# Beyond Banks: A Case for Interagency Collaboration to Combat Trade-based Money Laundering in Africa

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Regulation regarding trade-based money laundering (TBML) has focused mainly on documentary trade financing arrangements, which are bank intermediated. Yet, African countries predominantly employ alternative forms of trade financing models that span beyond banks' usual purview. These alternative models are supported by many actors across the supply chain that are not holistically supervised given the fragmented regulatory framework at the global and domestic levels. In contending that TBML significantly undermines intra-African trade and therefore amounts to a non-tariff barrier (NTB) to trade, this article challenges the need for globally transplanted solutions to address TBML. Rather, it argues for the introduction of new approach: a country focused experimental legislation that facilitates inter-agency collaboration beyond banks. This approach would ensure a homegrown, responsive, and legitimate framework that encompasses currently un-supervised actors. It contends that if the experimental legislation works at a country level, it may then be cascaded to the African Union level for contextual adaptability across other African countries.

**Keywords**: Trade Financing, Trade-based Money Laundering, Non-Tariff Barrier to Trade, Experimental Legislation, Transplantation, Intra-African Trade.

**INTRODUCTION**

Trade financing is critical to securing the benefits of intra-African trade and advancing the continent's development. Robust trade financing arrangements translate to business booms which occasions economic growth. However, trade-based money laundering (TBML) can undermine such projected benefits.[1] TBML is part of the global money laundering architecture, which also includes laundering through banks or cash. It involves a wilful falsification of price, quality, and quantity of traded goods in the process of trade transactions. Traders involved in TBML utilise this means of laundering either to avoid tax or move proceeds of crime from one jurisdiction to another.[2] To combat this illicit crime, the Financial Action Task Force (FATF), a standard-setting body for anti-money laundering (AML) has issued best practices and guidance papers. While critical in facilitating improved understanding of the challenge, these guidance documents are not sufficiently robust to combat TBML. Consequently, countries have adapted FATF recommendations focused on banks to regulate TBML. Although this helps with documentary financing transactions, it does not take account of intra-African trade financing, which includes open account transactions and other financing mechanisms. Hence, it is critical to advance a suitable regulatory framework for combatting TBML in Africa.

Academic literature and policy discourse have displayed an increasing understanding of TBML's implications for countries and how the extent to which this can be addressed is limited in the absence of a robust regulatory framework that reaches beyond banks. Earlier scholarship by McSkimming considered the need for a measured response that encompassed stakeholders beyond banks.[3] More recent scholars have argued for a global response through the introduction of a new FATF recommendation tailored to addressing TBML and the adaptation of the United States' customs trade data synchronisation framework.[4] However, these scholars have not considered that these frameworks are foreign, global north solutions which may have limited effectiveness in African countries, particularly where the received solutions are neither demanded nor considered suitable to existing legal orders.[5] It is within this context that this article contends that the suggested regulatory frameworks are mismatched and hence, Africa must utilise the existent regulatory space to advance its own agenda and promote a solution-driven framework that is sensitive to the continent's domestic needs.

This article aims to explain the mechanisms of TBML in contemporary debates from an African perspective. Particularly, Nigeria is used as a prism for Africa given the country's economic advancement, market size and continental reach, coupled with the country's exposure to TBML and impact thereof. Recognising that African countries have different legal regimes and approaches, it argues for the utilisation of experimental legislation which strongly aligns with the legislative harmonisation function of the Pan-African Parliament.[6] Experimental legislation refers to the enactment of laws for a pre-determined period of time in derogation of existing

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[1] D Kar and J Spanjers "Illicit Financial Flows from Developing Countries: 2004-2013" (December 2015) *Global Financial Integrity,* available at: <https://secureservercdn.net/45.40.149.159/34n.8bd.myftpupload.com/wp-content/uploads/2015/12/IFF-Update_2015-Final-1.pdf> (accessed 2 December 2020).

[2] FATF "Trade-Based Money Laundering" (23 June 2006) *FATF*, available at: <https://www.fatf-gafi.org/media/fatf/documents/reports/Trade%20Based%20Money%20Laundering.pdf> (accessed 3 December 2020).

[3] S McSkimming "Trade-Based Money Laundering: Responding to an Emerging Threat" (2010) 15/1 *Deakin Law Review* 37, available at: <https://ojs.deakin.edu.au/index.php/dlr/article/view/116/116> (accessed 3 December 2020).

[4] A.E. Iyanda "The Threat of Trade-Based Money Laundering to the African Continental Free Trade Area" (2018) 2/2 *Journal of Anti-Corruption Law* 141, available at: <http://www.jacl.org.za/docman-menu/21-iyanda/file.html> (accessed 3 December 2020).; R.S. Delston and S.C. Walls "Strengthening Our Security: A New International Standard on Trade-Based Money Laundering Is Needed Now" (2012) 44/3 *Case Western Reserve Journal of International Law* 773 at 34, available at: <https://scholarlycommons.law.case.edu/jil/vol44/iss3/28/> (accessed 3 December 2020).

[5] D Berkowitz, K Pistor and J.F. Richard "The Transplant Effect" (2003) 51/1 *The American Journal of Comparative Law* 163 at 167.

[6] African Union, "The Pan-African Parliament", available at: < https://au.int/en/pap > (accessed 20 November 2021).

laws, and subject to periodic or final evaluation.[7] The enacted law is 'tested' or evaluated on a small scale to determine its conformity with stipulated outcomes, its effects and side effects.[8] Where the laws are sufficiently proven to be suitable, they can be made more long-lasting and widely binding. Arguably, experimental legislation facilitates an evidence-based understanding of local circumstances to support the eventual AfCFTA NTB protocol on TBML. Supported with technology and necessary trainings to ensure robust implementation, the eventual framework can be cascaded to the African Union level for contextual adaptation by AfCFTA signatory countries.[9]

In highlighting the article's core arguments, this article builds on developing literature on curbing TBML and flips the angle of analysis from developed to developing jurisdictions to appreciate the loopholes that often-adopted perspectives may not appreciate. To this end, this article is divided into five sections. The first establishes the nexus between trade finance, Africa's development and TBML. It contends that the significant implications of TBML on intra-African trade qualifies it as a NTB to trade, which requires adequate attention. The second section highlights the limitations of the global and domestic frameworks for addressing TBML. These frameworks are overwhelmingly focused on banks and have a fragmented regulatory structure for inter-agency collaboration. The third section appraises proposals for global TBML regulation and analyses implications for Africa. The fourth section recommends experimental legislation that contextualises local realities and positions Nigeria as a global exporter of TBML legislation. The last section draws it all together and concludes.

[7] Sofia Ranchordas, "The Whys and Woes of Experimental Legislation" (2013) 1/3 Theory and Practice of Legislation 415 – 440, available at: <https://pure.rug.nl/ws/portalfiles/portal/53174440/TPLEG_Ranchordas.pdf> (accessed 20 November 2021).
[8] Ibid.
[9] AfDB "Africa must develop relevant knowledge for its problems" (2014) *African Development Bank*, available at: < http://www.afdb.org/en/news-and-events/article/africa-must-develop-relevant-knowledge-for-its-problems-13692/ > (accessed 16 January 2021) .

**Trade Financing, Africa's Development, and the Trade-based Money Laundering Nexus**

Generally, trade involves a range of risks for importers and exporters. The former is concerned with non-delivery and the latter with non-payment, valid concerns that catalyse tensions along supply chains and have adverse implications for parties to a transaction. Trade financing addresses these tensions by providing access to finance for businesses to mitigate payment risks.[10] Zammitt observes that "the function of trade financing is to act as a third-party in removing the payment and supply risks, whilst providing the exporter with accelerated receivables and the importer with extended credit".[11] This service has economic implications for businesses, as optimally functioning financing can spur the expansions of global value chains and their contribution to employment and productivity.

The African Union's Agenda 2063 (The Agenda), the continent's blueprint for transformation into a powerhouse, emphasises the correlation between trade financing and development.[12] The Agenda prioritises increased access to trade financing for indigenous small, medium and micro enterprises (SMMEs) to accelerate labour intensive, value-added manufacturing and productivity.[13] Such prioritisation demonstrates The Agenda's recognition of trade finance as an engine for Africa's development, given its ability to facilitate trade, economic growth, inclusion and poverty reduction.[14] The Agenda's aspirations align with the African Continental Free Trade Area Agreement (AfCFTA)'s objectives which is to achieve economic prosperity through a single continental market movement of goods, services and persons.[15] A major objective of the AfCFTA is to eliminate trade barriers and facilitate market access for goods.[16] With Africa's unmet demand for trade financing at $90 billion annually, the extent to which the continent can reap the benefits of intra-African trade is questionable.[17] Consequently, continental bodies are working assiduously in partnership with commercial banks to close the financing gaps.[18]

Traditionally, trade financing via commercial banks happens through complex techniques such as documentary credits or collections.[19] Both financing methods involve a heightened level of accountability and due diligence given the bank's guarantee of, or involvement in documentary exchange.[20] However, with barriers to documentary financing for African trade, many businesses resort to alternative financing methods which are not necessarily intermediated by banks in the same manner and hence, are less secure against money laundering. For instance, at least 80% of businesses utilise open account trading (OAT), where goods are shipped and

[10] A Malaket "How Trade Finance Works" in A. Klasen (ed) *The Handbook of Global Trade Policy* (2019, John Wiley & Sons Ltd.) 468.

[11] Global Trade Review "Tailor-Made Trade Finance Solutions to Optimize Business Growth" (21 January 2019) *Global Trade Review*, available at: <https://www.gtreview.com/magazine/volume-17-issue-1/tailor-made-trade-finance-solutions-optimise-business-growth/> (accessed 3 December 2020).

[12] The African Union Commission "Agenda 2063: The Africa We Want" (September 2015) *The African Union Commission*, available at: <https://au.int/sites/default/files/documents/36204-doc-agenda2063_popular_version_en.pdf > (accessed 3 December 2020).

[13] Ibid.

[14] Malaket "How trade finance works", above at (n10) 469; GL Clementi and HA Hopenhayn "A theory of financing constraints and firm dynamics" (2006) 121/1 *The Quarterly Journal of Economics* 229, available at: <https://doi.org/10.1093/qje/121.1.229> (accessed 3 December 2020).

[15] African Union "Agreement Establishing the African Continental Free Trade Area" *African Union,* available at: <https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf> (accessed 2 December 2020).

[16] C. Bellmann and A.V. Tipping "The Role of Trade and Trade Policy in Advancing the 2030 Development Agenda" (2015) 6.2 *International Development Policy,* available at: <https://journals.openedition.org/poldev/2149#tocfrom1n2> (accessed 2 December 2020).

[17] S Wass "Lack of Trade Finance Will Limit Benefits of Africa Free Trade Deal" (28 March 2018) *Global Trade Review*, available at: <https://www.gtreview.com/news/africa/lack-of-trade-finance-will-limit-benefits-of-africa-free-trade-deal/> (accessed 2 December 2020).

[18] AfDB "Trade finance in Africa: Trends over the Past Decade and Opportunities Ahead" (18 September 2020) *AfDB Group*, available at: <https://www.afdb.org/en/documents/trade-finance-africa-trends-over-past-decade-and-opportunities-ahead> (accessed 2 December 2020).

[19] Malaket "How Trade Finance Works", above at (n10) 475.

[20] Ibid.

delivered before payments are due.[21] With OAT, banks are not financing the trade, so their involvement is minimised. Businesses also use cash in advance payments or black-market peso exchanges (BMPEs) amongst other techniques.[22] BMPEs were originally used by drug cartels to circumvent traditional banking institutions and some brokers who facilitated laundering were middlemen in such transactions. Such brokers usually have various accounts, in different currencies, across different jurisdictions. They can thus buy "dirty money" from launderers at a commission and resell to actual traders without the funds crossing any borders. In some instances, brokers make payment on behalf of buyers, which hinders tracing as there is a disconnect between the buyer, seller, and bank. Consequently, banks channel payments for the broker, which restricts their ability to get a robust picture of ongoing transactions or conduct strong CDD on persons that are not customers. These alternative instruments heighten TBML occurrences.

Trade financing benefits for intra-African trade will continually be curtailed by TBML.[23] As highlighted, it entails deliberate over-invoicing or under-invoicing of transactions to avoid tax or levies and move proceeds of crime.[24] Collectively, these schemes involve the irregular pricing of goods as the true value of exports or imports deviate from that declared to authorities. In the extreme, an exporter may engage in multiple invoicing, phantom shipping – where no goods are shipped despite complete documentation processing via banks, manipulation of shipping values and falsely described goods.[25] Many forms of TBML involve a collusion between traders that entails capital transfer via banks. Multinationals may also act unilaterally through their engagement in transfer pricing.[26] TBML transactions are usually obscured by surrounding legitimate economic activities and further complicated by multiple actors and jurisdictions. Arguably, from an African-wide economics perspective, moving laundered funds from one country to another, whilst criminal, is unproblematic as it does not distort the continent's earnings. However, from a socio-political perspective, each country has its priorities, targets and projections which TBML could distort.

TBML has severe socio-economic implications for intra-African trade. At its core, it misallocates credit and compromises access to finance, which undermines Africa's macroeconomic progression and The Agenda's attainment.[27] Legitimate businesses may face unfair competition because of launderers dumping imported goods at discounted prices.[28] Similarly, TBML can undermine domestic production, which long-term, can dwarf and crowd out legitimate businesses from the market. Arguably, TBML institutes barriers against legitimate entrepreneurship and the growth of same. TBML also causes governments to lose foreign investment and tax, thereby reducing the resources they can allocate. For example, between 2010 and 2014, South Africa reportedly lost $16.3 billion to import under-invoicing and $11.5 billion to export under-invoicing, a significant loss in government revenue.[29] These

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[21] The Wolfsberg Group, International Chamber of Commerce and BAFT "Trade Finance Principles" (2017) *The Wolfsberg Group, International Chamber of Commerce and BAFT*, available at: <https://www.wolfsberg-principles.com/sites/default/files/wb/pdfs/comment-letters/6.%20Trade-Finance-Principles-Wolfsberg-Group-ICC-and-the-BAFT-2017.pdf> (accessed 2 December 2020).

[22] T Hataley "Trade-based Money Laundering: Organized Crime, Learning and International Trade" (2020) 23/3 *Journal of Money Laundering Control* 651, available at <https://doi.org/10.1108/JMLC-01-2020-0004> (accessed 2 December 2020).

[23] Kar and Spanjers "Illicit Financial Flows from Developing Countries: 2004- 2013", above at (n) 1.

[24] Ibid.

[25] Ibid.

[26] C Goredema "Trade Based Money Laundering: A Shady Side of Globalization" *Institute for Security Studies*, available at: <https://issafrica.org/amp/iss-today/trade-based-money-laundering-a-shady-side-of-globalisation> (accessed 10 December 2020).

[27] The United Nations "Sustainable Development Goals – Goal 17: Revitalize the Global Partnership for Sustainable Development" *The United Nations* 17.4, available at: <https://www.un.org/sustainabledevelopment/globalpartnerships/> (accessed 2 December 2020).

[28] M Boyrie and J Nelson "Capital Movement through Trade Misinvoicing: The Case of Africa" (2007) 14/4 *Journal of Financial Crime* 474 at 475.

[29] Global Financial Integrity "South Africa: Potential Revenue Losses Associated with Trade Misinvoicing" (November 2018) *Global Financial Integrity*, available at: <https://secureservercdn.net/45.40.149.159/34n.8bd.myftpupload.com/wp-content/uploads/2018/11/South-Africa-Report-2018.pdf?time=1610720540> (accessed 11 January 2020).

losses signify TBML's attractiveness to criminals, magnified by the continent's uncontrolled capital flight issues which obstruct trade financing.[30] Within Africa, recorded losses amount to significant reduction in trade financing, currently at a gap of $82 billion.[31] This represents a barrier, significantly slowing or preventing trade. Ibrahim Zeidy agrees that "lack of trade finance is a significant barrier that can limit the full potential of the AfCFTA".[32]

Long-term, TBML can destabilise local manufacturing, facilitate terrorism and undermine trade finance, inadvertently limiting the import and export volume.[33] In effect, it acts as a NTB to trade. NTBs are often viewed as acts of government through policies or measures that increase the cost of trade or serves as an impediment to trade.[34] In the absence of clear definitions on NTBs, scholars define them as rules and regulations that pose barriers to trade between countries.[35] These are usually typified as any border control unrepresentative of tariff measures, such as rules on labelling, bans, quotas, licensing, and safety standards on products or domestic subsidies.[36] However, more generally, these are impediments to free and fair international trade.[37] The AfCFTA defines NTBs more broadly as barriers that impede trade through mechanisms other than the imposition of tariffs. AfCFTA's use of 'other' in listing types of NTBs recognises the non-exhaustive nature of what classifies as a trade barrier. Arguably, AfCFTA's approach is steeped in regional perspectives as the Southern African Development Community (SADC) defines NTBs as 'any obstacle to international trade that is not an import or export duty'[38] In effect, NTBs need not constitute an act of government commission but can also be an omission.[39] NTBs are not necessarily protectionist, but rather represent unregulated trade spaces/crimes within the trade process. Left unaddressed, TBML can significantly undermine Africa's developmental trajectory.[40]

The nexus between trade finance and TBML is not novel - yet it has implications for intra-African trade. For instance, the FATF's 2006 typologies report included regulatory body interview responses on trends of laundering through trade financing.[41] Eleven of nineteen respondents from financial intelligence units revealed that TBML incidences included trade financing documentary products. Subsequent reports have emphasised the TBML techniques that occur outside documentary products and even outside the banking sector.[42] Consequently,

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[30] J Draper "Finding the Achilles' Heel of Trade-based Money Laundering" *Bae Systems*, available at: <https://content.baesystems.com/banking-insights-trade-based-money-laundering/landing-826J-1278ZT.html> (accessed 17 December 2020).

[31] E Nyantakyi and L Drammeh "African Economic Brief: Covid-19 Pandemic" (2020) 11/6 *African Development Bank* 1 at 4.

[32] IA Zeidy "The Role of Trade Finance in Promoting Trade: The Implications of Covid-19 on Trade Finance in Africa" *Common Market for Eastern and Southern Africa*, available at: <https://www.tralac.org/documents/resources/covid-19/regional/3908-the-role-of-trade-finance-in-promoting-trade-implications-of-covid-19-on-trade-finance-in-africa-comesa-special-report-july-2020/file.html> (accessed 18 December 2020).

[33] JS Zdanowicz "Trade-Based Money Laundering and Terrorist Financing" (2009) 5/2 *Review of Law and Economics* 855, available at: <https://www.cullencommission.ca/data/exhibits/361%20-%203%20Zdanowicz%20Article%20Trade%20Based%20Money%20Laundering.pdf> (accessed 17 December 2020).

[34] J Beghin "Nontariff barriers" (Centre for Agricultural and Rural Development, Working Paper 06-WP 438, December 2006) 1.

[35] Ibid.

[36] G Felbermayr, K Luisa and Y Erdal "Hidden Protectionism: Non-Tariff Barriers and Implications for International Trade" (December 2017) *Ifo Centre for International Economics*, available at <https://www.econstor.eu/bitstream/10419/176888/1/ifo_Forschungsberichte_91_2017_Yalcin_etal_Protectionism.pdf> (accessed 17 December 2020).

[37] Beghin "Nontariff barriers", above at (n34).

[38] Southern African Development Community 'Non-Tariff Barriers', available at: < https://www.sadc.int/pillars/non-tariff-barriers > accessed 11 September 2022).

[39] UK Parliament "Chapter 5: Non-Tariff Barriers" *Parliament.uk,* available at: <https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/129/12908.htm> (accessed 17 January 2021).

[40] UNCTAD, "Online Tool to Remove Trade Barriers in Africa Goes Live" (January 2020) UNCTAD, available at <https://unctad.org/news/online-tool-remove-trade-barriers-africa-goes-live > (accessed 1 April 2021)

[41] FATF "Trade-Based Money Laundering" (23 June 2006) *FATF*, available at: <https://www.fatf-gafi.org/media/fatf/documents/reports/Trade%20Based%20Money%20Laundering.pdf> (accessed 3 December 2020).

[42] R Delston and S Walls "Reaching Beyond Banks: How to Target Trade-based Money Laundering and Terrorist Financing Outside the Financial Sector" (2009) 41/1 *Case Western Reserve Journal of International Law* 75 at 87.

the FATF reports, and The Agenda[43] have emphasised the need to close the disconnect between "trade and the money used to finance it", a disconnect launderers exploited to mitigate their risk exposure.[44] Many reports have highlighted the enormous scale of risk, as the African Union loses $67 billion annually to illicit financial flows.[45] In 2020, the Global Financial Integrity (GFI) estimated that Sub-Saharan Africa lost approximately $22.6 billion between 2008-2017.[46] The GFI and the African Union agree that trade mis-invoicing represents the bulk of IFFs, with the GFI estimating this as 80%,[47] making Africa the region with the highest propensity for TBML.[48] Ferwada et al find that TBML is strictly proportional to trade flows, as countries with high trade volumes are more exposed to criminals who take advantage of their simplified procedures and low transaction costs.[49] Indeed, this raises concerns in light of projections for a significant increase in intra-African trade following the AfCFTA's commencement.

UNECA *High-Level Panel on Illicit Financial Flows from Africa* has emphasised that TBML is a critical area of concern for African countries.[50] The negative implications of TBML reveal an alignment between policies targeted at facilitating access to finance and combating money laundering. In the absence of policy conflict, there is need for a more targeted framework for addressing TBML. Consequently, the next part of this article will focus on the global and domestic regulatory frameworks for TBML.

## Current Framework and Proposals for Addressing TBML

- *International Framework for Addressing Trade Based Money Laundering*

At the global level, the International Chamber of Commerce (ICC) governs trade financing using several model rules. The Uniform Customs and Practice for Documentary Credits (UCP 600), which sets standardised banking procedures for such payments when incorporated by the contact, governs documentary credit payments.[51] The Uniform Rules for Collection governs documentary collections. [52]Paradoxically, there is no reference to money laundering principles in these documents even though international and domestic trades offer myriad opportunities for moving assets and converting them into money.[53] Although not fatal, this can be ascribed

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[43] The African Union Commission "Agenda 2063: The Africa We Want. A Shared Strategic Framework for Inclusive Growth and Sustainable Development - First Ten-Year Implementation Plans 2014-2023", above at (n12).

[44] Asia/Pacific Group on Money Laundering "APG Typology Report on Trade-based Money Laundering" (20 July 2012) *Asia/Pacific Group on Money Laundering*, available at: <http://www.fatf-gafi.org/media/fatf/documents/reports/Trade_Based_ML_APGReport.pdf> (accessed 2 December 2020).

[45] African Union "Domestic Resource Mobilization: Fighting against Corruption and Illicit Financial Flows" (2019) *African Union*, available at: <https://au.int/sites/default/files/documents/37326-doc-k-15353_au_illicit_financial_flows_devv10_electronic.pdf> (accessed 2 December 2020).

[46] Global Financial Integrity "Trade-Related Illicit Financial Flows in 135 Developing Countries: 2008 - 2017" (March 2020) *GFI*, available at: <https://secureservercdn.net/45.40.149.159/34n.8bd.myftpupload.com/wp-content/uploads/2020/03/GFI-Trade-IFF-Report-2020-Final.pdf?time=1610720540> (accessed 2 January 2021).

[47] The Financial Crime News "Trade Based Money Laundering in Sub-Saharan Africa by FCN" *The Financial Crime News.Com*, available at: <https://thefinancialcrimenews.com/wp-content/uploads/2020/08/Trade-Based-ML-in-SSA-by-FCN-2020-.pdf> (accessed 2 December 2020).

[48] Global Financial Integrity "Illicit Financial Flows to and from 148 Developing Countries: 2006 - 2015" (January 2019) *GFI*, available at: <https://www.gfintegrity.org/wp-content/uploads/2019/01/GFI-2019-IFF-Update-Report-1.29.18.pdf> (last accessible 6 January 2020).

[49] J Ferwada, M Kattenberg, H Chang, B Unger, L Groot and J Bikker "Gravity Models of Trade-based Money Laundering" (2013) 45/22 *Applied Economics* 3170 at 3171.

[50] UNECA "Track It! Stop It! Get it! Illicit Financial Flows – Report of the High-level Panel on Illicit Financial Flows from Africa" *UNECA*, available at <https://repository.uneca.org/bitstream/handle/10855/22695/b11524868.pdf?sequence=3&isAllowed=y> (accessed 2 December 2020).

[51] J Ulph, "The UCP 600: Documentary Credits in the 21st Century" (2007) 4 *Journal of Business Law* 355, available at: <https://www.researchgate.net/publication/30053492_The_UCP_600_documentary_credits_in_the_twenty-first_century> (accessed 17 January 2021).

[52] The Uniform Rules for Collection (1996 Revision), ICC Publication No. 522.

[53] Ibid.

to varying procedural challenges. For instance, money laundering is subject to domestic law which varies by jurisdictional implementation and perspectives.[54] Fundamentally, it is odd to include criminal laws which are subject to legislative changes within a code for banking practice which is focused on how legitimate transactions are conducted. Nevertheless, Ulph contends that acknowledging the challenges posed by money laundering in the introduction to the UCP600 would have been useful.[55]

This gap is exacerbated by the sparseness of the framework tailored to address TBML, despite overwhelming acknowledgement of trade transactions as a vehicle for legitimising proceeds of crime.[56] Delston and Walls contend that neither the United Nations conventions (the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the 2000 UN Convention Against Transnational Organised Crimes [UNTOC]) nor the FATF's recommendations contain express obligations for countries to address TBML.[57] In 2017, the United Nations Office on Drugs and Crimes recognised that "the Global Programme against Money Laundering, Proceeds of Crime and the Financing of Terrorism … is yet to pay adequate attention to Trade-Based Money Laundering …" even though the "comparatively unregulated global trade system offers significant opportunities for money laundering".[58] This reveals the dearth of regulatory specificity on TBML at the global level. Instead, reliance has been placed on a broad range of implicit requirements in the UNTOC, the United Nations Convention Against Corruption,[59] FATF provisions[60] and sectoral typologies,[61] which are inadequate in combatting TBML because they provide inadequate guidance on legislation and implementation. Consequently, regulation has been chequered, with various actors acting separately.

Seeking regulatory oversight of the various trade actors, the FATF has spotlighted TBML through typologies and best practices reports.[62] Belated recognition of TBML came in from 2006, by way of the FATF's typologies report,[63] a TBML Best Practice Paper in 2008,[64] a 2010 report on Money Laundering Vulnerabilities of Free Trade Zones[65] and a 2020 Trends and Development Report.[66] Collectively, these reports highlight the vulnerabilities associated with the misuse of the trade system and have brought about a series of non-binding guides on TBML.

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[54] Ulph, "The UCP 600: Documentary Credits in the 21st Century", above at (n51).
[55] Ibid.
[56] FATF "International Best Practices: Detecting and Preventing the Illicit Cross-Border Transportation of Cash and Bearer Negotiable Instruments" (19 February 2010) *FATF*, available at: <https://www.fatf-gafi.org/media/fatf/documents/recommendations/International%20BPP%20Detecting%20and%20Preventing%20illicit%20cross-border%20transportation%20SR%20IX%20%20COVER%202012.pdf> (accessed 13 December 2020).
[57] Delston and Walls "Strengthening our Security: A New International Standard on Trade-Based Money Laundering Is Needed Now", above at (n 4)740.
[58] UNODC "Independent In-Depth Evaluation of the Global Programme Against Money Laundering, Proceeds of Crime and the Financing of Terrorism 2011 - 2017" (2 October 2017) *UNODC*, available at: <https://www.unodc.org/documents/evaluation/indepth-evaluations/2017/GLOU40_GPML_Mid-Term_In-Depth_Evaluation_Final_Report_October_2017.pdf> (accessed 13 December 2020).
[59] United Nations "Twelfth United Nations Congress on Crime Prevention and Criminal Justice" (12 -19 April 2010) *United Nations*, available at: <https://undocs.org/pdf?symbol=en/A/CONF.213/8> (accessed 10 December 2020).
[60] No express requirement exists for reporting or for trade-based documents analysis. See FATF "The FATF Recommendations" (October 2020) *FATF,* available at: <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf> (accessed 1 January 2021).
[61] Clyde & Co "Trade Based Money Laundering (TBML) Risk in the Freight Forwarding and Customs Broking Sectors" (24 December 2020) *Clyde & Co*, available at: <https://www.clydeco.com/en/insights/2020/12/trade-based-money-laundering-tbml-risk-in-the-frei> (accessed 1 January 2021).
[62] See FATF "The FATF Recommendations", above at (n60).
[63] FATF "Trade-Based Money Laundering", above at (n 41).
[64] FATF "Best Practices on Trade-Based Money Laundering" (20 June 2008) *FATF*, available at: <https://www.fatf-gafi.org/media/fatf/documents/recommendations/BPP%20Trade%20Based%20Money%20Laundering%202012%20COVER.pdf> (accessed 10 January 2020).
[65] FATF "Money Laundering Vulnerabilities of Free Trade Zones" (March 2010) FATF, available at: <https://www.fatf-gafi.org/media/fatf/documents/reports/ML%20vulnerabilities%20of%20Free%20Trade%20Zones.pdf> (accessed 3 December 2020).
[66] FATF – Egmont Group "Trade-Based Money Laundering: Trends and Developments", (December 2020) FATF, available at: < https://www.fatf-gafi.org/media/fatf/content/Trade-Based-Money-Laundering-Trends-and-Developments.pdf> (accessed 5 November 2021).

Primarily, the FATF reports highlight the need for enhanced awareness and streamlined training for relevant authorities outside banking, including customs agencies, tax authorities and law enforcement agencies.[67] Fundamentally, the reports propose policy adaptations to ensure inter-agency coordination and international cooperation built on relevant data. The FATF reports also share "red flag indicators" and encourage relevant actors to utilise them in the war against TBML specific to trade finance. They advise on the training of regulators and training on processes and procedures for handling trade finance risks. Core to the suggestions is the need for increased awareness and knowledge of TBML across relevant private sector organisations and competent authorities. While it has been over a decade since the initial typologies report, the 2020 report reiterated these proposals. However, in comparison to other reports, it strongly highlighted the link between trade finance and TBML and called for inter-agency group coordination, increased understanding, and public-private partnerships.

Irrespective of the miles covered by these sector-specific guides, scholars agree that the reports, and best practices-based regulatory approaches are inadequate[68] because they are optional, whereas national legislations, pursuant to the FATF recommendations are arguably obligatory in nature. Hatchard underscores that whilst on its face value – the FATF recommendations are non-mandatory requirements as countries have the option of whether to implement a strategy – this is not necessarily the case.[69] Rather, embedded in the language of the FATF is the continual use of 'should' as opposed to 'may'.[70] The General Glossary of FATF 2012 Recommendation clarifies that '*should has the same meaning as must'*.[71] Accordingly, FATF's recommendations are indeed requirements.[72] Moreover, the recommendations also subject countries to assessments and sanctions for non-compliance.[73] Consequently, there is the contention that the FATF has failed to produce a recommendation even with scholarly guidance provided.[74] This challenge is further exacerbated by the fact that of the three avenues for laundering identified - through the financial system, cash, and TBML - there is limited emphasis on TBML.[75] Arguably, such gap can spur criminal activities within this realm[76] as policy makers who rely heavily on the FATF's lead to frame their AML responses are currently apathetic to TBML regulation. However, the reluctance of the FATF can be attributed to the implementation cost of a TBML regulatory framework, which may even be greater than the transactions costs. Indeed, reports have attributed the FATF's stance to the associated cost and logistical difficulty associated with regulating trade.[77]

In the absence of a binding and tailored FATF recommendation on TBML, bank-focused recommendations which are arguably limited in scope have been utilised.[78] In other words, the extant FATF recommendations applicable to banks have been adapted to combat TBML. These include Customer Due Diligence (CDD)[79] and reporting requirements. CDD entails an appraisal of customer identity, business history and pattern, principal counterparties alongside

[67] FATF "Trade-Based Money Laundering", above at (n 41).
[68] Delston and Walls "Strengthening our Security: A New International Standard on Trade-based Money Laundering Is Needed Now", above at (n 4)740.
[69] J Hatchard, "Combating Money Laundering in Africa: Dealing with the Problem of PEPs" (*Edward Elgar*, 2020) pp 57-58.
[70] Ibid.
[71] Ibid.
[72] Ibid.
[73] N Azinge-Egbiri, "Regulating and Combating Money Laundering and Terrorist Financing" (*Routledge*, 2021) pp 113.
[74] Ibid.
[75] FATF "Trade-based Money Laundering", above at (n 41).
[76] Delston and Walls "Reaching Beyond Banks: How to Target Trade-Based Money Laundering and Terrorist financing outside the Financial Sector", above at (n 42) 85 at 87.
[77] Sullivan and Smith "Trade-Based Money Laundering: Risks and Regulatory Responses", above at (n29).
[78] FATF "Best Practices on Trade-Based Money Laundering" above at (n 64).
[79] FATF "The FATF Recommendations", above at (n 60).

countries of business partners. Where a CDD suggests reasonable suspicion of financial crime, banks are expected to report suspicious transactions to the appropriate regulatory body. While critical in uncovering the source of a trader's repayment of funds in trade financing arrangements, research suggests that CDDs are usually paper based. This means criminals can use sophisticated techniques to bypass the assessment process by falsifying documents.[80] This is worsened because documents are not standardised and information on pricing is inaccessible.[81] Fundamentally, recognising suspicious transactions within trade transactions would also require banks to engage in the physical examination of the shipping processes.[82] This would be practically unworkable for banks, as it would involve active monitoring of various stages of supply chain processes, particularly the exportation, importation and transportation of goods. This would amount to a "heavy lifting exercise for banks".[83] With shipment of goods worth $14 trillion annually, banks will be in the dark as to actual shipping contents which amount to millions of containers.[84] Should this remain the responsibility of banks, the cost of accessing financing would be increased. This will inevitably be passed onto the traders, becoming a barrier to trade.[85] This is why the UCP model laws recognise that banks do not deal with goods.[86] Indeed, this signals the need for a synchronised supervisory amongst the necessary actors in the supply chain process.

The utilisation of bank-focused recommendations is underlined by the assumption that documentary financing is central to trade financing arrangements. However, these financing models have been displaced as the central means of securing trade transactions. Current estimates are that they are utilised in less than 15% of world trade.[87] Similarly, findings reveal that in Africa, documentary finance accounts only for 18% of intra-African trade.[88] The significantly low documentary financing level suggests the overwhelming reliance on inter-firm trade credit through OATs, cash-in advance transactions, non-financial companies' intermediation and even BMPE.[89] The Wolfsberg report revealed that TBML operates beyond the realm of conventional trade finance but encapsulates any process of money transfer.[90] Within Africa, alternative financing thrives partly because factors such as low client creditworthiness, and insufficient collateral hinder documentary financing uptake.[91] However, with OATs and BMPEs, banks have limited visibility of such payments as a settlement of trade transactions. The implication is that many transactions obscure TBML, drastically eliminating banks from the process of due diligence.[92] Despite this, monitoring controls are concentrated on documentary financing[93] and remain oblivious to other payment typologies, an inefficient risk/resource allocation.[94]

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[80] Delston and Walls "Strengthening our Security: A New International Standard on Trade-Based Money Laundering Is Needed Now", above at (n 4)741.
[81] The Wolfsberg Group, International Chamber of Commerce and BAFT "Trade Finance Principles", above at (n21).
[82] Asia/Pacific Group on Money Laundering "APG Typology Report on Trade-based Money Laundering", above at (n44).
[83] Ibid.
[84] BAFT "Combating Trade-based Money Laundering: Rethinking the Approach" (August 2017) *BAFT*, available at: <https://baft.org/docs/default-source/marketing-documents/baft17_tmbl_paper.pdf> (accessed 17 December 2020).
[85] Arguably, banks may internalise the cost by passing through the cost of checks to clients. In such circumstances, it would not be a barrier to trade.
[86] UCP Model Rule 4.
[87] BAFT "Combating Trade Based Money Laundering: Rethinking the Approach", above at (n 81). This data suggests that regulating TBML is not just an intra-African concern and indeed, highlights a gap at the global level that is needed to address this loophole. Nevertheless, in light of AfCFTA, the need for a continental framework cannot be ignored.
[88] African Development Bank Group "Trade Finance in Africa: Trends over the Past Decade and Opportunities Ahead", above at (n15).
[89] The Wolfsberg Group, International Chamber of Commerce and BAFT "Trade Finance Principles", above at (n21).
[90] Ibid
[91] Ibid.
[92] M Naheem "Trade Based Money Laundering: A Primer for Banking Staff" (2016) 14/2 *International Journal of Disclosure and Governance* 95 at 109.
[93] BAFT "Combating Trade-based Money Laundering: Rethinking the Approach", above at (n84).
[94] Ibid.

Furthermore, regulatory reliance on banks as gatekeepers overlooks alternative means of TBML which operate outside the purview of banks. This oversight poses significant challenges for enforcement officers. The myopic insights of banks in trade transactions unravels an unsuitable regulatory framework that is fundamentally incapable of addressing TBML within intra-African trade. This has occasioned questions about whether the FATF is the appropriate forum to set regulatory standards on TBML given its gapping inconsistencies.[95] There is also concern that compelling traders to go through the same regulations as other actors within laundering avenues may be costly and logistically difficult,[96] thus amounting to a trade barrier. Nevertheless, the role of banks in combatting TBML cannot be undermined but must be synchronised with other actors and relevant institutions.

- *Domestic Framework for Addressing Trade Based Money Laundering*

The global framework has largely influenced the domestic framework for addressing TBML, as countries predominantly focus on documentary financing options. In practice, with any trade financing arrangements, the appropriate departments within banks usually check compliance with the ICC uniform standards and international banking practice, which are different from AML checks. [97] Unlike AML, trade-based checks do not require detailed examination of all documents presented. Furthermore, thorough AML processes, such as CDD, are dependent on the risk-based approach of the bank in question,[98] which is largely determined by the domestic law and the effectiveness of the concerned jurisdictional framework.

Similar to the global framework, there is a failure to respond to the risks of TBML even with the scale of alternative financing options where the applicability of CDD and reporting requirements would prove ineffective. Rather, there is continued insistence on this approach.[99] This adaptation of a possibly mismatched framework that fails to look beyond documentary financing and banks generally is problematic in combating TBML.

Due to the overwhelming focus on banks, attempts at a holistic approach to address TBML in African countries, one which inculcates other financing methods and supply chain actors, have been fragmented. This can be illustrated through Nigeria's regulatory framework.[100] For instance, whilst there are various actors involved in the process of TBML, ranging from manufacturers, shippers, importers, exporters, accountants, and freight forwarders alongside regulators, such as customs, these actors are subject to dissipate regulatory framework. The applicable laws include the Banks and Other Financial Institutions Act, 2020,[101] the Money Laundering (Prohibition) Act 2011, the Economic and Financial Crimes (Establishment) Act 2004,[102] the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act 1995[103] and the Customs and Excise Management (Amendment) Act 1995[104].

However, the synergy between the laws and resulting regulatory agencies are weak. One example is that like the Foreign Exchange Act, the Customs Act criminalises failure to declare

[95] McSkimming "Trade-Based Money Laundering: Responding to an Emerging Threat", above at (n3) 49.
[96] Iyanda "The Threat of Trade-based Money Laundering to the African Continental Free Trade Area", above at (n) 4)153.
[97] Ibid; Financial Conduct Authority "Banks' Control of Financial Crime Risks in Trade Finance" (July 2013) *Financial Conduct Authority*, available at: <https://www.fca.org.uk/publication/thematic-reviews/tr-13-03.pdf> (accessed 2 December 2020).
[98] Ibid.
[99] Hataley "Trade-Based Money Laundering: Organized Crime, Learning and International Trade", above at (n 19).
[100] Arguably, from a methodological standpoint, Nigeria is not reflective of many African countries. However, the Pan-African Parliament is a diffusing point as it allows countries harmonize laws and engage in peer learning which can lead to contextual laws within other African countries.
[101] Section 66 of the Banks and Other Financial Institutions Act, 2020.
[102] The Economic and Financial Crimes (Establishment) Act, 2004.
[103] The Foreign Exchange (Monitoring and Miscellaneous Provisions) Act, 1995.
[104] The Customs and Excise Management (Amendment) Act, 2003.

proposed exported funds exceeding $10,000 to customs.[105] Infractions are reported to two regulators, the Central Bank of Nigeria and the Economic and Financial Crimes Commission (EFCC). These regulatory agencies have different reporting formats, resulting in an overly rigorous and cumbersome regulatory process. Furthermore, the role of the EFCC as an AML investigator, overlaps with the role of the Independent Corrupt Practices and Other Related Offences Commission (ICPC).[106] Rather than encouraging cooperation, this overlap may result in competition, which can undercut avenues for crime. Conversely, competition may hinder efforts in combatting TBML given the lack of clarity of the roles of the varying bodies – hence, significant loopholes maybe left unaddressed. A significant challenge is the absence of direct dealings between the Special Control Unit against Money Laundering (SCUML), the agency responsible for the AML regulation of designated non-financial business dealers, on the one hand, and financial institutions and customs on the other hand.[107] Yet SCUML supervises precious metal and stones dealers, goods that can be subjected to TBML.

Even when agencies or private sector business work together, combatting TBML is not at the forefront of their considerations. For example, the Customs Authorities work closely with the trade finance departments of banks for payments of duties and taxes. Similarly, bank officials may inspect goods with Customs Authorities to rule out the importation of contraband goods. This relationship is not necessarily AML-focused but one of payment and verification. Furthermore, whilst Customs Authorities engage in semi-automated scanning of goods, intelligence is not shared with relevant actors.[108] Describing this phenomenon, a staff of a regulatory agency observed that "all the parties (regulators) are sitting by different banks of the river, assuming it is not flowing…or they cannot swim in it. Custom Authorities alongside other public/private agencies believe they should focus on their roles and the financial intelligence unit doesn't seem to intervene".[109] The absence of inter-agency collaboration is attributed to the cultural context of the country where formal hierarchy thrives.[110] Bureaucracy limits collaboration, as request or permissions must be in writing. In a country where records are largely paper based and difficult to verify, information sharing is more complex.[111] This is antithetical to combatting TBML.

The fragmented regulatory framework within some African countries provides some insight into Africa's regional attempt at intra-agency collaboration. For example, the customs authorities of some African countries have commenced cross-border electronic data exchange. Pioneering this movement, the East African Community (EAC) single customs territory, which includes Burundi, Kenya, Rwanda, Tanzania, and Uganda, works to ensure an interconnected customs system within the regional union.[112] This framework facilitates streamlined clearance of goods, tax payment at the first point of entry and a declaration at the destination. Goods in transit are monitored by a cargo tracking system to facilitate faster clearance, efficient revenue

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[105] Sec 12 of the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act 1995.

[106] J Harvey, "Are Promised Changes to Nigeria's Anti-corruption Architecture Built on Sand?" (28 September 2020) *ACE Global Integrity,* available at: < https://ace.globalintegrity.org/are-promised-changes-to-nigerias-anti-corruption-architecture-built-on-sand/ > (accessed 29 April 2021).

[107] J Harvey, "Tracking Beneficial Ownership and the Proceeds of Corruption: Evidence from Nigeria" Interim Project Report, Northumbria University, Newcastle, (November 2020) <https://ace.globalintegrity.org/wp-content/uploads/2020/11/FCDO-project-Interim-Report-Final.pdf > (accessed 29 April 2021).

[108] E Akabogu "Dangerous Ignorance of Nigeria's Customs Boss" (23 August 2020) *LinkedIn*, available at: <https://www.linkedin.com/pulse/dangerous-ignorance-nigerias-customs-boss-emeka-akabogu/> (accessed 17 December 2020).

[109] Muazu Umaru "An Overview of the AML/CFT Framework in West Africa: The Role of GIABA as a Regional Initiative" (Annual Lecture on Anti-Money Laundering Regimes in NILE University of Nigeria, November 2021).

[110] J Harvey, "Are Promised Changes to Nigeria's Anti-corruption Architecture Built on Sand?" above (n106).

[111] Ibid.

[112] C Torgusson, C Paradi-Guilford, *et al* "A Single Digital Market for East Africa" (2018) *World Bank Group*, available at: <http://documents1.worldbank.org/curated/en/809911557382027900/pdf/A-Single-Digital-Market-for-East-Africa-Presenting-Vision-Strategic-Framework-Implementation-Roadmap-and-Impact-Assessment.pdf> (accessed 17 December 2020).

management and data collection. This is crucial to curtail TBML, given its projected ability to uncover trade mis-invoicing and curtail tax evasion. Attempts to sustain or replicate this framework across other regions, especially West Africa has proved challenging.[113] Whilst commendable, this is not a holistic approach to addressing TBML.

**Limitations to Proposals for Facilitating an Inter-Agency Driven Approach to Addressing TBML**

In light of the challenges highlighted in the global and domestic frameworks, proposal by Iyanda alongside Delston and Walls that are focused on facilitating an inter-agency regulatory approach to TBML can be divided into two categories. First, Trade Transparency Unit (TTU) framework adoption by the African Union, and secondly, the introduction of a new FATF recommendation on trade to facilitate interagency collaboration. This section explores the challenges with the adaptability of these proposals particularly considering their contextual unsuitability and legitimacy concerns.

- *Feasibility of the Trade Transparency Unit (TTU) in Africa: Data Limitations*

One key proposal is for the African Union to "mimic" the United States by establishing a Trade Transparency Unit (TTU) that mandates trading partners to exchange necessary information for analysing trade transactions.[114] Iyanda contends that the workability of the TTU is an intervention best achieved through a unified legal framework and common policies that are binding on all African Union member states.[115] The TTU, which is lauded for its ability to rely on historical trade data to identify anomalies that are indicative of TBML, is poised to spur voluntary trade-related information exchange between regulatory bodies across borders. Suggestions to transplant the TTU is based on its successes in the United States, where trade data analysis and information sharing have proved critical in spotlighting trade anomalies and combating TBML.[116] However, any such adaptation to intra-African trade must be considered with respect to its cost effectiveness, relative to the trade volume and harm posed, as well as Africa's data mining capacity and reliability.

TTU's practicality is largely dependent on the availability of reliable trade data to exchange. However, Africa's data reliability has been questioned. In the 1990s, Yeats described Africa's trade data as unavailable, unprecise, and inaccurate, and therefore unusable in determining trade composition or direction.[117] These concerns reverberate in recent literature. Deaton and Miller find that data from Africa is usually incomplete, error-ridden, and inconsistent across authorities.[118] Underlining these challenges are problems that flow from colonial policies that remain embedded in African economic law and policy.[119] Colonial accounting systems were designed to capture African resources expropriated to the Global North, consequently intra-

[113] The MultiMedia Group "GCNet Facilitates Implementation of First Port Duty Rule" (12 March 2019) *MyJoyOnline*, available at: <https://www.myjoyonline.com/gcnet-facilitates-implementation-of-first-port-duty-rule/> (accessed 17 December 2020).
[114] FATF "Best Practices on Trade-Based Money Laundering", above at (n 63); Iyanda "The Threat of Trade-based Money Laundering to the African Continental Free Trade Area", above at (n 4)159.
[115] Iyanda "The Threat of Trade-Based Money Laundering to the African Continental Free Trade Area", above at (n 4) 160. Note that the socio-economic context of African countries varies but transplantation across regional lines is usually stronger.
[116] Ibid.
[117] A Yeats "On the Accuracy of Economic Observations: Do Sub-Saharan Trade Statistics Mean Anything?" (1990) 4/2 *World Bank Economic Review* 135 at 153.
[118] A Deaton and R Miller "International Commodity Prices, Macroeconomic Performance, and Politics in Sub-Saharan Africa" (October 1995) *International Finance Section*, available at: <https://rpds.princeton.edu/sites/rpds/files/media/deaton_miller_international_commodity_prices_macroeconomic_performance_and_politics_puisf1995.pdf> (accessed 15 January 2021).
[119] C Schuster and J Davis "Old Dog, New Tricks? The Fitness of Mirror Trade Analysis to Detect Illicit Financial Outflows from Africa" (September 2020) *United Nations Conference on Trade and Development*, available at: <https://unctad.org/system/files/non-official-document/EDAR_2020_background_paper_2_en.pdf> (accessed 15 December 2020).

African trade was unrecorded. The long-lasting effect is trade data asymmetry. For instance, until 2008, the export statistics of Uganda were calculated at the port of Mombasa, Kenya.[120] This had been the case since the colonial era and the result was that calculations ignored intra-African trade. Vestiges of colonial legacies ensured that this continued post-independence.[121] Arguably, this illustrates a path of dependence alongside challenges in changing old practices. This explains why Sierra Leone did not include land border trade in reported statistics and about 11 African countries were frequently excluded from the countries to report trade.[122] This illuminates the disparities in recording trade data across countries, creating an additional layer of complexity whilst undermining analysis on intra-African trade patterns and techniques. It also explains why findings from the UNECA's *High Level Panel* on Illicit Financial Flows focused on outward as opposed to continental TBML.

Data scarcity complications precede border processes. Banks have insufficient data on trade financing processes[123] and staff of bonded warehouses reportedly connive to undermine data through the theft of uncleared goods.[124] Wealthy mining companies exploit the scarcity of available geological information in the continent by acquiring private information about reserves and governments, thereby spurring information asymmetries within the sector.[125] The significant data gaps in the continent further impede robust data collection on mineral resources, such as gold or other high value commodities in Africa, making the extractive sector prone to TBML.[126] With the AfCFTA, the potential of this risk is higher, coupled with the challenges in identifying the origin, destination, direction and composition of trade. Existing statistics do not readily provide this information.

Africa's data has remained on a seesaw of challenges due to capacity challenges. The full scale of informal legitimate trade in Africa, though recognised due to its customs duties and immigration requirements, is unrecorded.[127] This problem persists irrespective of the importers' goods declaration and detailed custom procedures. Audit trails simply disappear, meaning that data is not collected rigorously at borders. This undermines the usefulness of partner-country trade gap analysis for TBML inferences linked to intra-African trade. A key recommendation is that trade data gaps be addressed, potentially with the appendages of experimental legislation.

Jerven attributes these challenges to the dearth of data mining and management capacity across Africa's borders.[128] Such a problem has undermined EAC's ability to entrench its electronic data exchange model.[129] Challenges that burden this programme include unsynchronised data transmission between revenue and port authorities, incomplete system interface, and

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[120] M Jerven "On the Accuracy of Trade and GDP Statistics in Africa: Errors of Commission and Omission" (2013) 1 *Journal of African Trade* 45 at 50.
[121] K Head, T Mayer and J Ries "The Erosion of Colonial Trade Linkages after Independence" (2010) 81 *Journal of International Economics* 1 at 11.
[122] Jerven "On the Accuracy of Trade and GDP Statistics in Africa: Errors of Commission and Omission", above at (n120).
[123] D Prosser "The Continued Shortfall in Combatting Trade Based Money Laundering" (21 December 2020) *Arachnys*, available at: <https://www.arachnys.com/the-continued-shortfall-in-combatting-trade-based-money-laundering/> (accessed 1 January 2021).
[124] P Opoku, JJ Torso, E Amponsah, and HK Duah "To Investigate, Evaluate and Analyse the Challenges and Prospects of Bonded Warehouses" (2019) 7/1 *European Journal of Research and Reflection in Management Sciences* 35, available at: <http://www.idpublications.org/wp-content/uploads/2019/01/Full-Paper-TO-INVESTIGATE-EVALUATE-AND-ANALYSES-THE-CHALLENGES.pdf> (accessed 1 January 2021).
[125] African Union and UNECA "Impact of Illicit Financial Flows on Domestic Resource Mobilization: Optimizing Revenues from the Mineral Sector in Africa" (January 2017) *African Minerals Development Centre*, available at: <https://www.uneca.org/archive/sites/default/files/PublicationFiles/impact_of_illicit_financial_flows_-_april_2017_-_web.pdf> (accessed 4 January 2021).
[126] Ibid.
[127] Jerven "On the Accuracy of Trade and GDP Statistics in Africa: Errors of Commission and Omission", above at (n120) 49.
[128] Ibid.
[129] Tabitha "Experience in Cross-Border Electronic Data Exchange in East African Community (EAC) Single Customs Territory (SCT)", above at (n145).

inapplicability of this programme to other actors such as air cargo carriers.[130] Fundamentally, relevant staff lack the necessary capacity and ability to gather or utilise data collected to uncover TBML.[131] This problem is worsened by the complexity of TBML techniques, lack of infrastructure for - and cost of trade monitoring and the various currencies used in trade transactions.[132] The World Bank recognises that the EAC's model is not sufficiently advanced, neither is there a comprehensive approach to trade information to harness the benefits of the automated model.[133]

Whilst these challenges undermine official statistics[134] and limit estimations of TBML, reactionary responses may be disproportionate, misinformed, or biased. In simple terms, the current data challenges present a serious obstacle to any control moving forward. Arguably, these challenges indicate the limitations of a TTU's wholesale transplantation.

Proportionality is critical in determining the AfCFTA's "mimicked" response to TBML. In comparison to the United States, Africa's trade volume is remarkably low.[135] In 2019, intra-African trade was estimated as $2.8 billion in import and export,[136] whereas between 2015 – 2017, export alone from US amounted to $5,150 billion, which significantly trumps intra-African trade.[137] The volume of US trade indicates its vulnerability to TBML and its consequent TTU adoption. Furthermore, the US has long utilised data processing to streamline trade data which is largely formal. It does not address Africa's prevalent informal trade. Whilst the cost of instituting a TTU framework is unknown, it includes software and machinery, as well as trained officials and inter-agency cooperation. African countries will struggle with these, especially small landlocked countries with minimal international trade. Indeed, this approach may lack the proportionality required to address the threat posed, given the current trade volume and data challenges vis-à-vis the regulatory cost implications.[138]

At present, some African countries are facilitating digitalised on-site inspection of containers.[139] However, this cannot be a comprehensive response, given the delays, lack of cooperation, exorbitant cost, and other needed resources. Fundamentally, such screening exercises do not deter TBML, given their limitations in unveiling the price discrepancies,

[130] World Bank Group "Kenya: Issues in Trade Logistics" (July 2005) *World Bank Group*, available at: <http://documents1.worldbank.org/curated/en/330211468047096946/pdf/477830WP0KE0Tr10Box338866B01PUBLIC1.pdf> (accessed 10 December 2020).

[131] Schuster and Davis "Old Dog, New Tricks? The Fitness of Mirror Trade Analysis to Detect Illicit Financial Outflows from Africa", above at (n 119).

[132] Congressional Research Service "Trade Based Money Laundering: Overview and Policy Issues" (22 June 2016) *Congressional Research Service*, available at: <https://www.everycrsreport.com/reports/R44541.html> (accessed 10 December 2020).

[133] The World Bank "World Development Indicators" (2014) *The World Bank*, available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/18237/9781464801631.pdf?sequence=1&isAllowed=y> (accessed 10 January 2021).

[134] P Reuter "Introduction and Overview: The Dynamics of Illicit Flows" in P Reuter (ed) *Draining Development? Controlling Flows of Illicit Funds from Developing Countries* (International Bank for Reconstruction and Development, 2012).

[135] Note that this comparison is in light of Iyanda's recommendation for Africa's adaptation of the US model. However, instituting a TTU would require a cost benefit analysis of the gains from the system vis-a-vis the cost of not having it. E.g.: *impact on lost trade revenues or indirect economic costs of TBML.*

[136] Trade Law Centre "Summary of Intra-Africa Trade 2019" (2019) *Trade Law Centre (TRALAC)*, available at: <https://www.tralac.org/documents/publications/trade-data-analysis/3982-summary-intra-africa-trade-2019/file.html> (accessed 14 December 2020).

[137] United Nations Conference on Trade and Development "Press release: Facts & Figures" (2019) *United Nations Conference on Trade and Development (UNCTAD)*, available at: <https://unctad.org/press-material/facts-figures-0> (accessed 14 December 2020).

[138] McSkimming "Trade-Based Money Laundering: Responding to an Emerging Threat", above at (n 3) 57.

[139] United Nations Conference on Trade and Development "Economic Development in Africa Report 2019: Made in Africa – Rules of Origin for Enhanced Intra-African Trade" (29 October 2019) *United Nations Conference on Trade and Development (UNCTAD)*, available at: <https://unctad.org/system/files/official-document/aldcafrica2019_en.pdf> (accessed 14 December 2020).

quantity, or payment model. Combatting terrorism or its financing is too critical a responsibility to entrust to foreign custom agents.[140]

Improving Africa's trade statistics is crucial for integration and transparency, which are important for combatting TBML. Yet, adopting the TTU wholesale is arguably premature, in the absence of an enabling framework for replicated successes. To overcome this challenge, African countries should consider pre-conditions for effective data mining and analysis, as well as legislative frameworks for inter-agency collaboration for data sharing.

- *A New FATF Recommendation?*

The second proposal calls for a new FATF recommendation on TBML. This "41st recommendation" would encompass necessary trade financing options and trade actors along the supply chain.[141] Although the FATF's recommendations are designated as "soft law", they can be binding in nature, particularly through international organisations "conditionalities".[142] Consequently, it expected that the 41st recommendation would mandate developing countries that depend on aid from international organisations to pass legislation on TBML that would curtail relevant actors from abusing the trade architecture. Expansive coverage is projected to enable collaborative and enhanced inspection while ensuring that all actors pay close attention to the AML/CFT standards. Commentators have advanced the argument that this recommendation would be a nuanced method given its risk-based approach, and consequently will facilitate global recognition of the problem and cascade domestic support globally.[143] Arguably, Africa's alignment with this binding recommendation would represent a hegemonic subjection of the continent to global standards which are ill-timed and ill-suited for the continent and has trade hindering implications.

If similar to the extant 40 recommendations, the 41st recommendation will not be sufficiently inclusive if it does not incorporate the voices or experiences of African countries in its making. For instance, the conceptualisation of the new recommendation is based on an examination of TBML's impact on the United States.[144] Yet, the recommendation will place an onus on African countries to give such recommendations the force of law, by imbedding them into their national laws and systems and ensuring implementation. Consequently, African countries will have little leeway to contest or amend the recommendations, irrespective of its effect on their domestic affairs, inter alia, trade policies and ML/TF regulation.[145] This scenario is symptomatic of a legitimacy deficit which has implications for the acceptability of, and compliance with the recommendations.

Legitimacy concerns go to the root of the FATF's existence and membership. Originating from the G7 countries, the FATF's membership still only includes "strategically important countries" which are predominantly developed countries.[146] Such closed group participation

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[140] Delston and Walls "Strengthening our Security: A New International Standard on Trade-Based Money Laundering Is Needed Now", above at (n 4) 742.
[141] Ibid. Including, importers, exporters, transporters, freight forwarders, shipping, air courier and multinational corporations.
[142] S Ghoshray "Compliance Convergence in FATF Rulemaking: The Conflict between Agency Capture and Soft Law" (2015) 59/3 *New York Law School Law Review* 521 at 530.
[143] Delston and Walls "Strengthening our Security: A New International Standard on Trade-Based Money Laundering Is Needed Now", above at (n 4) 740.
[144] Ibid.
[145] See also other literature on hegemony on world trade, Purdue, "Hegemonic Trips: World Trade, Intellectual Property and Biodiversity" (1995) 4 (1) *Environmental Politics* 88.; Mattoo and Staiger, 'Trade Wars: What Do they Mean? Why are they Happening Now? What are the Costs? (2019) *NBER Working Paper Series* 25762.
[146] FATF "FATF Membership Policy" *FATF*, available at: <http://www.fatf-gafi.org/about/membersandobservers/fatfmembershippolicy.html> (accessed 23 January 2021).

has resulted in a membership asymmetry with core members as the rule makers and developing countries (largely African countries) as the rule takers.[147] Rule takers are usually rendered reticent in the decision-making processes that results in the FATF recommendations.[148] Yet they are coerced into compliance and suffer the consequences of non-participation during the transplantation processes. Given the absence of ownership, inclusiveness and procedural fairness, the rule takers do not consider the FATF legitimate.[149] A plausible implication of this legitimacy crisis is that rule takers are unable to engage with the FATF's standard proactively, particularly given that they do not consider the standards to be in their best interest, or suitable to their local circumstances. Instead, countries may engage in sham compliance, a strategy attributable to discursive power-based mechanisms, a combination of direct coercion and mimicry.[150] This means that compliance is not out of will, but rather due to force or to replicate the successes of their developed counterparts, even in the absence of pre-conditions for effective regulation.

Nigeria's last minute legislative response to avert sanctions exemplifies a "sham" compliance given that it did not necessarily agree with the initiatives.[151] Sham compliance does not remain undetected because countries are subject to periodic assessments which unveils loopholes or gaps in compliance claims which cannot be substantiated. Whilst many developed countries also fall short on compliance, all sanctioned countries in the recent assessments are developing countries, including African countries.[152] A glaring pattern is how the FATF's sanctioning regime fails to capture the deficiencies in developed economies but focuses disproportionately on penalising developing countries. Consequently, the legitimacy of the sanctioning process is also questionable.

Scholars have strongly argued that as the institution is an epistemic authority, the FATF and its standards are built on expertise and not membership politics.[153] Arguably, this position is blindsided to the politics of the workings of the institution and its effect on African countries. The non-inclusiveness of the FATF can stifle the compliance of developing countries. Hence, expertise in the absence of legitimacy is problematic. Emphasising the need for soft law bodies like FATF to gain acceptability, Weber argues that perceived institutional legitimacy translates to improved compliance.[154] This buttresses the fact that a legitimate body will foster dialogue and reciprocal exchange of information where persuasion would be wielded as opposed to coercion. Against this backdrop, it is crucial to examine the extent to which laws can be transplanted in a manner that stimulates proactive compliance, particularly when a legitimacy crisis looms.

Legal comparativists have engaged in a discourse on the practicality of transplanting foreign laws developed in substantially varied socio-economic order. Berkowitz et al contend that

[147] Mark C. Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' [1995] 20 (3) Academy of Management Review 571, 588.
[148] Jason Campbell Sharman, "Power and Discourse in Policy Diffusion: Anti-Money Laundering and Developing Countries" (2008) 52 *International Studies Quarterly* 635, 644.
[149] D Bodansky, "The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?" (1999) 93 (3) *American Journal of International Law* 596.
[150] DW Drezner's *All Politics is Global: Explaining International Regulatory Regime* (2007, Princeton University Press) at 75.
[151] M Oloja "Nigeria Rushes to Avert Sanction over Money Laundering Law" (27 September 2012) *The Guardian*, available at: <http://odili.net/news/source/2012/sep/27/16.html> (accessed 10 March 2020).
[152] However, in the Fourth Round of evaluations 24 additional jurisdictions have received at least "one" low rating for an immediate outcome but have not been highlighted as a risk or required by the FATF to make progress. Of these 24 countries, the majority are not developing countries and 9 countries are FATF members: Austria, Canada, China, Denmark, Finland, Mexico, Saudi Arabia, Singapore and the United States.
[153] Dieter Kerwer and Rainer Hulsee, 'How International Organisations Rule the World: The Case of the Financial Action Task Force on Money Laundering' (2011) 2 *Journal of Int'l Stud.* 50, 55; Frank Vibert, 'Reforming International Rule-Making' [2012] 3 (3) *Global Policy* 391, 392.
[154] I Max Weber, *Economy and Society* (Guenther Roth & Clau Wittich eds., 1968).

where factors such as neo-colonialism dictate the demand for foreign laws, the effectiveness of the transplanted law or requisite institution will be weak.[155] In such instances, the received legal order maybe substantially mismatched with the local order, given the social, economic, and institutional contextual differences that create fundamentally different conditions for imported legal order to work. Conversely, homegrown demand for laws which are adaptable to local conditions of the implementing states facilitate the practical use and effectiveness of such laws.[156] Responsive laws will occasion strong enforcement institutions, particularly when complementary to pre-existing orders.[157] Demand, suitability and comparable interpretation of transplanted law within the host state will ensure its functionality and elicit voluntary compliance.

Fundamentally, where laws are developed locally through a process of trial and error, innovation and correction with stakeholder participation, they are better suited to the country in question and the legal institutions tend to be highly effective.[158] This explains why the effectiveness of the FATF 40 recommendations have remained marginal, whether categorised as successful in disrupting criminal finance and illegal activities, or in terms of greater benefit for the society which overrides the cost of regulation itself. Thus, although transplantation may lead to improved compliance ratings, proactive compliance levels are neither unusually high nor low, illustrating that states are merely concerned with achieving minimum acceptable standards.

Other scholars however posit that treaties and conventions can be easily transplanted, since they are rooted in negotiations amongst countries and reflective of general interests. They argue that given the convergence of countries to address AML, such laws cannot be designed in isolation. Barak-Erez contends that AML legislation are not necessarily "mimicked", as it is expected that the international model or conventions can lead to similar laws in host countries.[159] These arguments fail to consider the legitimacy crisis that plagues the FATF and its limited ability to spur compliance. According to Legrand, exclusion restricts host states (which in this case are African countries) from realising the originators' vision of their world.[160] This legitimacy deficit hinders the originator's ability to decipher how its circumstances differ from the host states. Instead of organising diversity of discourse around varying cultural forms, what is noticed is a crowding toward uniformity.[161] As it stands, the FATF and its processes lack the necessary legitimacy, thus the inclusion of a 41st recommendation would not automatically facilitate proactive compliance.

An appraisal of the proposed recommendations for inter-agency collaboration reveals possible adaptability challenges and hinderance for intra-African trade. Therefore, this article advocates an experimental legislative response, tested in Nigeria, Africa's largest market and political power, which can then be cascaded to other countries via the Pan-African Parliament. Arguably, this prepares the continent for a robust treatment of TBML as a NTB. An experimental legislative approach varies from binding international responses which come with pressures that shift the continent's focus from responding to non-voluntary transplantation to

[155] Berkowitz, Pistor and Richard "The Transplant Effect", above at (n5).
[156] Ibid.
[157] Ibid at 168.
[158] African Development Bank "Africa must Develop Relevant Knowledge for its Problems" (2014) *African Development Bank*, available at: <http://www.afdb.org/en/news-and-events/article/africa-must-develop-relevant-knowledge-for-its-problems-13692/> (accessed 16 January 2021). L Spataru-Negura "Exporting Law or the Use of Legal Transplants" (2012) 2 *Challenges of the Knowledge Society* 812 at 819. Stakeholders include traders, relevant regulatory authorities, etc.
[159] D Barak-Erez "The International Aspects of Comparative Law" (2008) 13 *Colum. J.Eur.L.* 477, 484.
[160] P Legrand 'The Impossibility of Legal Transplants' (1997) 4 *Masstricht Journal of European. & Comparative Law* 111 at 114. – Originator refers to the Global North.
[161] Id at 118.

addressing material homegrown issues.[162] The rest of this article discusses experimental legislation as a tool for inter-agency collaboration in combatting TBML and facilitating intra-African trade.

**A Case for an Experimental Legislative Response**

As highlighted above, TBML regulation needs to move beyond banks and encompass other relevant agencies and actors. Proposals to facilitate this within African countries would however prove challenging and may hinder intra-African trade. Furthermore, whilst the categorisation of TBML as a NTB warrants the subjection of TBML to trade rules that restrict NTBs, it is albeit premature given the current limited understanding on TBML within a fluid framework. Consequently, this article advocates for an experimental legislative framework which would ensure an inter-agency collaborative approach to combatting TBML. This legislative framework needs not be prematurely instituted by the entire African Union countries. A good starting point would be the country with the largest market and political power – Nigeria. An improvement of Nigeria's framework may provide a learning curve for an African-centred regulatory framework which other countries may contextualise to suit their local circumstances - whilst maintaining the spirit of the law.

Experimental legislation, which have been successfully adapted in environmental and technology law, is important because it results in responsive and contextual laws that are grounded in empirical methodology.[163] Practically, it entails legislative gathering of information on the nature of the underlying problem, through consultation, impact assessment and evaluations that incidentally accords legitimacy to the resulting legislation.[164] The resulting legal rules are then tested for effectiveness on a small-scale and within a timeframe, prior to their full implementation throughout the entire country. Given the elasticity of financing methods alongside the varying actors involved in the process of TBML, there are "uncertainties", which experimental legislation would address. This is largely because such legislative processes allow countries to engage in trials, gather information and evidence to support their choices whilst allowing them to learn from their mistakes – with the aim of improving the legislation's quality. Arguably this approach which is new to Nigeria's legislative processes and TBML alike is a first step toward suitable and lasting legislations. Indeed, experimental legislation aligns with the theoretical argument that internally developed laws that go through a process of trial and error, are more likely to be highly effective.[165]

While seemingly comparable to the usual legislative processes, they are distinct. Conventional legislations are somewhat experimental, however, as legislators cannot predict the effects of laws, amendments are critical to meet necessary changes. However, experimental legislations work in the reverse as, post drafting, it is usually passed for a limited time-period to test its real-world impact prior to enactment, if considered effective. This process helps reduce cognitive biases and misperceived risks between the regulator and the regulated.[166]

Underlying an experimental legislation agenda is the need for an automated, risk based, goods valuation and compliance checks that go beyond paper processes. Such framework will aim to categorise transaction risk, utilise digitalised bill of lading to extract information such as

[162] Only few African Countries legislated on AML/CFT prior to the FATF Recommendations. See the Ethiopian Anti-Terrorism Law of 1954; The Penal Code No. 85 of the Arab Republic of Egypt 1937, which contains AML/CFT provisions in Articles 86 – 102.
[163] Rob Van Gestel and Gijs van Dijck, "Better Regulation through Experimental Legislation" (2011), Eur.Pub. L 539, on.542, 546
[164] D Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' see note above 140.
[165] Berkowitz, Pistor and Richard "The Transplant Effect", above at (n 5) 167.
[166] Rob Van Gestel and Gijs van Dijck, "Better Regulation through Experimental Legislation" (2011), above 163.

business history with the bank or third parties, tracked vessel information, country of origin risk, amongst other relevant information.[167] This process allows automated checks on inflated prices, beneficial owners, abnormality of transactions and all objects so related. Automated check through algorithms will require public, private sector collaboration on data synchronisation to turn the tide against illicit trade. Such information would enable relevant actors identify and assess information, trends and anomalies indicative of TBML schemes. It would also help claw back revenues where mis-invoicing is detected through audits and reviews. Investment in capacity building for the requisite officials is critical to achieve this. Indeed, this can only be built on the back of a holistic regulation of TBML that mandates the use of this framework as a condition precedent for exports/imports. The regulatory framework will need to incorporate a sanctions structure to deter private actors from engaging in trade abuses within intra-African trade. Furthermore, it must mandate information sharing amongst competent authorities, automated goods screening and valuation, continental data sharing and analysis.[168] Indeed, the success of inter-agency collaboration is dependent on its enhancement through simplified technology such as artificial intelligence, cloud and blockchain.[169]

Training is required to ensure relevant staff of custom agencies, tax authorities and financial intelligence units, amongst others comply with the regulatory framework. Training should span research-based policies, procedures, and internal controls to enable collaboration on reporting and documenting anomalies digitally. Such training must encompass cross-country data analysis and sharing, a critical step to addressing TBML and ensuring that multinationals and businesses pay their taxes.[170] To circumvent the inordinate focus on banks, training must go encompass other stakeholders.[171]

There are concerns that simply increasing regulation to address TBML via OAT, for instance, is not economically viable.[172] However, an experimental homegrown strategy would enable a first-hand understanding of the threat posed, to ensure a proportionate remedy. This is because it would emerge from internal research and understanding of local circumstances. The approach would ensure a tailored regulatory framework suited to national and possibly continental challenges. Arguably, Nigeria's eventual legislation may cascade a contextually framed African-centred regulatory approach.

**Conclusion**

This article provides a novel approach for addressing TBML in Nigeria, a prism through which this menace can be regulated continentally. It argues for a holistic regulation instituted through experimental legislation, that allows for contextual adaptability prior to enactment. Such approach is advanced largely because of its ability to facilitate inter-agency collaboration and enhance the use of technology to address data challenges whilst circumventing a hegemonic imposition of a foreign agenda.

The argument of this article builds on the recognition that whilst trade financing is critical for enhancing intra-African trade, the projected benefits can be undermined by TBML. Currently,

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[167] Arguably, this system will depend on robust IT systems and data networks – which is growing across African countries. However, for countries with weak digitalised frameworks, there is a need to build these systems first.
[168] FATF, "Trade-Based Money Laundering", above at (n 41).
[169] BIS "Trade Finance TechChallenge", available at: <https://www.bis.org/hub/hk_techchallenge.htm> (accessed 10 December 2020).
[170] In line with FATF "Best Practices on Trade-based Money Laundering", above at (n 64). The Wolfsberg Group, International Chamber of Commerce and BAFT "Trade Finance Principles", above at (n21).
[171] Delston and Walls "Reaching Beyond Banks: How to Target Trade-Based Money Laundering and Terrorist financing outside the Financial Sector", above at (n 42) 107.
[172] FATF "The FATF Recommendations", above at (n 60).

regulations focus on documentary financing via banks, wherein due diligence is required. Whilst critical, use of documentary financing in Africa is quite weak. Most financing is done via OATs, cash advance, or black-market peso exchanges. Furthermore, beyond banks, there are a host of other actors along the supply value chain that can be complicit in TBML that are not captured by the regulatory framework. In addition, regulators are not able to checkmate TBML due to the fragmented regulatory framework that does not enhance inter-agency collaboration. This article contends that proposed recommendations to address TBML do not consider the enumerated challenges. Furthermore, the recommendations risk creating a hegemonic agenda with the transplantation of standards that are not contextually suited to local circumstances.

Consequently, this article contends that a holistic regulation of TBML that can synchronise the islands of regulatory data is required. Indeed, this would put Africa at the forefront of regulatory exportation.