The Evolution of Anti-Money Laundering and Anti-Terrorism Financing (AML/ATF) Regime in Malaysia

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ABSTRACT: Money laundering is regarded as the world's third largest industry, after international oil trade and foreign exchange. In 2009, the United Nations Office on Drugs and Crime (UNODC) has estimated that the total amount of money being laundered has reached USD 1.6 trillion. The extent of the problem has led to many legal and regulatory efforts at international and national levels to curb the crime. In the Malaysian context, the government has taken preventive measures in combating money laundering by introducing the Anti-Money Laundering Act in July 2001 and its amendment in 2003. In view of the above, this paper attempts to chart the evolution of AML/ATF law in Malaysia since its inception in 2001 and to examine the extent of its compliance with the International Recommendations issued by the Financial Action Task Force (FATF). The authors contend that the creation of legal and regulatory framework in governing money laundering and terrorism financing in many jurisdictions around the world, including Malaysia, is in accord with international standards. Despite such modalities and global governance, such crimes remain significant threats to the national and global financial systems. This paper employed a doctrinal legal analysis and secondary data of which the Anti-Money Laundering and Terrorism Financing Act 2001 (AMLATFA) is the primary source. The secondary sources for this research include decided cases, articles in academic journals, books and online databases.

KEYWORDS: *Money Laundering, Terrorism Financing, Anti Money Laundering & Anti-Terrorism Financing Act 200, Financial Action Task Force, Compliance*

INTRODUCTION

Governing money laundering has been an ongoing agenda by the international communities (Holder, 2003). Early literature has indicated that initially the crime of money laundering was associated with drug trafficking and organized crimes (Lupsha, 1996). The Financial Action Task Force on Money Laundering (FATF) was created in 1989 to resolve the issue of money laundering. The FATF was an inter-government organization to specifically identify and deal with the issues, techniques and possible policies recommendations related to money laundering (FATF, 2001). After the September 11 attacks in the USA, the FATF has extended their policies

recommendations to cover terrorism financing, which is now known as 40+9 Recommendations, which has now been adapted as national AML/CFT legislation by many countries worldwide, including Malaysia. The threats of money laundering and terrorism financing have led to many legal and regulatory efforts undertaken at global and national levels to minimize the impact of such crimes. This paper attempts to chart the evolution of AML/ATF law in Malaysia since its inception in 2001 and to examine the extent of its compliance with the international Recommendations issued by the Financial Action Task Force (FATF). The first part explains the crimes of money laundering and terrorism financing. The second part analyses the international perspectives in the criminalisation of money laundering and terrorism financing. The next part, which is the main thrust of the paper, examines the legal and regulatory measures taken by Malaysia in criminalising money laundering and terrorism financing. The last part will conclude the paper.

MONEY LAUNDERING

Various attempts have been made by commentators, international and local bodies to define money laundering. For instance, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (commonly referred to as the 1988 Vienna Convention) has been among the first to deal with the issues of money laundering. This Convention has defined money laundering as the conversion of illicit cash to a less suspicious form so that the true source or ownership is concealed, and the legitimate source is created. The definition was initially referred to the proceeds of drug trafficking, which, at that time, money laundering is interlinked with it (Schooner & Taylor, 2009, UNODC, 1988). Next, the FATF has defined money laundering as the processing of criminal proceeds to disguise its illegal origin, in which the process is important to enable the criminals to enjoy the profits without declaring the sources of the income (FATF, 2001; Banerjee, 2004). In addition, the European Union states that money laundering is disguising the proceeds of criminal activity through four processes. Firstly, the conversion or transfer of property derived from criminal activity to conceal or disguise its illicit origin. Secondly, the concealment or disguise of the true nature, source, location, disposition, movement or ownership of property known to been derived from criminal activity. Thirdly, is the acquisition, possession or use of property known to have been derived from criminal activity, and finally, the participation, or assistance, in the commission of any of the activities above (EU Directives 1991). Many commentators view that traditionally, money laundering is a process in which criminals attempt to hide the origins of the ill-gotten money (Hopton, 2009). It is also a sophisticated crime, which has not been taken seriously at the first glance as compared to other street crimes (Kumar, 2012). Cuellar (2003) classifies money laundering as a crimes committed against nations, economics, the rule of law and the world at large instead of a particular individual.

Extant literature indicates that money laundering has caused many problems to countries around the world. For example, Gurule (1998) observes that money laundering has devastating social consequences, and it does provide fuel for the drug dealer, terrorists, arms dealer and other criminals to expand their activities, which would lead to the manipulation of the financial stability of a country. Similarly, Brent (2002) suggests that money laundering could firstly, impairs the sustainability and the development of the financial institutions in many countries. Secondly, customers' trust is fundamental to the growth of sound financial institutions. The perceived risk to

depositors and investors from financial crimes such as institutional fraud, corruption and money laundering is an obstacle to such trust. Along the same line, Kumar (2012) notes that such crimes have a negative effect on the economic development and, thus constitute a serious threat to national economies, securities and government.

The exposure to the threats of money laundering and terrorism financing is a continuing problem for Malaysia. The evidence of such problem is in the report by Global Integrity 2013, that indicates that the illicit outflows from trade mispricing from Malaysia since 2002 to 2011 has reached RM1.2 trillion (GFI, 2013). Such illicit outflows which are derived from the abuse of international trade system and transactions to disguise the proceeds of the crimes have led the commission of trade- based money laundering. The GFI report also showed that Malaysia ranked fourth in illicit financial outflows after China, Russia and Mexico (GFI, 2013).

TERRORISM FINANCING

Terrorism financing and money laundering may have a catastrophic effect on the socio-economic development of many countries (Amoore 2005). Tanasegaran and Shanmugan (2007) note that terrorism financing and money laundering share a symbiotic relationship, whereby the terrorists are using the proceeds of money laundering to finance their terrorism activities. Terrorism financing is defined by Sander (2014) as supporting the terrorist activities by providing any financial supports. The funds of the terrorist activities are raised from legitimate and illegitimate sources, which could be derived from money laundering activities (Sander, 2014). Also, she argues that terrorism financing and money laundering are both involved in the movement of funds with minimal scrutiny to disguise their origin (Sander 2014).

Following the September 11 attacks, the terrorist activities have continued to pose threats against national security around the world. The impact of the attacks has led to a critical need for cooperation among States to curb the networks of terrorism financing (Dalyan 2008). In 2001, soon after the attacks, the FATF has issued Nine Special Recommendations in addition to the existing 40 Recommendations to criminalize terrorism financing (Hamin et al., 2014; Levi, 2010). The Nine Special Recommendations by the FATF in criminalising terrorism financing has now been adopted by many countries worldwide, including Malaysia as the governance framework in criminalisation of terrorism financing (Hamin et al., 2014).

CRIMINALISATION OF MONEY LAUNDERING & TERRORISM FINANCING FROM THE INTERNATIONAL PERSPECTIVES

Since money laundering and terrorism financing have become international agendas, many international bodies have been concerned with the extent of the problem caused by these crimes (William, 1994). In the late 1980s, the international efforts in relation to money laundering have been identified through the internalization of trade and finance and the advancement of technology that has facilitated the crimes (Sarigul, 2013).

Money laundering was first made debatable in the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 known as the Vienna Convention (Steward,

1989). This Convention is concerned with the magnitude of and the rising trend in the illicit production, the demand for and the traffic in narcotic drugs and psychotropic substances. Such crimes pose serious threats to the health and welfare of human beings and adversely affecting the economic, cultural and political foundations of society (Paust, Scharf, Sadat, Bassiouni, Gurule, Zagaris, & Williams, 2000). Also, the said Convention recognizes the links between illicit traffic and other related organized criminal activities, which undermine the legitimate economies and threaten the stability, security and sovereignty of States. The lack of effective national law to curb organized crime and the laundering of its proceeds were also significant consideration for the Convention (Paust, Scharf, Sadat, Bassiouni, Gurule, Zagaris, & Williams, 2000). The Convention had established international offences with regards to drug trafficking and money laundering (The Vienna Convention, 1988; Gurule, 1998). In December 2000, the United Nations drew up the Convention against Transnational Organized Crime. The purpose of Article 7 of the said Convention is to promote cooperation amongst State members to prevent and curb transnational organized crime more effectively and also to establish measures to regulate money laundering (Berdal, 2002; Guymon, 2000).

The most significant effort that has been taken by international community is the creation of the Financial Action Task Force (FATF) which was established by the G-7 Summit in Paris in 1989 (Williams, 2001; Johnson & Lim, 2003). The FATF has worked closely with other key international organizations, including the IMF, the World Bank, the United Nations, and FATF-style regional bodies such as the APG Group (IMF, 2014; Boorman & Ingves, 2001). The main objectives of the FATF are to set standards and promote effective implementation of legal, regulatory and operational measures to govern money laundering, terrorist financing and other related threats to the integrity of the international financial system (IMF, 2014 & FATF, 2001). In April 1990, the FATF has issued its first 40 Recommendations to criminalise the offence of money laundering and provided a blueprint for money laundering countermeasures. The latter has been adopted by all the G-7 member countries as their national laws in curbing money laundering (Mortman, 1991; Wiliams, 2001; Manney, 2002).

Scant literature suggests that besides money laundering, the FATF is also paying attention to terrorism financing. Such crime has been regarded as a serious problem after the September 11 attacks in the USA (Schott 2006). The impact of the attacks has led to a critical need for cooperation among States to curb the networks of terrorism financing (Dalyan, 2008). As mentioned above, the FATF has established 9 Special Recommendation in 2003 to criminalise terrorism financing. Since then, the FATF is continually updating their Recommendations which is a form of policy to suit to the current threats and typologies of money laundering and terrorism financing. Such efforts have resulted in the latest 40 + 9 Recommendations and the risk-based approach in mitigating the risks of such crimes. (FATF, 2010; Chatain, Zerzan, Noor, Dannaoui, & De Koker, 2011; Doyle, 2001; Levi & Reuter, 2006).

CRIMINALISATION OF MONEY LAUNDERING & TERRORISM FINANCING IN MALAYSIA

Prior to the enactment of AMLA 2001, the offence of money laundering was governed under several laws namely Sections 3 and 4 of the Drugs Dangerous (Forfeiture of Property) Act 1988,

section 18 of the Prevention of Corruption Act, 1997, Section 411 to section 414 of the Penal Code. (Hansard of the House of Representatives Malaysia, 2001).

In view of the threats and the extensive international efforts taken to criminalise money laundering and terrorism financing, the Malaysian government has also done their part in curbing such crimes. Such efforts can be seen through the adoption of the FATF 40 Recommendations to the national law known as the Anti-Money Laundering Act 2001 (AMLA). The AMLA 2001 is created to deal with the prevention of money laundering more effectively and to have a comprehensive law to deal with such crimes. The AMLA 2001 came into force in January 2002 (Mohd Yasin 2004; Hamin et al. 2013) which was subsequently amended on 30 September 2004 following the FATF 2003 Recommendations. The effect of the amendments has led to three pertinent changes. Firstly, is the change of the name of the Act from AMLA to AMLATFA 2001. Secondly, the criminalisation of terrorism financing and finally, the designated non-business and professions (DNFBPs) in Malaysia were imposed the same obligations with the financial institutions to report to the competent authority any suspicious transaction which falls within section 14 of the AMLATFA 2001 (Mohd Yasin, 2004; Hasan & Murad, 2010).

In 2013, the effort in Malaysia to curb money laundering and terrorism financing continues with the amendments to the AMLATFA 2001 (The Star, 2014). The name of the said Act has now been lengthen to the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2014. Such amendments improvise on several aspects. Firstly, is the creation of new offences for money laundering such as smurfing and cross border cash transfers? Secondly, is a new definition for the instrumentalities of a crime. Thirdly, is the increase of sanctions for money laundering. Fourthly, the duty to report by the reporting institutions has been tightened and clarified by the amended Section 14. The new Section 14A seeks to prohibit the disclosure of reports and related information that have been provided to the competent authority. Certain exceptions are provided, namely if the disclosure is required for the performance of the duties or exercise of the functions under the Act, for the purpose of enabling risk management by the related corporations of the reporting institution, to the supervisory authority of the reporting institution and if otherwise duly authorised by the competent authority. Fifthly, section 29 of the Act has extended the investigation powers to terrorism financing offences as well as offences under the new section 4A and new Part IVA relating cross border cash movement. Sixthly, sections 44, 45, 50, 51, 53, 55, 56 and 59 of the Act 2001 were amended to extend the power to freeze, seize and forfeit property and other ancillary powers to property that is reasonably suspected to be the proceeds of an unlawful activity and the instrumentalities of an offence. Finally, the rules have been tightened for cross border monitoring and cash transfer movement (Hamin et.al. 2014).

In addition to the AMLATFA 2001, the Central Bank of Malaysia as the financial intelligence unit established under section 8 of the AMLATFA, has issued guidelines for the financial and DNFBPs sectors as preventive measures for money laundering and terrorism financing (Bank Negara, 2009. AML Forum, 2013).

Apart from the legal and regulatory measures taken to govern money laundering and terrorism financing, in 2005, the Malaysian government has formed the National Co-ordination

Committee (NCC). Such committee is comprised of members from 13 government agencies such as the Malaysian Anti-Corruption Commission (MACC), the Attorney-General's Chambers, the Companies Commission of Malaysia, the Inland Revenue Board, the Labuan Offshore Financial Services Authority, the Ministry of Domestic Trade and Consumers Affairs, the Ministry of Finance, the Ministry of Foreign Affairs, the Ministry of Internal Security, the Royal Malaysian Customs, the Royal Malaysian Police and the Securities Commission. The purpose of the establishment of the NCC is to co-ordinate activities across agencies in curbing money laundering and terrorism financing. Abdul Ghani (2005) observes that the member agencies in the NCC have been working together, discussing the areas of concern, undertaking research and updating the developments of such crimes in the country as well as at the international level.

Despite the legal and regulatory modalities of governance, which were based on the international standards and which were adopted to criminalise money laundering and terrorism financing, several deficiencies still in existence. For instance, the APG Mutual Evaluation Report on Malaysia in 2007 has identified such weaknesses including inadequate criminalisation of several serious offences such as environmental crimes and counterfeiting of goods; inadequate coverage of certain sectors as DNFBPs; the lack of effectiveness and the problems in suspicious transaction reporting by the reporting institutions (APG Report, 2007, Hamin et al. 2003). Also, the Central Bank of Malaysia notes that Malaysia is yet to undergo a mutual evaluation exercise by the APG group in late 2014, which will be challenging as such assessment will cover not only the technical compliance but also the effectiveness of core components of AML/ATF regime (Central Bank Malaysia, 2013).

CONCLUSION

Since the creation of the AMLA in 2001, the Act has undergone two major changes. Firstly, in 2003, which involves the criminalisation of terrorism financing and the inclusion of DNFBPs as reporting institutions. Secondly, in 2014, the most recent amendments, which is basically an overhaul of the AMLATFA 2001, which includes the creation of several new offences, the enhancement of the sanctions of all offences in the Act, the extension of the power of the investigators and the powers of the relevant ministry and the clarification of the duties of the reporting institutions. The money laundering and terrorism regime in Malaysia is deemed to be in compliance with the international standards. However, as discussed above, several deficiencies in the said regime still exist, which must be urgently addressed by the relevant authorities so as to prepare for the upcoming Mutual Evaluation exercise by the APG Group. Despite the establishment of legal and regulatory modalities in Malaysia, money laundering and terrorism financing crimes will not easily disappear and may remain significant threats to the national and global financial systems.

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