability as derogable continued within the context of the 'war on terror' and proliferation financing post-9/11. The focus has since shifted to a preoccupation with the risk-based regulation of financial services sectors in the aftermath of the 2008 global financial and economic crises. This study was borne out of the clear need to critically engage with the increasingly apparent unintended sustainable development consequences of transnational AML/CFTP regulatory governance. Indeed, de-risking and financial exclusion have been direct consequences of the continued assault on Commonwealth Caribbean States' sovereignty. Demonstrably, this campaign has been waged by powerful OECD States, onshore regulatory elites, and transnational institutional actors. The disciplining strategies of choice have been labelling, naming and shaming, adverse ratings and rankings, and the threat of sanctions and exclusion from the global payment and financial systems.

Scholarly examination of these transnational AML/CFTP regulatory and enforcement issues have been traditionally restricted to Commonwealth Caribbean OFCs, and especially quasi-sovereign British Overseas Territories. Given the sizeable share of offshore assets held in these jurisdictions, their regulatory interests have more directly conflicted with those of advanced financial centres whose governments hegemonically dominate the TAMLO. By focusing on the Bahamas, Jamaica and Trinidad and Tobago, the study filled the gap in the sparse literature on the diverse AML/CFTP regulatory experiences within the independent Commonwealth Caribbean. Their selection for

rigorous analysis was intended to discredit the ‘singular narrative’ of Commonwealth Caribbean States within the transnational AML/CFTP discourse as offshore pariahs. Instead, the thesis has been concerned to demythologise the popular perceptions of the Commonwealth Caribbean as paradise. It exposed the region as a complex microcosm of sovereign States whose diverging ML/FTP threat contexts, regulatory experiences, and adaptive capabilities, require development-centred and proportionate responses. As demonstrated, from a transnational regulatory perspective, the Bahamas as a large OFC has not been treated markedly different from Jamaica and Trinidad and Tobago that have not engaged in offshore finance as an economic transformation strategy. In this regard, the study advanced a case for the TAMLO to normatively evolve to accommodate country-specific threat contexts in the attribution of AML/CFTP regulatory responsibilities. The failure of the RBA to accomplish this was amplified. Specifically, the RBA was shown to rationalise resources to combat assessed ML/FTP risks based on perceived threat levels rather than rationalising AML/CFTP responsibilities. The study, therefore, advocated for flexibility in delineating States’ collective responsibility to protect the integrity of the global financial system, in a manner that is compatible with the sovereignty and development sustainability of small countries. Furthermore, the study sought to advance theorising within the AML/CFTP scholarship beyond competing claims as to why Commonwealth Caribbean States comply with transnational AML/CFTP standards. In so doing, it presented a more nuanced perspective on coercion as the dominant explanation by highlighting economic pragmatism as an alternative causal variable.

Having critically inquired into how to balance Commonwealth Caribbean States’ sovereignty and sustainable development with their recognised responsibility to suppress ML/FTP, it has been submitted that a reconstituted anti-hegemonic TAMLO that is principled by the ethos of the United Nations Sustainable Development Agenda might be the most pragmatic point of departure. Given the politically sensitive competing regulatory interests at stake, and the asymmetrical power relations along the Onshore/Offshore axis, within the TAMLO, this might prove difficult beyond an academic undertaking. Nonetheless, this study has been the first deliberate effort to reconstitute the transnational AML/CFTP discourse as development discourse, with respect to Commonwealth Caribbean Small Island Developing States (SIDS). The substantive findings can be usefully summarised around three normative fault lines within

transnational AML/CFTP regulatory governance and enforcement, which were recurrently highlighted throughout the thesis.

### 8.1. Whose Interests?

There is a well-recognised international public interest in combating the scourge of money laundering. Similarly recognised is the urgency of coordinating a collective response to finding, freezing, and forfeiting criminally derived assets or instrumentalities, or licit funds that might be diverted for the financing of terrorism and proliferation of weapons of mass destruction. This is particularly true in the context of increasingly sophisticated laundering techniques and threat financing typologies, which have made use of disruptive financial technologies, products, delivery channels and virtual assets. However, the objectives of the TAMLO have not only become expansive but increasingly unclear.<sup>1664</sup> Objectives identified include preventing criminals from amassing “wealth, power, and influence, which...[could] undermine the rule of law and have a corrosive, corrupting effect on society;” “promote integrity and stability of financial markets;” enhance “macroeconomic stability;” and curb tax evasion, capital flight or “budget deficit shortfalls.”<sup>1665</sup> In the 1980s, international consensus had converged around the original objective of depriving criminals of the proceeds of crime within an inclusive, democratic and consent-based international legal order. Furthermore, this was mediated by the United Nations and premised on international cooperation, tackling the recognised capacity constraints of developing countries, and respect for state sovereignty and territorial integrity. The resulting policies of ‘taking the profit out of crime,’<sup>1666</sup> and ‘following the money’<sup>1667</sup> to trace, freeze, and confiscate criminal proceeds have become obfuscated by

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<sup>1664</sup> Halliday, Levi, and Reuter, ‘Disciplinary Transnational Legal Order’; Halliday, Levi, and Reuter, ‘Global Surveillance of Dirty Money’.

<sup>1665</sup> International Monetary Fund, ‘AML/CFT Inclusion in Financial Surveillance’, 5–11.

<sup>1666</sup> Rider, ‘The Wages of Sin - Taking the Profit out of Corruption - A British Perspective Twelfth International Symposium on Economic Crime’; Rider, ‘The Crusade against Money Laundering - Time to Think’; Halliday, Levi, and Reuter, ‘Disciplinary Transnational Legal Order’.

<sup>1667</sup> Naylor, ‘Wash-Out’; Naylor, ‘Follow-the-Money Methods in Crime Control Policy’; Halliday, Levi, and Reuter, ‘Disciplinary Transnational Legal Order’; Matthew Levitt, ‘Follow the Money: Leveraging

policies that do not appear to be premised on transnational criminal justice. This has been attributed, in part, to regulatory capture of transnational AML/CFTP governance. Indeed, “clubs of powerful states, international financial institutions, banking, and financial institutions,”<sup>1668</sup> have consorted to construct a deeply penetrating TAMLO. Still, it is not unusual for powerful States to use transnational legal orders to advance their geopolitical interests.<sup>1669</sup> “Less official reasons” for expanding the TAMLO,<sup>1670</sup> have become increasingly apparent. Officials from the US Treasury and delegation to the FATF have openly acknowledged that “maintaining a level playing field... and reducing unfair competitive advantage of inadequately regulated jurisdictions,”<sup>1671</sup> were among the latent interests behind the United States’ role in globally diffusing AML/CFTP standards.<sup>1671</sup> Still, these hidden agendas provided a justificatory basis for transnationally targeting the regulatory sovereignty of small offshore States, especially those with banking secrecy and confidentiality laws,<sup>1672</sup> such as the Bahamas. Unlike the offshore finance sector in the Bahamas, it is the United States’ geopolitical and security interests arising from drug trafficking and, more recently, frauds perpetrated against Americans by organised crimes groups in Jamaica, which have accounted for its perhaps justifiable targeting as a high-risk money laundering jurisdiction. In the case of Trinidad and Tobago, it has been tax transparency and the alarming per capita number of Foreign Terrorists Fighters joining ISIL that have caused the country to be subjected to similar extraterritorial surveillance.

Against this threat context, asymmetrical power relations within the TAMLO have led to discursively constructed “regimes of truth,”<sup>1673</sup> or “geographical knowledge,”<sup>1674</sup> about Commonwealth Caribbean States. While plausible, these knowledge claims have

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Financial Intelligence to Combat Transnational Threats’, *Georgetown Journal of International Affairs* 12, no. 1 (2011): 34–43.

<sup>1668</sup> Halliday, Levi, and Reuter, ‘Disciplinary Transnational Legal Order’, 2.

<sup>1669</sup> Halliday and Shaffer, ‘Researching Transnational Legal Orders’.

<sup>1670</sup> Eleni Tsingou, ‘Global Governance and Transnational Financial Crime: Opportunities and Tensions in the Global Anti-Money Laundering Regime’, CSGR Working Paper (United Kingdom: Centre for the Study of Globalisation and Regionalism, University of Warwick, May 2005), 11.

<sup>1671</sup> Tsingou, 11.

<sup>1672</sup> Levi, ‘Pecunia Non Olet’.

<sup>1673</sup> Roxanne Lynn Doty, *Imperial Encounters: The Politics of Representation in North-South Relations* (U of Minnesota Press, 1996).

<sup>1674</sup> Gearóid O. Tuathail, ‘Geopolitics and Discourse. Practical Geopolitical Reasoning in American Foreign Policy’, *Geopolitics and Discourse. Practical Geopolitical Reasoning in American Foreign Policy* 11, no. 2 (1992): 190–204.

not always kept pace with AML/CFTP strides made by these jurisdictions. Powerful onshore States and their institutional ‘collaborators’ have continued to attribute ‘rogue’ identities to powerless Commonwealth Caribbean States that seek to leverage their economic sovereignty to meet the sustainable development aspirations of their peoples. Implicitly, Caribbean States continue to be disparagingly represented as “geographies to be conquered,”<sup>1675</sup> rather than as sovereign States with regulatory agency. Thus, through a Constructivist lens, the author has laid bare the subjectively constructed imageries of the Commonwealth Caribbean as ‘paradise’ and inherently high-risk for money laundering. Indeed, transnational legal orders have been “historically inadequate” in effectively facilitating the development concerns and aspirations of the Global South.<sup>1676</sup> Thus, from a distributional perspective, the ability to frame transnational regulation invariably determines who are the “winners and losers.”<sup>1677</sup> Similar to the “categorical villainization of Islamic terrorist finance,”<sup>1678</sup> and channels such as hawalas, as a threat to Western financial systems, offshore finance in the Commonwealth Caribbean and indigenous FIs been othered as ‘high-risk’ for ML/FTP. They have been disproportionately subjected to extraterritorial scrutiny and escalating onshore regulatory expectations as a prerequisite for retaining access to the global financial and payment systems. Invariably, scholarly and policy discussions about ML/TFP risks related to these jurisdictions have been narrated in relation to Western interests rather than their financial development and security. Thus, Commonwealth Caribbean States have arguably been among the ‘losers’ within the TAMLO. Until the crisis of de-risking and financial exclusion within the region, scant regard had been paid to the development context in which transnational AML/CFTP ‘soft law’ norms were being implemented and expected to effectively operate. One of the most significant contributions of the study, therefore, has been to bridge the discourses on sovereignty, security, and development within the ambit of transnational AML/CFTP regulatory governance. Specifically, it has advocated for reconstituting transnational AML/CFTP governance as a sustainable development

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<sup>1675</sup> Marshall, ‘The New International Financial Architecture and Caribbean OFCs’, 930.

<sup>1676</sup> Salomon, ‘From NIEO to Now and the Unfinishable Story of Economic Justice’, 34.

<sup>1677</sup> Fabrizio Cafaggi and Katharina Pistor, ‘Regulatory Capabilities: A Normative Framework for Assessing the Distributional Effects of Regulation’, *Regulation & Governance* 9, no. 2 (2015): 95, <https://doi.org/10.1111/rego.12065>.

<sup>1678</sup> Atia, ‘In Whose Interest?’, 463.

policy issue, as was originally intended and before being treated as a question of risk-based financial regulation.

As the discussion on use of AML standards to suppress money laundering by corrupt PEPs has demonstrated, some of the policy assumptions underpinning the attribution of AML/CFTP responsibilities within the TAMLO have not been fit-for-purpose in the context of the Commonwealth Caribbean. Rampant bribery of PEPs by multinational corporations, high-volume cross-border flows of looted assets, and the nature of kleptocracy in resource-endowed African and Asian countries, for example, have not typified the ML/corruption risks within Commonwealth Caribbean States. Rather, it is entrenched patronage politics, used a redistributive policy to mitigate poverty and social inequality that has been pervasive within the region.<sup>1679</sup> Its manifestation in the public procurement sector and cronyism, have been especially problematic. Moreover, instances of grand corruption in the Bahamas, Jamaica and Trinidad and Tobago have been infrequent. Still, the FATF's recommendations related to corruption have largely responded to bribery of foreign PEPs and curbing illicit financial flows from kleptocratic regimes. Additionally, the presumptions that PEPs in poorer nations are generally "kleptocratic with a deep interest in weakening money laundering controls," and that this has weakened their moral claims against regulatory overreach by the FATF given its "visibly moral position,"<sup>1680</sup> is evidently not the case in Commonwealth Caribbean countries. Nonetheless, the adoption of the FATF International Standards is seen to confer respectability.<sup>1681</sup> However ill-suited to their respective threat financing contexts, Commonwealth Caribbean States' compliance with those AML/CFTP standards has been non-negotiable, at the expense of their sovereignty, and regardless of whether the predominant interests served are of States from other geographic regions.

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<sup>1679</sup> Natasha T. Duncan and Dwayne Woods, 'What About Us? The Anglo-Caribbean Democratic Experience', *Commonwealth & Comparative Politics* 45, no. 2 (1 April 2007): 202–18, <https://doi.org/10.1080/14662040701317527>.

<sup>1680</sup> Halliday, Levi, and Reuter, 'Disciplinary Transnational Legal Order', 18.

<sup>1681</sup> Joseph Raz, 'The Future of State Sovereignty- Columbia Public Law Research Paper No.14-574' (Constitutional Law Commons, Columbia Law School, 2017), [https://scholarship.law.columbia.edu/faculty\\_scholarship/2069](https://scholarship.law.columbia.edu/faculty_scholarship/2069).

## 8.2. Whose Responsibility?

Evidence has been furnished to highlight that prior to the establishment of the FATF in 1989, Caribbean States had been spearheading international cooperation efforts to combat money laundering and transnational organised crimes within the Commonwealth of Nations. It is inconceivable that, decades later, their commitment to discharging their collective AML responsibilities is now being brought into question. It is submitted that, perhaps, the more fundamental questions to be resolved are who ought to legitimately determine the scope of AML/CFTP responsibilities that these States have; what principles should frame their allocation; and how should enforcement authority be legitimately exercised to render them accountable should they shirk their responsibilities.

From a normative standpoint, all sovereign States ought to be able to independently determine what transnational AML/CFTP responsibilities to assume and what international legal rules or standards to abide by. One would expect this to be the case especially with respect to transnational ‘soft law’ standards, in the promulgation of which they had no substantive participation, but which have deeply penetrated domestic legal and regulatory rule-making. Conventionally, normative discourses on Westphalian sovereignty indiscriminately ascribed States with a universal identity as sovereign equals. This has overshadowed the fact that legal orders are constituted of States with varying levels of material power and empirical capabilities to independently exercise substantive sovereignty.<sup>1682</sup> Illustratively, the determination of AML/CFTP responsibilities has occurred within a highly politicised space that is characterised by asymmetrical power relations along the Onshore/Offshore axis. Insofar as Commonwealth Caribbean States depend on access to the global financial and payment systems, which are controlled by powerful onshore States, they have had to play by the rules of the game at the expense of their sovereignty and, increasingly, their development sustainability. Thus, modern conceptions of the exclusive territorial competence of the State have never truly reflected the experiences of small post-colonial States within the international legal order. For these

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<sup>1682</sup> Ronzoni, ‘Two Conceptions of State Sovereignty and Their Implications for Global Institutional Design’, December 2012, 581.

States, regulatory self-determination has been historically negotiated with more powerful States and the international institutions that they hegemonically dominate. With over 200 States and jurisdictions committed to implementing the FATF International Standards, the FATF is the ultimately attributor of AML/CFTP responsibilities, backed by G7 and OECD States. It is also true that States are increasingly sharing their policy-making and regulatory authority with non-state actors to achieve policy outcomes,<sup>1683</sup> due to the globalisation of security risks. However, unaccountable transnational actors have assumed normative authority to make Commonwealth Caribbean States render accountable for deficiencies in AML/CFTP compliance with standards that lack a formal or legally binding character. Particularly since both public and private actors influence transnational regulatory decision-making and, ultimately, domestic norms, any assumption of responsibilities by States should operate on the basis of “regulatory self-determination.”<sup>1684</sup> As highlighted, there has been a shift in the locus of AML/CFTP regulatory responsibilities from international treaty law to FATF transnational soft law standards. Resultantly, this has decentred the primacy of the international obligation of developed countries to commit technical assistance to building developing countries’ capabilities to combat money laundering and other economic crimes. Such obligations, as laid out under the Vienna Convention (1988), the Palermo Convention (2000) and UNCAC (2003), have been invariably ignored in discourses on AML/CFTP responsibilities. As indicated, other than encouraging the implementation of relevant international conventions in R.36, the FATF recommendations on international cooperation in criminal matters have been restricted to circumventing financial secrecy and confidentiality laws or legal requirements for dual criminality (R.37); and expeditiously adhering to requests for mutual legal assistance (R.38), extradition (R.29) and information exchange (R.40) from foreign governments. These provisions are likely to benefit onshore regulators and LEAs intent on curbing capital flight, rather than Commonwealth Caribbean States.

‘Regulatory capture’ of transnational AML/CFTP governance, by the FATF and the OECD, has had implications for the proportionality of AML/CFTP responsibilities

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<sup>1683</sup> John Mikler, ‘Sharing Sovereignty for Policy Outcomes’, *Policy and Society* 30, no. 3 (1 September 2011): 151–60, <https://doi.org/10.1016/j.polsoc.2011.07.007>.

<sup>1684</sup> Cafaggi and Pistor, ‘Regulatory Capabilities’, 95.

conferred on Commonwealth Caribbean States. The FATF's rules-based, 'one-size-fits-all', approach that purported to level the playing field for all countries has since been discredited. However, as demonstrated by the staunch critique of the FATF's risk-based approach to combating money laundering and the financing terrorism and proliferation (RBA), it has done little to address normative concerns about the proportionality of AML/CFTP responsibilities vested on developing States. The RBA was developed in response to the 2008 economic and financial crises that were perceived to have resulted from governments' regulatory failure to mitigate systemic risks in financial markets.<sup>1685</sup> Despite conferring gatekeeping responsibilities on the financial services sector for policing ML/FTP risks, the RBA has not materially relieved Commonwealth Caribbean under-resourced governments of the responsibility of financing effective AML/CFTP supervisory, regulatory and law enforcement frameworks. Rather, the simultaneous shift from formalistic technical compliance with FATF standards to effectiveness assessment of AML/CFTP regimes,<sup>1686</sup> has driven up AML/CFTP resource requirements. The RBA has only provided a blueprint for rationalising resources commensurate with the degree of ML/FTP risks identified across sectors and products. The RBA was not intended to rationalise States' AML/CFTP responsibilities. Indeed, there have been calls for the repoliticization of the normative assumptions underpinning the identification, assessment and management of financial risks.<sup>1687</sup> It has been argued that although often presented as "depoliticized financial innovations" that are responsive to 'objective danger', risks are subjective constructions of insecurity, representations of political dictates of what to fear, and by virtue of their incalculability are often accompanied by "a bottomless barrel of demands."<sup>1688</sup> The ever expanding menu of AML/CFTP regulatory demands have far outpaced financial services development in many Commonwealth Caribbean countries. Nonetheless, to avoid reputational sanctions they must increasingly mobilise resources to

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<sup>1685</sup> Nataliya M. Vnukova, Zhanna O. Andriichenko, and Daria D. Hontar, 'The Conceptual Framework for the Formation of a Risk-Based System for Combating Money Laundering, Terrorist Financing, and the Financing of the Proliferation of Weapons of Mass Destruction \*', *Problemy Ekonomiky; Kharkiv*, no. 4 (2018): 208, <http://dx.doi.org/10.32983/2222-0712-2018-4-201-215>.

<sup>1686</sup> Mason, 'Twenty Years with Anti- Corruption. Part 3: The International Journey- From Ambition to Ambivalence'.

<sup>1687</sup> de Goede, 'Repoliticizing Financial Risk'.

<sup>1688</sup> de Goede, 197–98.

combat even low-risk sectors, products and ML/FTP typologies that could otherwise finance sustainable development initiatives.

There is a fundamental need to re-examine how Commonwealth Caribbean States fit into the global threat financing environment and what risks they respectively pose to the transnational AML/CFTP legal order and its objectives. There is also a need to critically engage with questions such as whether non-OFCs such as Jamaica and Trinidad should assume proportionate AML/CFTP responsibilities as the Bahamas? Or, given their respective risk contexts, whether the Bahamas and Jamaica should have to divert strained human and financial resources to target terrorist and proliferation financing if not high-risk, as opposed to Trinidad and Tobago that has the highest per capita rate of foreign terrorist fighters joining ISIL? Or, given that the misuse of non-profit organisations (NPOs) and Islamic charities by terrorist networks and financiers<sup>1689</sup> are low-risk within the region, whether adverse effectiveness ratings should be given for their seemingly poor prioritisation by the Bahamas, Jamaica and Trinidad and Tobago? It is in this context that the author has advanced the principle of common but differentiation responsibilities as a more pragmatic, flexible, and development-centric framework for rationalising AML/CFTP responsibilities in developing country contexts. Any rationalisation of AML/CFTP responsibilities might very well be vulnerable to exploitation by criminals and terrorist financiers. Nonetheless, cost-benefit analyses of AML/CFTP efforts have suggested that costs borne by non-OECD States are a cause for serious concern.<sup>1690</sup> Escalating compliance and reputational costs have also brought the efficiency of the TAMLO into question.<sup>1691</sup> CARICOM countries, for example, have repeatedly decried the “shifting goal posts”<sup>1692</sup> in onshore regulatory expectations as they struggle to strengthen their AML/CFTP regimes.

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<sup>1689</sup> Baradaran et al., ‘Funding Terror’; Gardella, ‘The Fight against the Financing of Terrorism between Judicial and Regulatory Cooperation Articles - General’.

<sup>1690</sup> Harvey, ‘Compliance and Reporting Issues Arising for Financial Institutions from Money Laundering Regulations’; Geiger and Wuensch, ‘The Fight against Money Laundering’; Sharman, ‘Power and Discourse in Policy Diffusion’.

<sup>1691</sup> Tsingou, ‘Global Governance and Transnational Financial Crime: Opportunities and Tensions in the Global Anti-Money Laundering Regime’.

<sup>1692</sup> Caribbean Community (CARICOM) Secretariat, ‘Blacklisting Comes under Microscope at Intersessional’, CARICOM, 18 February 2020, <https://caricom.org/search/blacklist/>.

Also unresolved is normative legitimacy of enforcement responsibilities assumed by powerful States and unaccountable transnational institutional actors within the AML/CFTP legal order, especially against Commonwealth Caribbean States. Transnational AML/CFTP enforcement has been markedly fragmented. The emergence of transnational non-governmental organisations (TNGOs) as key normative actors has challenged state-centrism and legal formalism in regulatory governance.<sup>1693</sup> Undoubtedly, TNGOs have held States to higher standards of probity in public affairs and responsible for mitigating strategic deficiencies in their domestic AML/CFTP regimes. Still, the need for sovereign States to meet the expectations of transnational rating and ranking institutions and networks<sup>1694</sup> whose self-ascribed normative authority may inflict adverse reputational and development harm on small States, is problematic. Institutionally embedded mechanisms for rendering account for deficiencies in compliance with the FATF International Standards, namely mutual evaluation processes or peer reviews, have functioned well at the regional level, under the auspices of the Caribbean Financial Action Task Force. However, Commonwealth Caribbean countries found to have strategic deficiencies in their AML/CFTP regimes have been subjected to enhanced monitoring under the FATF International Cooperation Review Group (ICRG) ‘grey-list’ for high-risk jurisdictions. This has required that they signal high-level political commitment to addressing those deficiencies within agreed plans of action and timetables. Moreover, it is material to the FATF’s enforcement legitimacy that Commonwealth Caribbean States are only Associate Members. Indeed, it seems counterintuitive that Commonwealth Caribbean States have been othered as a threat to the integrity of the global financial system but have not qualified as ‘jurisdictions of strategic importance’ for the purpose of FATF membership. Furthermore, powerful States have unilaterally labelled Commonwealth Caribbean jurisdictions as high-risk using metrics that have yielded diverging results from mutual evaluations. CARICOM, for

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<sup>1693</sup> Peer Zumbansen, ‘Transnational Legal Pluralism’, *Transnational Legal Theory* 1, no. 2 (1 July 2010): 141–89, <https://doi.org/10.1080/20414005.2010.11424506>; Peer Zumbansen, ‘Comparative, Global and Transnational Constitutionalism: The Emergence of a Transnational Legal-Pluralist Order’, *Global Constitutionalism* 1, no. 1 (March 2012): 16–52, <https://doi.org/10.1017/S2045381711000037>.

<sup>1694</sup> Mikler, ‘Sharing Sovereignty for Policy Outcomes’.

example, has rejected as “callous,”<sup>1695</sup> the European Commission’s blacklisting of some Caribbean countries as high-risk jurisdictions for ML/FTP and as non-cooperative for tax purposes, despite their compliance with the FATF standards. They have also repeatedly criticised blacklisting as a veiled foreign policy “incursion on their sovereignty and right to determine the economic and financial pathways to development based on their peculiar circumstances.”<sup>1696</sup>

It is in this context that the study has sought to contribute to the refinement of a coherent conceptual framework on role of coercion in Commonwealth Caribbean States’ compliance with the FATF International Standards. It is submitted that coercion-based explanations have tended to deprive these States of their agency and have delegitimised their demonstrated commitment to discharging their collective responsibility to combat ML/FTP threats. The study, therefore, seeks to offer a more nuanced explanation by arguing that although coercive practices undoubtedly accounted for the diffusion of FATF standards across the Commonwealth Caribbean, it is economic pragmatism that has sustained their implementation. Common forms of resistance to transnational regulatory standards by weaker States such as ‘foot-dragging’, symbolic compliance,<sup>1697</sup> and socialisation,<sup>1698</sup> have not necessarily typified the experiences of Commonwealth Caribbean States. Due to their service-oriented economies, they simply cannot afford to lose access to the global payment and financial systems. It is further submitted that it is not only the threat of reputational sanctions that might account for perceived reluctant acquiescence to FATF International Standards. Rather, it is equally plausible that their perceived anti-development ethos, consequent to regulatory capture by powerful policy elites, may disincentivise transnational AML/CFTP policy ownership. Instructive in this regard, are the following observations on the development and democratic deficits within the TAMLO, by the Honourable Gaston Browne, Prime Minister of Antigua and Barbuda:

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<sup>1695</sup> Sandy Deane, ‘CARICOM Rejects European Commission Blacklist of Caribbean Countries’, Barbados Today, 19 May 2020, <https://barbadostoday.bb/2020/05/19/caricom-rejects-european-commission-blacklist-of-caribbean-countries/>.

<sup>1696</sup> Caribbean Community (CARICOM) Secretariat, ‘Blacklisting Comes under Microscope at Intersessional’.

<sup>1697</sup> Halliday and Carruthers, *Bankrupt*; Halliday and Shaffer, ‘Researching Transnational Legal Orders’; Shaffer, ‘Theorizing Transnational Legal Ordering’.

<sup>1698</sup> Sharman, ‘Power and Discourse in Policy Diffusion’.

Without the inclusion of all member states of the United Nations in the discussions of global financial reforms, there can be no real comprehension of the grave vulnerability of small states... The exclusive clubs of the G7 and G20 cannot repair the fragmented international financial system... Arbitrary rules, set by unrepresentative bodies, for their own narrow purposes, have no legitimacy... [nor does their] enforcement ... by threat and sanctions of the mighty... It results only in ... reluctant acquiescence that lacks enduring support.<sup>1699</sup>

The fact that countries that responded the quickest to FATF backlisting under the NCCTs initiative (2000-2002) were either the wealthiest or those with large services and financial sectors,<sup>1700</sup> such as the Bahamas, gives credence to the economic pragmatism argument being advanced here.

Commonwealth Caribbean States have also appeared to be frustrated with apparent double standards in accountability within the TAMLO. Indeed, the Panama and Paradise Papers scandals implicated several OFCs in complex tax evasion, tax avoidance and, to a lesser extent, money laundering schemes. Money laundering scandals in presumably well-regulated onshore jurisdictions have been unabated. The 1991 scandal involving the Bank of Credit and Commerce International (BCCI), infamously mocked by former CIA Director Robert Gates as “‘the Bank of Crooks and Criminals International,’”<sup>1701</sup> was deemed “‘a scandal of nearly unimaginable proportions.”<sup>1702</sup> In September 2020, the leaked ‘FinCEN Files’ or an estimated 2,121 suspicious activity reports (SARs) filed with the US’ financial intelligence unit between 2000 and 2017, revealed questionably transactions totalling an estimated \$2 trillion.<sup>1703</sup> This is yet another of successive

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<sup>1699</sup> Statement by the Honourable Gaston A. Browne, MP, Prime Minister of Antigua and Barbuda, to the 73<sup>rd</sup> session of the United Nations General Assembly, at the United Nations Headquarters in New York, on Friday 28<sup>th</sup> September 2018.

<sup>1700</sup> Johnson, ‘Repairing Legitimacy after Blacklisting by the Financial Action Task Force’.

<sup>1701</sup> Bill Engdahl and Jeffrey Steinberg, ‘The Real Story of the BCCI’, *Executive Intelligence Review* 22, no. 41 (1995): 15.

<sup>1702</sup> Mark Potts, Nick Kochan, and Robert Whittington, *Dirty Money: BCCI, the inside Story of the World’s Sleaziest Bank*, 1st ed (Washington, D.C: National Press Books, 1992), 27.

<sup>1703</sup> Transparency International, UK, ‘FinCEN Files: Overhaul to Global Anti-Money Laundering System Needed’, Transparency.org, accessed 21 September 2020, <https://www.transparency.org/en/press/fincen-files-overhaul-to-global-anti-money-laundering-system-needed>; Alicia Tatone, ‘Global Banks Defy U.S. Crackdowns by Serving Oligarchs, Criminals and Terrorists: The FinCEN Files Show Trillions in Tainted Dollars Flow Freely through Major Banks, Swamping a Broken Enforcement System’, International

scandals involving large onshore banks,<sup>1704</sup> which have, presumably unwittingly, systematically facilitated criminals and kleptocrats. In 2018, the FATF rated the UK's AML/CFTP regime as one of the most effective in the world. Yet, the 'FinCen Files' revealed that roughly 929 UK shell companies were used in 89 corruption and money laundering cases involving assets totalling £137 billion. These revelations, in the view of Transparency International UK's Chief Executive, Daniel Bruce, are "a damning indictment ... [and] add to the already overwhelming body of evidence of the UK's central role as an enabler of global corruption and money laundering."<sup>1705</sup> Unlike offshore States, onshore jurisdictions in which these regulatory failures repeatedly occur tend to suffer little material or reputational consequences from these scandals. Nonetheless, these onshore States have assumed the moral authority to police States of the Global South that lack resources to effectively comply with transnational AML/CFTP standards on par with advanced financial centres. The argument being advanced here is neither that Commonwealth Caribbean small States are beyond external scrutiny nor that they should be allowed to shirk their collective responsibilities to suppress ML/FTP with effective countermeasures. Rather, the intention is to highlight the need for more accountability, inclusiveness, and transparency in the institutionally embedded processes for rendering of account along the Onshore/Offshore axis, within the transnational AML/CFTP legal order.

### 8.3. What Potential Solutions?

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Consortium of Investigative Journalists, 20 September 2020, <http://www.icij.org/investigations/fincen-files/global-banks-defy-u-s-crackdowns-by-serving-oligarchs-criminals-and-terrorists/>.

<sup>1704</sup> Agustino Fontecchia, 'HSBC Helped Terrorists, Iran, Mexican Drug Cartels Launder Money, Senate Report Says', *Forbes*, 16 July 2012, sec. Investing, <https://www.forbes.com/sites/afontecchia/2012/07/16/hsbc-helped-terrorists-iran-mexican-drug-cartels-launder-money-senate-report-says/>.

<sup>1705</sup> Transparency International, UK, 'FinCEN Files Leak Is More Stark Evidence of the UK's Role in Global Money Laundering and Corruption', 20 September 2020, <https://www.transparency.org.uk/finCEN-files-leak-uk-money-laundering-banks-suspicious-activity-report>.

There is a fundamental need to reaffirm the sovereignty and sustainable development of developing States within transnational AML/CFTP regulatory governance. Supranational regulatory institutional design could potentially resolve political injustice and rebalance the power of States with weak positive sovereignty.<sup>1706</sup> United States' officials have conceded, in relation to the FATF, that “no one would actually design it as it is; but it would be counter-productive to introduce something new.”<sup>1707</sup> In the context of the perceived democratic deficit in FATF rulemaking, Commonwealth Caribbean States have been advocating for a comprehensive United Nations AML treaty. Initial demands by developing countries for such a treaty at the UN Congress on Crime Prevention and Criminal Justice in 2005 in Bangkok were unequivocally rejected by powerful onshore States.<sup>1708</sup> As is the case of the UN Convention against Corruption, developing countries would have likely ensured that the text of any such UN AML convention is replete with references to the respect for state sovereignty and territorial integrity. It is inconceivable that current onshore policy elites would concede the asymmetrical power they wave in enforcing the dynamic FATF's transnational soft law standards against non-FATF Member States. Nevertheless, it is resubmitted that United Nations 2030 Sustainable Development Agenda and Sustainable Development Goals (SDGs) may provide a principled anti-hegemonic framework for streamlining development sustainability principles into transnational AML/CFTP regulatory governance. These policy instruments have not only sought to curb illicit financial flows. They have expressly provided a blueprint for the delivery of more effective, credible, accountable, and legitimate institutional arrangements and democratic decision-making processes for global financial governance. Furthermore, they have reinforced the international community's commitment to capacity-building for, and policy ownership by, developing countries as sustainable development imperatives.

In closing, the mammoth task was undertaken of gauging Commonwealth Caribbean States' subjective perceptions of the legitimacy and fairness of institutional arrangements

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<sup>1706</sup> Ronzoni, 'Two Conceptions of State Sovereignty and Their Implications for Global Institutional Design', December 2012, 574–76.

<sup>1707</sup> Tsingou, 'Global Governance and Transnational Financial Crime: Opportunities and Tensions in the Global Anti-Money Laundering Regime', 17.

<sup>1708</sup> Tsingou, 'Global Governance and Transnational Financial Crime: Opportunities and Tensions in the Global Anti-Money Laundering Regime'.

and decision-making processes within the transnational AML/CFTP legal order, having regard to their state sovereignty and sustainable development. In so doing, the study framed its engagement with these normative questions within a Constructivist account of transnational legal orders (TLOs). This was on account of the recognised usage of the concept of TLOs for anti-hegemonic purposes.<sup>1709</sup> Within this framework, the author was concerned to unpack, expose and problematise the unfettered leveraging of transnational regulatory and enforcement power along the Onshore/Offshore axis. Within the transnational AML/CFTP legal order, the results demonstrated have been the construction and reproduction of deeply penetrative quasi-legal norms; undemocratic institutional arrangements and decision-making processes; and ultimately, the normalisation of the negligible treatment of the sovereignty and development sustainability of small States of geopolitical importance to powerful onshore States. These discursive, legal and policy practices have been pursued on the basis of the securitisation of structural ML/FTP risk factors in the Commonwealth Caribbean Basin. With increasingly sophisticated ML/FTP typologies; transnational criminal and terrorist networks; and the use of professional enablers by kleptocrats; there is a particular urgency for sustaining collective responses to ML/FTP. However, this must be on a more inclusive, transparent, equitable and democratic basis, if developing countries are to effectively participate in the transnational AML/CFTP legal order. In attempting to resolve the main research question, the thesis has shed light on several other perplexing normative questions that remain to be resolved. Indeed, some have no obvious answers and will need to be subjected to further rigorous analysis. This study will, however, provoke deep reflection on the need to urgently revisit some of the fundamental normative and policy assumptions underpinning transnational AML/CFTP regulatory governance. This is particularly true in relation to the exposed development deficit and negligible treatment of small States sovereignty within the transnational AML/CFTP legal order. These findings will be of interest to the Member States of the Caribbean Financial Action Task Force; small developing States elsewhere in Offshore spaces; and progressive members of academia who may wish to further advance an anti-hegemonic reform agenda for the transnational AML/CFTP legal order.

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<sup>1709</sup> Halliday and Shaffer, 'Researching Transnational Legal Orders'.

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