

Controlling Money Laundering in India – Problems and Perspectives

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ABSTRACT

‘Money-Laundering’ – A sophisticated crime not to be taken very seriously at the first glance by anyone in the society as compared to street crimes. To give a head start to this paper, researcher wanted to limit the paper to National context, but was not able to do so as it was not at all possible due to the fact that any instance of money laundering would have a tinge of international flavour as money laundering typically involves transferring money through several countries in order to obscure its origin. It was difficult to discuss the topic of money-laundering nationally in abstract. If done so, would have appeared as a patchwork. To have a comprehensive paper, the researcher discusses the theme of the paper in three parts. Part I opens up with explaining the concepts and processes of money laundering pointing out the challenges and losses and is a kind of primer to money laundering. As observed earlier, money laundering essentially involves a foreign ground for washing – laundering the dirty money – proceeds of crime, Part II moves with elaborating the international developments and control mechanisms to deal with the problem of money laundering. In light of the aforesaid discussion Part III proceeds to analyze the position of India in controlling money laundering keeping up with the mandate of international forum. India is proposing to update its anti-money-laundering law and a Bill of 2008 is waiting for enforcement. A comparative analysis of the Bill of 08 is done in one of the sub-parts of the paper. To sum up the paper various problems and loopholes in implementation of the anti-money-laundering laws are discussed putting forth few humble suggestions to have a balanced anti-money-laundering regime.

Key-Words: Money Laundering, anti-money-laundering, FATF, terrorism.

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PAPER

PART I: INTRODUCING MONEY LAUNDERING

Money is like fire, an element as little troubled by moralizing as earth, air and water. Men can employ it as a tool or they can dance around it as if it were the incarnation of a god. Money votes socialist or monarchist, finds a profit in pornography or translations from the Bible, commissions Rembrandt and underwrites the technology of Auschwitz. It acquires its meaning from the uses to which it is put.¹

Mahatma Gandhi² said

Capital as such is not evil; it is its wrong use that is evil. Capital in some form or other will always be needed.

I.A. Money – The Root of the Problem:

The primary function of money is to serve as a medium of exchange, and as such it is accepted without question in final discharge of debts or payment of goods or services.³ The term ‘money’ generally includes banknotes as well as coins, although it may be limited to such of each as are legal tender at the time and place in question⁴. The precise meaning of the term depends upon the content in which it is used so that, for example, it

¹Lewis H. Lapham (b. 1935), U.S. essayist, editor. Money and Class in America, ch. 8 (1988), the Columbia Dictionary of Quotations.

² Mohandas K. Gandhi (1869–1948), Indian political and spiritual leader. Harijan (28 July 1940), id.

³ Moss vs. Hancock [1899] 2 QB 111 at 116 per Darling J., quoted in Halsbury Laws of England, 4th Ed., Vol. 32 para 102 p. 63

⁴ The term is sometimes used to include not only actual cash but also a right to receive cash, as for example, sums standing to the credit of a bank account or invested in securities; and the term may in some cases be used in a popular sense to include all personal or even, exceptionally, all real and personal property. Id.

is usually given a wide meaning when used in a will and when that meaning gives effect to the intention of the testator, an intermediate meaning in connection with claims for money paid or for money had and received, and a narrow meaning in the criminal law and in relation to execution⁵.

Money has been regarded as bone of contention between friends and relatives. It is said lend money to a person if you want to spoil him or make foe. Money - wealth, property or estate have always caused family, feuds and even murders for it is said that all is fair in love and war. Money is devil's child and is responsible for many mischief and evils. Some people think that wealth can bring happiness in life but it is not so⁶.

Money is the root cause of many evils like corruption, black marketing, smuggling, drug trafficking, tax evasion, and the buck does not stop here it goes to the extent of sex tourism and human trafficking (a human selling another human in the era of human rights). People are crazy for money. Majority is here to become rich and money has become the basic goal of education⁷. The more developed the nation, the more the standard of living of the people. People want more money to cater to their needs and at a point of time they don't hesitate to have money from any source (black or white who cares). This is the available soft corner where the concept of money laundering enters and prospers.

The influence of money on the people was appropriately portrayed by *Henry Fielding*⁸ as follows:

Sir, money, money, the most charming of all things; money, which will say more in one moment than the most elegant lover can in years. Perhaps you will say a man is not young; I answer he is rich. He is not genteel,

⁵ Halsbury Laws of England, 4th Ed., Vol. 32 para 102 p. 63

⁶ Frank Desantis, 'Love of Money is Root Cause of Evils', available at <<http://ezinearticles.com/?Love-of-Money-is-Root-Cause-of-Evils&id=664612>>, last accessed on November 10, 2008

⁷ Based on an ad-hoc survey conducted among the students, majority of whom join National Law Universities for an attractive package. Now the studies have become package-driven. Frank Desantis remarks "Instead of acquiring learning for the sake of learning, majority has hectic aims to earn money by hooks or crooks and become rich over night."

⁸ Henry Fielding (1707–54), English novelist, dramatist. Mariana, in *The Miser*, act 3, sc. 7, the Columbia Dictionary of Quotations.

handsome, witty, brave, good-humoured, but he is rich, rich, rich, rich, and rich— that one word contradicts everything you can say against him.

I.B. Money Laundering – The Concept:

Money Laundering⁹ refers to the conversion or "Laundering" of money which is illegally obtained, so as to make it appear to originate from a legitimate source¹⁰. Money Laundering is being employed by launderers worldwide to conceal criminal activity associated with it such as drug / arms trafficking, terrorism and extortion¹¹. Robinson states that

“Money laundering is called what it is because that perfectly describes what takes place – illegal, or dirty, money is put through a cycle of transactions, or washed, so that it comes out the other end as legal, or clean money. In other words, the source of illegally obtained funds is obscured through a succession of transfers and deals in order that those same funds can eventually be made to appear as legitimate income.”

Article 1 of EC Directive¹² defines the term ‘money laundering’ as “the conversion of property, knowing that such property is derived from serious crime, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the committing such an offence or offences to evade the legal consequences of his action, and the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from serious crime”.

Thus, Money Laundering is not an independent crime, it depends upon another crime (predicate offence), the proceeds of which is the subject matter of the crime in money laundering. From the legal point of view, the Achilles’ heel in defining and criminalizing money laundering relates to the so-called ‘predicate offences’ understood as the criminal

⁹ Section 2(1) (p) of Prevention of Money Laundering Act, 2002 (hereinafter PMLA-02) defines Money-laundering” has the meaning assigned to it in Section 3. Section 3 provides for offence of money-laundering – whoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime and projecting it as untainted property shall be guilty of offence of money laundering.

¹⁰ Popularly this is known as making black money white.

¹¹ S. Ganesh, Money Laundering, article available at <<http://www.rbi.org.in/scripts/btcdisplay.aspx?pg=btcmoneylaunder.htm>> last accessed on November 9, 2008

¹² EC Directive on Prevention of the use of the Financial System for the Purpose of Money Laundering, 1991

offences which generated the proceeds thus making laundering necessary. Hiding or disguising the source of certain proceeds will of course, not amount to money laundering unless these proceeds were obtained from a criminal activity. Therefore, what exactly amounts to money laundering, which actions and who can be prosecuted is largely dependant on what constitutes a predicate crime for the purpose of money laundering¹³.

I.C. Money Laundering - An Organized Crime:

Money Laundering has a close nexus with organized crime. Money Launderers accumulate enormous profits through drug trafficking, international frauds, arms dealing etc. Cash transactions are predominantly used for Money Laundering as they facilitate the concealment of the true ownership and origin of money. It is well recognized that through the huge profits the criminals earn from drug trafficking and other illegal means, by way of money laundering could contaminate and corrupt the structure of the State at all levels, this definitely leads to corruption. Further, this adds to constant pursuit of profits and the expansion into new areas of criminal activity.

Through money laundering, organized crime diversifies its sources of income and enlarges its sphere of action. The social danger of money laundering consists in the consolidation of the economic power of criminal organizations, enabling them to penetrate the legitimate economy. In advanced societies, crime is increasingly economic in character. Criminal associations now tend to be organized like business enterprises and to follow the same tendencies as legitimate firms; specialization, growth, expansion in international markets and linkage with other enterprises. The holders of capital of illegal origin are prepared to bear considerable cost in order to legalize its use¹⁴.

I.D. Historical Evolution:

‘Money Laundering’ as an expression is one of fairly recent origin. The original sighting was in the newspapers reporting the Watergate Scandal in the United States in 1973¹⁵.

¹³ Brigitte Unger, *The Scale and Impacts of Money Laundering*, UK: Edward Elgar Publishing, 2007, p.16

¹⁴ Ernesto Savona, *Responding to Money Laundering: International perspectives*, Harwood Academic Publishers, 1997, p 1

¹⁵ The action of the US President Richard Nixon’s “Committee to re-elect the President” that moved illegal campaign contributions to Mexico, and then brought the money back through a company in Miami. It was Britain’s newspaper Guardian that coined the term, referring to the process as “laundering”.

The expression first appeared in a judicial or legal context in 1982 in America in the case of *US vs. \$4,255,625.39*.¹⁶ The term “money laundering” is said to originate from Mafia ownership of *laundromats*¹⁷ in the United States. Gangsters there were earning huge sums in cash from extortion, prostitution, gambling and bootleg liquor. They needed to show a legitimate source for these monies. One of the ways in which they were able to do this was by purchasing outwardly legitimate businesses and to mix their illicit earnings with the legitimate earnings they received from these businesses. *laundromats* were chosen by these gangsters because they were cash businesses and this was an undoubted advantage to people like Al Capone who purchased them¹⁸. Al Capone was prosecuted, though not for money laundering but for tax evasion. However, the conviction of Al Capone may have triggered the money laundering business off the ground. But other historians differ from this inasmuch as they are of the view that money laundering is called so, because it perfectly describes what takes place illegal or dirty money is put through a cycle of transactions, or washed, so that it comes out at the other end as legal or clean money. In other words, the source of illegally obtained funds is obscured through a succession of transfers and deals, in order that those same funds can eventually be made to appear as legitimately earned income.¹⁹

Another celebrated mode of doing money laundering was with Swiss Bank. Gangster Meyer Lansky used the number of Swiss Bank accounts to hide his illegal money. He used the ‘loan-back’ concept, which meant that the hitherto illegal money could now be disguised as ‘loans’ provided by compliant foreign banks, which could be declared as their ‘revenue’ if necessary, and a tax-deduction obtained in the bargain.

¹⁶ (1982) 551 F Sup. 314, quoted in Gururaj, see infra note 17.

¹⁷ A service mark used for a commercial establishment equipped with washing machines and dryers, usually coin-operated and self-service. Excerpted from *The American Heritage Dictionary of the English Language*, Third Edition.

¹⁸ Gururaj, B.N., *Commentaries on FEMA, Money Laundering Act and COFEPOSA*, Nagpur: Wadhawa, Ed. 2005, p.729

¹⁹ Alagiri, Dhandapani, Ed. *Money Laundering: Issues and Perspectives*, Hyderabad: ICFAI University Press, 2006, p.iii

Money Laundering as a crime attracted the interest in the 1980s, essentially within a drug trafficking context²⁰. It was from an increasing awareness of the huge profits generated from this criminal activity and a concern at the massive drug abuse problem in western society which created the impetus for governments to act against the drug dealers by creating legislation that would deprive them of their illicit gains²¹.

I.E. The Alarming Statistics²²:

Estimating how much money is actually laundered in the United States, any other country, or globally is extremely difficult. Money Laundering is a largely secretive phenomenon. The exact number of launders that operate every year, how much money they launder in which countries and sectors, and which money laundering techniques they use is not known²³. However, a sustained effort between 1996 and 2000 by the FATF to produce such estimates failed. In fact, no direct estimates exists of how much money passes through the financial system, whether broadly or narrowly defined, for the purposes of converting illegal gains into a nontraceable form²⁴.

John Walker²⁵ (1995) was the first to make a serious attempt at quantifying money laundering and initial output. His model suggests that US\$2.85 trillion are laundered

²⁰ When under UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, criminalization of the proceeds of drug related offences was provided. However, later many other crimes were included in the purview of 'predicate offences' to find out a money laundering activity.

²¹ See www.laundryman.u-net.com/ for historical materials on money-laundering, last accessed on November 10, 2008

²² Due to the volatile nature of the statistics, the researcher could not find the recent concretized statistics. The statistics provided are taken from different articles duly acknowledged and is meant to just focus on the gravity and *enormosity* of the problem.

²³ See for a detailed overview of ways of quantifying money laundering in Brigitte Unger, *The Scale and Impacts of Money Laundering*, UK: Edward Elgar Publishing, 2007, p.29

²⁴ "What is known is the amount of laundered money the US government identifies through its investigations. According to the 2002 National Money Laundering Strategy – an annual report from 1999 to 2003 by the US Treasury to Congress on anti-money laundering efforts – seizures of money laundering related assets in fiscal 2001 amounted to \$386 million, while the corresponding figure for forfeited assets was \$241 million. Considering the billions of laundered dollars believed to be out there, a few hundred million dollars annually is a negligible share of the true total." Peter Reuter and Edwin M. Truman, "Chasing Dirty Money: The Fight Against Money Laundering", Peterson Institute of International Economics, 2004, p.9

²⁵ He was a pioneer who attempted to measure money laundering worldwide, using an ad hoc equation. The Walker Model examines two different aspects of money laundering process. First, it scrutinizes money generated for laundering per country. Second, it examines flows of generated money from one country to another. His model has seven steps. See Unger supra note 13.

globally. As per an estimate of the International Monetary Fund, the aggregate size of money laundering in the world could be somewhere between two and five percent of the world's Gross Domestic Product. Although money laundering is impossible to measure with precision, it is estimated that US\$300 billion to US\$500 billion in proceeds from serious crime (not tax evasion) is laundered each year²⁶. Though data on the size of money laundering is scant, UK and US officials estimate that “the amount of money laundered annually in the financial system worldwide was roughly \$500 billion - some 2% of global GDP”²⁷. According to international accounting firms, India is estimated to have a parallel economy of nearly 40 percent of its \$600 billion Gross Domestic Product²⁸.

I.F The Process of Money Laundering – PLI:

Money Laundering is not a single act but is in fact a process that is accomplished in three basic steps as enumerated below:

- 1. Placement:** "Placement" refers to the physical disposal of bulk cash proceeds derived from illegal activity. This is the first step of the money-laundering process and the ultimate aim of this phase is to remove the cash from the location of acquisition so as to avoid detection from the authorities. This is achieved by investing criminal money into the legal financial system by opening up a bank account in the name of unknown individuals or organizations and depositing the money in that account²⁹.
- 2. Layering:** "Layering" refers to the separation of illicit proceeds from their source by creating complex layers of financial transactions. Layering conceals the audit

²⁶ Scott, David. 1995. “Money Laundering and International Efforts to Fight It. Public Policy of the Private Sector,” Public Policy for the Private Sector, Note No. 48, The World Bank. Available at: <http://www.worldbank.org/html/fpd/notes/48/48scott.pdf>

²⁷ Quirk, Peter J. 1997 “Money Laundering: Muddying the Macroeconomy.” Finance and Development. International Monetary Fund. March. Vol. 34, No. 1, p. 8. Available at: <http://www.imf.org/external/pubs/ft/fandd/1997/03/pdf/quirk.pdf>.

²⁸ Even-Zohar, Chaim, Indian Parliament Moves to Finally Implement Money Laundering Laws, see Alagiri, see supra note 19, p.86

²⁹ While countermeasures to all three components of money laundering are important, laundered money is generally most vulnerable to detection at the placement stage. As a consequence, international regulatory and law enforcement efforts have concentrated especially on developing methods to make it difficult to place illicit funds without detection by developing measures such as mandatory record-keeping and even reporting of large or unusual currency transactions, “know your customer” and suspicious transaction reporting requirements, and cross-border monetary declaration requirements, see

trail and provides anonymity. This is achieved by moving money to offshore bank accounts in the name of shell companies, purchasing high value commodities like diamonds³⁰ and transferring the same to different jurisdictions. Now, Electronic Funds Transfer (EFT) has become boon for such layering exercise³¹. Different techniques like correspondent banking, loan at low or no interest rates, money exchange offices, back-to-back loans, fictitious sales and purchases, trust offices, and recently the Special Purpose Vehicles (SVPs) are utilized for the purpose of laundering the money.

- 3. Integration:** "Integration" refers to the reinjection of the laundered proceeds back into the economy in such a way that they re-enter the financial system as normal business funds. The launderers normally accomplish this by setting up unknown institutions in nations where secrecy is guaranteed. New forms of business give a platform for integration exercise. Now a person can start a business with just a webpage and convert his illegal money to legal by showing profits from the webpage³². There are other ways like capital market investments, real estate acquisition, the catering industry, the gold market, and the diamond market.

Money laundering, at its simplest, is the act of making money that comes from Source A look like it comes from Source B.³³

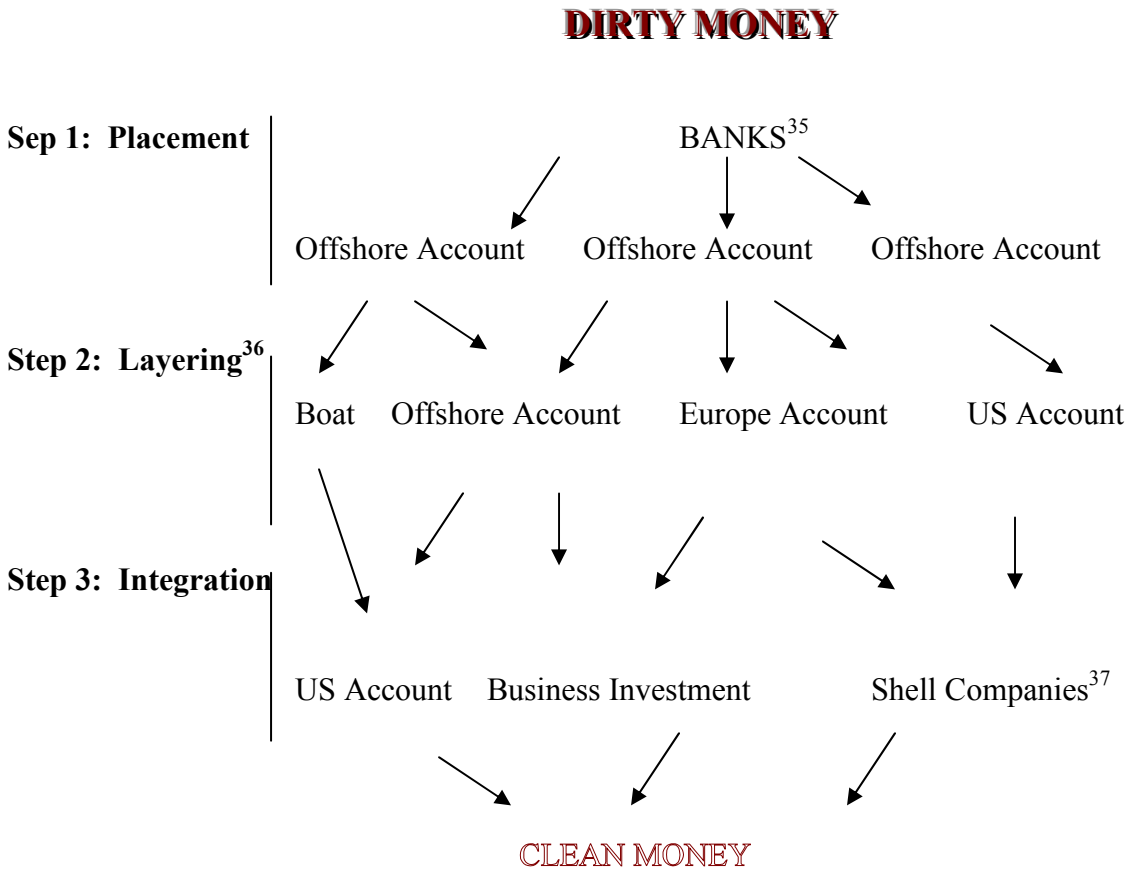
³⁰ For example a money launderer may buy an antique worth several dollars which would appear to be few rupees for a few and the same can be transferred as gift item, etc. and sold in the international market. This would involve money-laundering exercise to further another illicit trade in antiques.

³¹ International standards to discourage layering have also begun to develop, through a focus on increased transparency in financial systems generally and through increased recognition of the need to eliminate techniques, such as the use of nominees and numbered accounts to disguise the actual ownership of assets. Likewise, there has been growing international recognition that bank secrecy rules must give way to permit law enforcement agencies to review financial records in cases where there is an active criminal investigation pertaining to the source of the funds.

³² Finally, integration of illicit proceeds can be fought through the strengthening of asset forfeiture laws, by which governments can seize the proceeds of criminal activity even when those proceeds have been reinvested in ostensibly legitimate enterprises. Many states are currently working to improve methods by which asset forfeiture regimes, and asset sharing among law enforcement agencies of different countries, to make it more difficult for criminals to protect their money from the law.

³³ The most common types of criminals who need to launder money are drug traffickers, embezzlers, corrupt politicians and public officials, mobsters, terrorists and con artists. Drug traffickers are in serious need of good laundering systems because they deal almost exclusively in cash, which causes all sorts of logistics problems. Not only does cash draw the attention of law-enforcement officials, but it's also really heavy. Cocaine that's worth \$1 million on the street weighs about 44 pounds (20 kg), while a stash of U.S. dollars worth \$1 million weighs about 256 pounds (116 kg). see <<http://money.howstuffworks.com/money-laundering3.htm>> last accessed on November 13, 2008

The Process of money laundering can be shown diagrammatically as follows³⁴:



I.F.1 Some Techniques of Money Laundering

At each of the three stages of money laundering various techniques can be utilized. It is really not possible to enlist all the techniques of Money Laundering exercise; however, some techniques are illustrated for the sake of understanding:

³⁴ The illustration above is inspired by howstuffworks.com which provides a beautiful illustrative explanation of the concept of money laundering. see <<http://money.howstuffworks.com/money-laundering3.htm>> last accessed on November 13, 2008

³⁵ Money launderers often send money through various "offshore accounts" in countries that have bank secrecy laws, meaning that for all intents and purposes, these countries allow anonymous banking. A complex scheme can involve hundreds of bank transfers to and from offshore banks. According to the International Monetary Fund, "major offshore centers" include the Bahamas, Bahrain, the Cayman Islands, Hong Kong, Antilles, Panama and Singapore, id.

³⁶ The Layering above may have few more stages of transfer of money. It is the real stage of laundering and the money is kept on the trail of layering unless all the dirt on the money is laundered so as to infuse it into the shell companies to have clean money as an outcome.

³⁷ These are fake companies that exist for no other reason than to launder money. They take in dirty money as "payment" for supposed goods or services but actually provide no goods or services; they simply create the appearance of legitimate transactions through fake invoices and balance sheets.

1. *Hawala* – Hawala is an alternative or parallel remittance system. It exists and operates outside of, or parallel to 'traditional' banking or financial channels. It was developed in India, before the introduction of western banking practices, and is currently a major remittance system used around the world³⁸. In hawala networks the money is not moved physically. A typical hawala transaction would be like a resident in USA of Indian origin doing some business wants to send some money to his relatives in India. The person has option either to send the money through formal channel of banking system or through the hawala system. The commission in hawala is less than the bank charges and is without any complications for opening account or visit the bank, etc. The money reaches in to the doorstep of the person's relative and the process is speedier and cheaper³⁹.
2. *Structuring Deposits* – Also known as *smurfing*, this method entails breaking up large amounts of money into smaller, less-suspicious amounts. In the United States, this smaller amount has to be below \$10,000 -- the dollar amount at which U.S. banks have to report the transaction to the government. The money is then deposited into one or more bank accounts either by multiple people (smurfs) or by a single person over an extended period of time⁴⁰.
3. *Third-Party Cheques* – Utilizing counter cheques or banker's drafts drawn on different institutions and clearing them via various third-party accounts. Third party cheques and traveller's cheques are often purchased using proceeds of crime. Since these are negotiable in many countries, the nexus with the source money is difficult to establish.

³⁸ It is but one of several such systems; another well known example is the 'chop', 'chit' or 'flying money' system indigenous to China, and also, used around the world. These systems are often referred to as 'underground banking'; this term is not always correct, as they often operate in the open with complete legitimacy, and these services are often heavily and effectively advertised. <http://www.interpol.int/Public/FinancialCrime/MoneyLaundering/Hawala/default.asp>

³⁹ It is interesting to note here that this system is used by Indians using the ATM machines nationally. As a labourer from Bihar working in New Delhi wants to send some money to his father living in village. He gives the money along with the commission with one of his villager, generally a richer person, who is having a bank account with ATM in New Delhi. An instruction over phone is passed to village where the richer person's representative gives the money to the relative of that labourer. It is beneficial to the labourer as the commission charged by the richer person is less than would be required for maintaining the ATM or sending it by Money Order and would be faster too. (a model of National legal Hawala)

⁴⁰ <http://money.howstuffworks.com/money-laundering3.htm>

4. *Credit Cards* – Clearing credit and charge card balances at the counters of different banks. Such cards have a number of uses and can be used across international borders. For example, to purchase assets, for payment of services or goods received or in a global network of cash-dispensing machines⁴¹.

5. *Peso Broker* - A drug trafficker turns over dirty U.S. dollars to a peso broker in Colombia. The peso broker then uses those drug dollars to purchase goods in the United States for Colombian importers. When the importers receive those goods (below government radar) and sell them for pesos in Colombia, they pay back the peso broker from the proceeds. The peso broker then gives the drug trafficker the equivalent in pesos (minus a commission) of the original, dirty U.S. dollars that began the process.

The list is endless and quite a lot of techniques are not easily attributed to one laundering phase alone. With each reporting of crime, the modus operandi changes keeping in view the earlier detection. The money-launderers appear to be serious researchers and the officials appear to be mere readers of research reports.

I.F.2 *Some New areas of Operation of Money Laundering*

Both authorities and the money launderers seem to permanently change their behaviour when trying to hunt and escape money laundering. One can notice changed techniques of money laundering as a reaction to regulation⁴². Launderers continuously explore new routes for laundering their money. Economies with growing or developing financial centers, but inadequate controls are more vulnerable than countries with established financial centers as the latter must have implemented comprehensive money-laundering regimes⁴³.

Insurance Sector – the insurance sector is a relatively less haunted sector compared to banks and other avenues of financial services. However, there has been a gradual increase in laundering activity in insurance as well. The Laundering in insurance is either internal or external in nature. The internal channels of laundering money are

⁴¹ For a detailed list see Gururaj, supra note ... at page 767-68

⁴² See Unger supra note 13 p. 107

⁴³ U Jawaharlal and KBS Kumar, Insurance Chronicle, December, 2004.

agent/broker premium diversion, reinsurance fraud and rented asset schemes etc. Phony insurance companies, offshore/unlicensed Internet companies, staged auto accidents, viatical and senior settlement fraud are external channels of money laundering⁴⁴.

Open Securities Market - Money launderers have traditionally targeted banks, which accept cash and facilitate domestic and international funds transfers. However, the securities markets, which are known for their liquidity, may also be targeted by criminals seeking to hide and obscure illicit funds. Money launderers can target any of the various types of businesses that participate in securities industry. Broker-dealers, for instance, provide a variety of products and services to retail (usually individual) and institutional investors—buying and selling stocks, bonds, and mutual fund shares⁴⁵. This is moreover possible due to the instruments like Hedge Funds and Participatory Notes which have very limited disclosures as to the source. These funds can be effectively used as Laundromats. Although the number of documented cases⁴⁶ in which broker-dealer or mutual fund accounts have been used to launder money is limited, law enforcement agencies are concerned that criminals may increasingly attempt to use the securities industry to launder money. This is a new area which requires a serious thought processing.

Cyber Crime – Now one has to confront with hybrid crimes, the crimes with many attributes. According to Capt. Raghu Raman⁴⁷, “Five types of crimes are now converging. Cyber crimes such as identity theft, illegal access to e-mail, and credit card fraud are coming together with money laundering and terrorist activities. Large amounts of money is now stored in digital form. Now you can transfer money through electronic

⁴⁴ India is also alarmed by this area and IRDA has issued few guidelines on anti-money laundering program for insurers, Circular Ref: 043/IRDA/LIFE/AML/MAR-06, available at <http://fiuindia.gov.in/downloads/IRDA.pdf>, last accessed on November 15, 2008

⁴⁵ Anti-Money Laundering: Efforts in the Securities Industry, United States General Accounting Office, Report to the Chairman, Permanent Subcommittee on Investigations, Committee on Governmental Affairs, U.S. Senate, available at <http://www.gao.gov/new.items/d02111.pdf> last accessed on November 10, 2008

⁴⁶ In India we have cases like Harshad Mehta and Ketan Parekh as a model of money laundering activity in securities market.

⁴⁷ It's a borderless world for cyber crime, interview taken by Rahul Wadke, available at <http://www.thehindubusinessline.com/2006/04/12/stories/2006041201760400.htm>

and online gateways to multiple accounts.” This convergence leads to a greater problem of tackling of different issues at one time.

I.G Causes of Increase in Money Laundering and Inability to Control⁴⁸

There are various causes for increase in Money Laundering and the few of them can be enlisted as follows which is popularly known as ‘*Features of an Ideal Financial Haven*’:

- No deals for sharing tax information with other countries –
- Availability of instant corporations
- Corporate Secrecy Laws – as the corporate law of certain countries enables launderers to hide behind shell companies.
- Excellent Electronic Communication
- Tight Bank Secrecy Laws
- A Government that is Relatively Invulnerable to Outside Pressures
- A high degree of Economic Dependence on the Financial Services Sector
- A Geographical Location that Facilitates Business Travel to and from rich neighbors.
- Increase in sophistication and employment of professional people for doing the task⁴⁹.

I.H Harmful Effects of Money Laundering:

In a detailed study by Unger et al. about money laundering literature they were able to identify 25 different effects of money laundering. Unger⁵⁰ classifies the effects of money laundering on the basis of its gestation period within which it surfaces, under two broad heads, i.e. short term effects of money laundering⁵¹ and long term effects of money laundering⁵².

⁴⁸ For a detail for these causes refer to www.undoc.org/unodc/money_laundering_haven_features.html

⁴⁹ In 1996, Harvard-educated economist Franklin Jurado went to prison for cleaning \$36 million for Colombian drug Lord Jose Santacruz-Londono. People with a whole lot of dirty money typically hire financial experts to handle the laundering process. It's complex by necessity: The whole idea is to make it impossible for authorities to trace the dirty money while it's cleaned.

⁵⁰ Unger, see supra note 13

⁵¹ This usually happens within one or two years – and these include losses to the victim and gains to the perpetrator of a crime; distortion of consumption and saving; distortion of investment; artificial increase in prices; unfair competition; changes in imports and exports; effect on output, income and employment; lower or higher revenues for the public sector; changes in the demand for money, exchange rates, and interest rates; increase in the volatility of interest and exchange rates; greater availability of credit; higher capital inflows; distortion of economic statistics;

⁵² This usually happens within four years – and these threatens privatization; changes in foreign direct investment; risk for the financial sector, solvability, liquidity; profits for the financial sector; reputation of the financial sector; illegal business contaminates legal business; corruption and bribe; negative or positive effect on growth rates; undermines political institutions; undermines foreign policy goals; increases crime; and increases terrorism.

Money Laundering threatens national governments and international relations between them through corruption of officials and legal systems. It undermines free enterprise and threatens financial stability by crowding out the private sector, because legitimate businesses cannot compete with the lower prices for goods and services that businesses using laundered funds can offer⁵³. There are few specific challenges which is posed by Money-laundering activities throughout the world.

I.H.1 *Terrorism* – Terrorism is an evil which affects each and everybody. Now and then we can find terrorist attacks being made by terrorists. These attacks definitely cannot be done without the help of money⁵⁴. Money Laundering serves as an important mode of terrorism financing. Terrorists have shown adaptability and opportunism in meeting their funding requirements. Terrorist organizations raise funding from legitimate sources, including the abuse of charitable entities or legitimate businesses or self-financing by the terrorists themselves. Terrorists also derive funding from a variety of criminal activities ranging in scale and sophistication from low-level crime to organised fraud or narcotics smuggling, or from state sponsors and activities in failed states and other safe havens. Terrorists use a wide variety of methods to move money within and between organisations, including the financial sector, the physical movement of cash by couriers, and the movement of goods through the trade system. Charities and alternative remittance systems have also been used to disguise terrorist movement of funds⁵⁵.

I.H.2 *Threat to Banking System* – Across the world, banks have become a major target of Money Laundering operations and financial crime because they provide a variety of services and instruments that can be used to conceal the source of money. With their polished, articulate and disarming behaviour, Money Launderers attempt to make bankers lower their guard so as to achieve their objective. Though norms for record keeping, reporting, account opening and transaction monitoring are being introduced by central banks across the globe for checking the incidence of Money Laundering and the employees of banks are also being trained to recognise suspicious transactions, the

⁵³ Reena Ray, KYC: Anti-Money Laundering Act and Banks, see Alagiri, *supra* note 19

⁵⁴ Estimated direct attack cost in Bali Bombings is estimated at USD 50,000. source – Financial Action Task Force Report on Terrorist Financing, 29th February 2008, available at <<http://www.fatf-gafi.org/dataoecd/28/31/40196357.pdf>> last accessed on November 14, 2008

⁵⁵ *Id.*

dilemma of the banker in the context of Money Laundering is to sift the transactions representing legitimate business and banking activity from the irregular / suspicious transactions. Launderers generally use this channel in two stages to disguise the origin of the funds first, when they place their ill gotten money into financial system to legitimize the funds and introduce these funds in the financial system and second, once these funds have entered the banking system, through a series of transactions, they distance the funds from illegal source. The banks and financial institutions through whom the ‘dirt money’ is laundered become unwitting victims of this crime.

I.H.3 *Threat to Economic and Political Stability* – the infiltration and sometimes saturation of dirty money into legitimate financial sectors and national accounts can threaten economic and political stability. An IMF working paper concludes that money laundering impacts financial behaviour and macro-economic performance in a variety of ways including policy mistakes due to measurement errors in national account statistics; volatility in exchange and interest rates due to unanticipated cross border transfer of funds; the threat of monetary instability due to unsound asset structures; effects on tax collection and public expenditure allocation due to misreporting of income and many more such ways⁵⁶.

I.I Argument FOR Money Laundering – How far Sustainable?

In contrast to the position with insider dealing, a few serious academic arguments have been advanced that money laundering is beneficial or even that it should be permitted⁵⁷. There exist theories of legitimization, suggesting that money laundering enables criminals to come in from the shadows and take their place in the legitimate economy. An example of this was the Seychelles’ proposed Economic Development Assistance Act, 1995, which would have provided that, where a person invested at least US\$10 million in the country, they would be immune from criminal prosecution by any party, the only exception being the Seychelles authorities and then only in the context of the

⁵⁶ Gururaj, see supra note 18. It is known, for instance that in early 1990s an influx of tainted money into several banks in the Baltic states resulted in their collapse due to the high number of withdrawals triggered by customers’ knowledge of dirty deals and lack of consumer confidence.

⁵⁷ Alexander, RCH, *Insider Dealing and Money Laundering in the EU: Law and Regulation*, Ashgate, 2007, p.21

drug trafficking investigation⁵⁸. Further, the funds themselves would be *de jure* ‘clean’ and not liable to confiscation. Professor Barry Rider and others have also pointed out that it may often be beneficial to the state (for e.g. in the funding of intelligence operation) as well as to individuals, not only to keep the origin of certain funds secret but actually to disguise their provenance⁵⁹. However, this argument is not sustainable because money laundering is essentially concerned with the enabling of criminals and, on occasion, their associates to retain or recover the proceeds of their offences. Moreover, the financial confidentiality and money laundering are two distinct things. Dr. Kris Hinterseer has gone to the extent of telling that actual money laundering is, on occasion, in a country’s interest⁶⁰.

I.J Rationale for Anti-Money Laundering Law

Though academically it could be discussed that money-laundering may prove useful in certain context, in light of the harmful effects of money-laundering posed above no one⁶¹ would argue against the anti-money-laundering laws. There are various motivations to have an AML mechanism in place. To begin with, at the most basic, the rationale is to support the adage that “crimes don’t pay”. Firstly, there is the moral dimension: crime should not pay. It is simply not acceptable to society that a person who does wrong should benefit as a result⁶². Apart from the aforesaid dimension, it is intended to deprive the criminal organization of their “financial lifeblood.” Moreover, if it is shown that crime does not pay would act as a sufficient deterrent, as few theorists suggest for cost-

⁵⁸ This virtually legalized money-laundering of proceeds of crime from sources other than drug trafficking to the limit of US\$10 million. The proposed Seychelles Act was later withdrawn in response to international pressure. In Indian context, it would not be out of place to mention that government comes many times with schemes like ‘Voluntary Disclosure Schemes’ for unearthing the black money within the country. Voluntary Disclosure Schemes were earlier launched by the Government in 1951 and 1965 also. Resort to Voluntary Disclosure Schemes has been disapproved by the Tyagi Committee in 1959 and later, by the Wanchoo Committee. Both the Committees were quite clear on the subject. Yet, in 1975, the Government announced another Voluntary Disclosure Scheme because the proper climate had, by then, been created, as a result of a large number of searches conducted during 1974-75 and the message sent home that the honest tax payer will be helped by the Department and dishonest identified and exposed. Available at <http://www.incometaxindia.gov.in/HISTORY/1962-1974.ASP>> last accessed on November 14, 2008

⁵⁹ Alexander, see supra note 57

⁶⁰ Hinterseer, K, Criminal Finance: The political economy of money laundering in a comparative legal context, Kluwer Law International, 2002

⁶¹ This is with due respect to the theories put by authors in support of money laundering.

⁶² Alexander, see supra note 57, at p.24

benefit analysis, especially in economic crimes like money-laundering. Further, there is another theory that if criminals can be prevented from profiting from their offences, they will not be able to re-invest money in those various ways and hence will be hampered from committing further offences⁶³. Equally, if the victims of crime, or even just the law-abiding public, see criminals enjoying a very comfortable life, far more comfortable than their own, this will lead to a considerable public disquiet.⁶⁴ Further, we live in a globalized world as a community and have international relations at stake. There are pressures from parent organizations to which one has acceded to as well as pressures from the developed countries for compliance to tough anti-money-laundering regimes. The compliance results in better international status of the country.

Anti-money laundering law is necessary because money laundering tends to corrupt even the most professional players in the market. Now a money-launderer can be a white collar businessman doing the business legitimately. However, when lured by low interest rate loans (given from proceeds of crime), he would be tempted to launder the black money for that purpose. This illegal business in the long run contaminates the legal business and profession, for example, money laundering needs lawyers and the lure of money can transform the noble professionals to criminals (which they do not perceive they are doing). Money laundering promotes corruption and bribery in every sector, specifically the banking sector. Bribe is just like human blood to the tongue of a wild cat, which once gets the taste of it cannot resist killing humans. Thus money laundering is an activity which is capable of corrupting a chain of financial institution. This provides a sufficient rationale for having an anti-money laundering law which acts like a slow poison, though to some it may seem as power vitamin.

⁶³ This would prevent further development of the system of organized crime.

⁶⁴ Alexander, see supra note 57

PART II: REGULATION OF MONEY LAUNDERING – INTERNATIONAL PERSPECTIVE

Money laundering is a truly global phenomenon. The increasing integration of the world's financial system, as technology has improved and barriers to the free movement of capital have been reduced, has meant that money launderers can make use of this system to hide their ill-gotten gains. They are able to quickly move their criminally derived cash proceeds between national jurisdictions, complicating the task of tracing and confiscating these assets⁶⁵. The International dimension of money laundering was evident in a study of Canadian money laundering police files. They revealed that over 80 percent of all laundering schemes had an international dimension. More recently, "*Operation Green Ice*⁶⁶" (1992) showed the essentially transnational nature of modern money laundering⁶⁷. Only a handful of industrialized western nations had systems in place by the end of the 1980s. Because of this, it has been recognized by many governments that close international operation was needed to counter money laundering, and a number of agreements have reached internationally in order to counter this menace. Today there are an increasing number of States that are passing laws and regulations but UNDCP estimates that about 70 percent of the governments do not yet have effective legislation in place⁶⁸. Action at the international level to combat money laundering began in 1988 with two important initiatives: The Basel Committee on Banking Regulations and Supervisory Practices and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances⁶⁹.

⁶⁵ Gururaj, see supra note 18 at p.803

⁶⁶ In Operation Green Ice, law enforcement from Italy, Colombia, the United Kingdom, Canada, Spain, Costa Rica, the Cayman Islands, and the United States co-operated together to expose the financial infrastructure of the Cali mafia. During the first phase of Operation Green Ice, over \$50 million in cash and property were seized and almost 200 people were arrested world-wide, including seven of Cali's top money managers. In addition, valuable information was obtained when we gained access to financial books and records, as well as computer hard drives and discs containing financial transactions and bank account information. During the second phase of Green Ice, nearly 14,000 pounds of cocaine, 16 pounds of heroin, almost \$16 million in cash were seized, and over 40 people were arrested. Available at <http://www.laundryman.u-net.com/printversion/operation_green_ice.html>

⁶⁷ www.laundryman.u-net.com

⁶⁸ Gururaj, see supra note 18 at p.740

⁶⁹ There are 183 parties to this convention and 87 signatories. India acceded to this treaty on 27th March 1990, available at www.un.org.treaty_adherence_convention_1988.pdf.

II.A. Basle Committee on Banking Regulations and Supervisory Practices

The Basle Statement of Principles⁷⁰ on the prevention of criminal use of the banking system was a significant breakthrough on the financial front to have some controlling mechanism for money-laundering on an international plane. The Statement of Principles does not restrict itself to drug-related money laundering but extends to all aspects of laundering through the banking system, i.e. the deposit, transfer and/or concealment of money derived from illicit activities whether robbery, terrorism, fraud or drugs. It seeks to deny the banking system to those involved in money laundering by the application of the four basic principles:

1. *Know Your Customer (KYC)* - This mandates the bank to take reasonable efforts to determine their customer's true identity, and have effective procedures for verifying the bonafides of a new customer.
2. *Compliance with Laws* – Bank management should ensure high ethical standards in complying with laws and regulation and keep a vigil to not provide services when any money-laundering activity is suspected.
3. *Cooperation with Law Enforcement Agencies*
4. Adherence to the Statement⁷¹

II.B. UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances⁷²

This UN Convention was one of the historic conventions inasmuch as the parties to the Convention recognized the links between illicit drug traffic and other related organised criminal activities which undermine the legitimate economies and threaten the stability,

⁷⁰ December 1988. Available at < <http://www.bis.org/publ/bcbasc137.pdf>> last accessed on November 14, 2008

⁷¹ “All banks should formally adopt policies consistent with the principles set out in this Statement and should ensure that all members of their staff concerned, wherever located, are informed of the bank's policy in this regard. Attention should be given to staff training in matters covered by the Statement. To promote adherence to these principles banks should implement specific procedures for customer identification and for retaining internal records of transactions. Arrangements for internal audit may need to be extended in order to establish an effective means of testing for general compliance with the Statement.”

⁷² The Vienna Convention – 19th December 1988. A delegation of 106 States participated in the Convention. Mr. Guillermo Bedregal Gutiérrez (Bolivia) was elected President of the Convention. As of 24 March 2003, there were 167 parties and 87 signatories to this convention. (http://untreaty.un.org/english/treatyevent2003/Treaty_7.htm) see also <http://www.unodc.org/pdf/convention_1988_en.pdf> last accessed on November 14, 2008.

security and sovereignty of States and that illicit drug trafficking is an international criminal activity that generates large profits and wealth, enabling transnational, criminal organizations to penetrate, contaminate and corrupt the structures of government, legitimate commercial and financial businesses and society at all levels. The treaty required the signatories to criminalize the laundering of drug money, and to confiscate it where found. All countries ratifying agree to introduce a comprehensive criminal law against laundering the proceeds of drug trafficking and to introduce measures to identify, trace, and freeze or seize the proceeds of drug trafficking. Based on the convention many countries have framed their national legislations. Council of Europe Convention on Laundering is motivated by this convention as well as this convention gave a framework for FATF to work.

II.C. GPML – The *Global Programme against Money Laundering* was established in 1997 in response to the mandate given to UNODC by the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. GPML mandate was strengthened in 1998 by the United Nations General Assembly Special Session (UNGASS) Political Declaration and Action Plan against Money Laundering which broadened its remit beyond drug offences to all serious crime⁷³.

Three further Conventions have been adopted / specify provisions for AML/CFT related crimes:

- International Convention for the Suppression of the Financing of Terrorism (1999),
- UN Convention against Transnational Organized Crime (2000)
- UN Convention against Corruption (2003)

II.D. The Financial Action Task Force (FATF)⁷⁴

The Financial Action Task Force (FATF) is an inter-governmental body founded by G7 Countries (Canada, France, Germany, Italy, Japan, United Kingdom), created in 1989,

⁷³ UN Security Council Resolutions 1267(1999), 1373(2001), 1540(2004), 1566(2004), and 1624(2005) call on UN Member States to combat terrorism, including financing of terrorism. GPML has capacities and a special mandate to assist Member States in ratifying and implementing the international standards related to money laundering and financing of terrorism.

⁷⁴ <http://www.fatf-gafi.org>

whose purpose is the development and promotion of national and international policies to combat money laundering and terrorist financing. The Forty Recommendations of the Financial Action Task Force on Money Laundering (FATF) have been established as the international standard for effective antimoney laundering measures. FATF regularly reviews its members⁷⁵ to check their compliance with these Forty Recommendations and to suggest areas for improvement. It does this through annual self-assessment exercises and periodic mutual evaluations of its members. The FATF also identifies emerging trends in methods used to launder money and suggests measures to combat them⁷⁶. In addition to the existing 40 recommendations FATF has come up with 9 special recommendations on terrorist financing. As per the recommendations of the task force, all countries have to ensure that offences such as financing of terrorism, terrorist acts and terrorist organisations are designated as ‘*money laundering predicate offences.*’

The 40 Recommendations provide a complete set of counter-measures against money laundering (ML) covering the criminal justice system and law enforcement, the financial system and its regulation, and international co-operation. They set out the principles for action and allow countries a measure of flexibility in implementing these principles according to their particular circumstances and constitutional frameworks. Though not a binding international convention, many countries in the world have made a political commitment to combat money laundering by implementing the 40 Recommendations. Moreover, FATF’s recommendations have UN Support⁷⁷. Initially developed in 1990,

⁷⁵ There are currently 34 members (India is not among them but is an observer) of the FATF; 32 jurisdictions and 2 regional organisations (the Gulf Cooperation Council and the European Commission). These 34 Members are at the core of global efforts to combat money laundering and terrorist financing. There are also 27 international and regional organisations which are Associate Members or Observers of the FATF and participate in its work. Available at < http://www.fatf-gafi.org/document/5/0,3343,en_32250379_32236869_34310917_1_1_1_1,00.html> accessed on November 13, 2008

⁷⁶ Financial Action Task Force on Money Laundering. 2000. “Review to Identify Non-Cooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures,” Paris: FATF/GAFI, June 22. (Available at: http://www1.oecd.org/fatf/pdf/NCCT2000_en.pdf)

⁷⁷ Resolution 1617 (2005) of the UN Security Council: Strongly urges all Member States to implement the comprehensive, international standards embodied in the Financial Action Task Force’s (FATF) Forty Recommendations on Money Laundering and the FATF Nine Special Recommendations on Terrorist Financing; Resolution 60/288 of the UN General Assembly (20 Sept 2006): Annexed Plan of Action: “To encourage States to implement the comprehensive international standards embodied in the Forty Recommendations on Money-Laundering and Nine Special Recommendations on Terrorist Financing of the Financial Action Task Force, recognizing that States may require assistance in implementing them”

the Recommendations were revised for the first time in 1996 to take into account changes in money laundering trends and to anticipate potential future threats. More recently, the FATF has completed a thorough review and update of the 40 Recommendations (2003). In 2004

II.E. Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime:

Popularly known as Strasbourg convention⁷⁸ was intended to extend the provisions of international cooperation against the activities of international organized criminality in general beyond the area of drug trafficking⁷⁹. Further *the EC Directive on Prevention of the use of the Financial System for the Purpose of Money Laundering in 1991* is a legal regulation of mandatory force requiring member states to incorporate the rules contained therein in their own legal systems by a certain date. Other initiatives of European Union to deal with the situation are Council common position on combating terrorism⁸⁰, Council common position on the application of specific measures to combat terrorism⁸¹, Warsaw convention – Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism dated 16 May, 2005, and Directive 2005/60/EC dated 26th October 2005.

II.F Other Organization and Initiatives against Anti-Money-Laundering (AML)

Money laundering is an increasingly ramified, complex phenomenon that must be tackled in an integrated and interdisciplinary fashion⁸². Towards this there are many organizations throughout the world working coordinately. Some of the prominent ones are discussed below:

II.F.1. International Money Laundering Information Network (IMoLIN)⁸³:

IMoLIN is an Internet-based network assisting governments, organizations and individuals in the fight against money laundering and the financing of terrorism

⁷⁸ <http://conventions.coe.int/treaty/en/Treaties/Html/141.htm>

⁷⁹ UK was the first country to ratify this treaty in 1992.

⁸⁰ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:344:0090:0092:EN:PDF>

⁸¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:344:0093:0096:EN:PDF>

⁸² Ernesto Savona, *Responding to Money Laundering: International perspectives*, Harwood Academic Publishers, 1997, p 1

⁸³ <http://www.imolin.org/imolin/index.html>

administered by UN office on Drugs and Crime. IMoLIN has been developed with the cooperation of the world's leading anti-money laundering organizations. It provides with an international database called Anti-Money Laundering International Database (AMLID) that analyses jurisdictions' national anti-money laundering legislation. It is intended as a tool for practitioners to assist them in their international cooperation and exchange of information efforts. Currently, the Anti-Money Laundering International Database (AMLID) 2nd Round of Legal Analysis has been launched by UNODC on 27 February 2006, IMoLIN has twelve participating organization⁸⁴, four international organizations⁸⁵, and five international financial institutions⁸⁶ on its website.

II.F.2. Wolfsberg AML Principles⁸⁷

This gives eleven principles as an important step in the fight against money laundering, corruption and other related serious crimes⁸⁸. Transparency International (TI), a Berlin based NGO in collaboration with 11 International Private Banks⁸⁹ under the expert participation of Stanley Morris and Prof. Mark Pieth came out with these principles as important global guidance for sound business conduct in international private banking. The importance of these principles is due to the fact that it comes from initiative by private sector. Normally, most initiatives to date have been public sector led by governments and their regulatory and law enforcement agencies, or by government representatives acting through international forms such as the Financial Action Task

⁸⁴ Asia/Pacific Group on Money Laundering (APG), Caribbean Financial Action Task Force (CFATF), Commonwealth Secretariat (COMSEC), Council of Europe – MONEYVAL, Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG), Eurasian Group (EAG), Financial Action Task Force (FATF), Financial Action Task Force on Money Laundering in South America (GAFISUD), Inter-Governmental Action Group Against Money Laundering and Terrorist Financing in West Africa (GIABA), International Criminal Police Organization (Interpol), Organization of American States/Inter-American Drug Abuse Control Commission (OAS/CICAD), United Nations Office on Drugs and Crime Global Programme against Money Laundering, Proceeds of Crime and the Financing of Terrorism (GPML)

⁸⁵ European Commission, International Organization of Securities Commissions (IOSCO), Offshore Group of Banking Supervisors (OGBS), The Egmont Group

⁸⁶ Asian Development Bank (ADB), International Monetary Fund (IMF), World Bank (IBRD/IDA), European Bank for Reconstruction and Development (EBRD) and Inter-American Development Bank (IDB)

⁸⁷ <http://www.wolfsberg-principles.com/>, The original principles were made public on October 30, 2000 in Zurich Switzerland

⁸⁸ Global Anti-Money-Laundering Guidelines for Private Banking, available at <http://www.wolfsberg-principles.com> last accessed on November 15, 2008.

⁸⁹ ABN AMRO Bank N.V., Bank of Tokyo-Mitsubishi Ltd., Barclays Bank, Citigroup, Credit Suisse Group, Deutsche Bank AG, Goldman Sachs, HSBC, J.P.Morgan Private Bank, Santander Central Hispano, Société Générale, and UBS AG

Force (FATF) and the Basel Committee of Bank Supervisors. The Wolfsberg Principles are a non-binding set of best practice guidelines governing the establishment and maintenance of relationships between private bankers and clients⁹⁰.

II.F.3. Egmont Group of Financial Intelligence Units

The Egmont Group is the coordinating body for the international group of Financial Intelligence Units (FIUs) formed in 1995 to promote and enhance international cooperation in anti-money laundering and counter-terrorist financing⁹¹. The Egmont Group consists of 108 financial intelligence units (FIUs)⁹² from across the world. Financial intelligence units are responsible for following the money trail, to counter money laundering and terrorism financing. FIUs are an essential component of the international fight against money laundering, the financing of terrorism, and related crime⁹³. Their ability to transform data into financial intelligence is a key element in the fight against money laundering and the financing of terrorism⁹⁴. The FIUs participating in the Egmont Group affirm their commitment to encourage the development of FIUs and co-operation among and between them in the interest of combating money laundering and in assisting with the global fight against terrorism financing.⁹⁵

II.F.4. Asia-Pacific Group on Money Laundering (APG)⁹⁶

The Asia/Pacific Group on Money Laundering (APG) is an international organisation consisting of 38 member countries/jurisdictions⁹⁷ and a number of international and regional observers including the United Nations, IMF and World Bank. The APG is closely affiliated with the FATF based in the OECD Headquarters at Paris, France. All APG members commit to effectively implement the FATF's international standards for anti-money laundering and combating financing of terrorism referred to as the 40+9

⁹⁰ Kris Hinterseer, The Wolfsberg Anti-Money Laundering Principles, *Journal of Money Laundering Control*, Vol 5:1 2001, p.25-41

⁹¹ <http://www.egmontgroup.org/ExecSecPR.pdf>

⁹² Financial Intelligence Unit of India is also an member of the egmontgroup. http://www.egmontgroup.org/list_of_fius.pdf

⁹³ Definition of FIU “A central, national agency responsible for receiving, (and as permitted, requesting), analysing and disseminating to the competent authorities, disclosures of financial information: (i) concerning suspected proceeds of crime and potential financing of terrorism, or (ii) required by national legislation or regulation has been adopted at the plenary meeting of the Egmont Group in Rome in November 1996, as amended at the Egmont Plenary Meeting in Guernsey in June 2004

⁹⁴ http://www.egmontgroup.org/PRESS_RELEASE_version_27_MAY_2008_G.pdf

⁹⁵ http://www.egmontgroup.org/statement_of_purpose.pdf

⁹⁶ <http://www.apgml.org/>

⁹⁷ India is a member to APG

Recommendations. Part of this commitment includes implementing measures against terrorists listed by the United Nations in the "*1267 Consolidated List*"⁹⁸. The key functions of APG is to Assess APG members' compliance with the global AML/CFT standards through mutual evaluations; Coordinate technical assistance and training with donor agencies and APG jurisdictions to improve compliance with the AML/CFT standards; Co-operate with the international AML/CFT network; Conduct research into money laundering and terrorist financing methods, trends, risks and vulnerabilities; Contribute to the global AML/CFT policy development by active Associate Membership of FATF.

Thus one can see the panoply of efforts taken by the international community to fight the menace of money-laundering. As the financial systems of the world grow increasingly interconnected, international cooperation has been, and must continue to be, fundamental in curtailing the growing influence on national economies of drug trafficking, financial fraud, other serious transnational organized crime, and the laundering of proceeds of such crimes⁹⁹.

The international effort to develop and implement effective anti-money laundering controls has been marked by the persistent, ever present need to balance, on the one hand, the interests of government in access to financial records and even affirmative disclosure of suspicious activity, against, on the other hand, the interests of financial institutions in being free from unduly burdensome regulation, along with the interests of their customers in maintaining an appropriate degree of financial privacy.

At one hand the international community is responding: transgovernmental groups -- made up of financial, regulatory and judiciary specialists -- are working in a variety of ways to share information and expertise to fight money laundering and other crimes while on the other Still, the crime of money laundering, and the fight against it, are both relatively recent phenomena, and much work remains to be done.

⁹⁸ <http://www.un.org/sc/committees/1267/pdf/consolidatedlist.pdf>

⁹⁹ International Strategies to Combat Money Laundering Remarks of Joseph M. Myers, Assistant Director (International Programs) Financial Crimes Enforcement Network, U.S. Department of the Treasury for the International Symposium on the Prevention and Control of Financial Fraud Beijing, 19 - 22 October, 1998at <http://www.icclr.law.ubc.ca/Publications/Reports/myer_pap.pdf> accessed on November 15, 2008.

PART III: REGULATION OF MONEY LAUNDERING IN INDIA

With its growing financial strength, India is vulnerable to money laundering activities even though the country's strict foreign exchange laws make it difficult for criminals to launder money¹⁰⁰. International Narcotics Control Strategy Report by Bureau for International Narcotics and Law Enforcement Affairs¹⁰¹ emphasizes India's Vulnerability to money-laundering activities in following words:

“India’s emerging status as a regional financial center, its large system of informal cross-border money flows, and its widely perceived tax avoidance problems all contribute to the country’s vulnerability to money laundering activities. Some common sources of illegal proceeds in India are narcotics trafficking, illegal trade in endangered wildlife, trade in illegal gems (particularly diamonds), smuggling, trafficking in persons, corruption, and income tax evasion. Historically, because of its location between the heroin-producing countries of the Golden Triangle and Golden Crescent, India continues to be a drug-transit country.”

Money-laundering in India has to be seen from two different perspectives, i.e., Money-laundering on international forum and Money-laundering within the country. As far as the cross-border money-laundering is concerned India's historically strict foreign-exchange laws¹⁰² and reporting norms have contributed to a great extent to control money laundering on international forum¹⁰³. However, there has been threat from informal transactions like 'Hawala'.

¹⁰⁰ India vulnerable to money-laundering, T V Parasuram in Washington, March 02, 2004 12:30 IST, available at <<http://imdownloads.rediff.com/money/index.html>>

¹⁰¹ See International Narcotics Control Strategy Report dated February 29, 2008, available at <<http://www.state.gov/documents/organization/102588.pdf>> accessed on November 15, 2008

¹⁰² Foreign Exchange Regulation Act, 1973. The law was very stringent. This was relaxed by FEMA 1999 with the coming of liberalization. FERA though criticized by many for its strictness was successful in controlling cross-border money-laundering in the nascent stage of Indian Economy.

¹⁰³ India's strict foreign-exchange laws and transaction reporting requirements, combined with the banking industry's due diligence policy, make it increasingly difficult for criminals to use formal channels like banks and money transfer companies to launder money. *However, large portions of illegal proceeds are often laundered through "hawala" or "hundi" networks or other informal money transfer systems. Hawala is an alternative remittance system that is popular among not only immigrant workers, but all strata of Indian society. Hawala transaction costs are less than the formal sector; hawala is perceived to be efficient and reliable; the system is based on trust and it is part of the Indian culture.* - International Narcotics Control Strategy Report dated February 29, 2008, available at <<http://www.state.gov/documents/organization/102588.pdf>> accessed on November 15, 2008.

According to Indian observers, funds transferred through the hawala market are equal to between 30 to 40 percent of the formal market. The Reserve Bank of India (RBI), India's central bank, estimates that remittances to India sent through legal, formal channels in 2006-2007 amounted to U.S. \$28.2 billion. Due to the large number of expatriate Indians in North America and the Middle East, India continues to retain its position as the leading recipient of remittances in the world, followed by China and Mexico¹⁰⁴.

In India, before the enactment of the Prevention of Money Laundering Act 2002 (PMLA-02 hereinafter), the following statutes addressed scantily the issue in question:

- The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974
- The Income Tax Act, 1961
- The Benami Transactions (Prohibition) Act, 1988
- The Indian Penal Code and Code of Criminal Procedure, 1973
- The Narcotic Drugs and Psychotropic Substances Act, 1985
- The Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988

However, this was not sufficient with the growth of varied areas of generating illegal money by selling antiques, rare animal flesh and skin, human organ, and many such varied new areas of generating money which was illegal. Money-laundering was an effective way to launder the black money (wash it to make it clean) so as to make it white. The international initiatives as discussed above to obviate the threat not only to financial systems but also to the integrity and sovereignty of the nations and the recent Hawala episode in India triggered the need for an anti money-laundering law. In view of the urgent need for the enactment of a comprehensive legislation *inter alia* for preventing money laundering and connected activities, confiscation of proceeds of crime, setting up of agencies and mechanisms for coordinating measures for combating money-laundering etc., the PML Bill was introduced in the Lok Sabha on 4th August 1998, which ultimately was passed on 17th January 2003. However, the implementation of the same did not see the light of the day until 2005¹⁰⁵ when it was enforced. The time when the Act of 2002

¹⁰⁴ International Narcotics Control Strategy Report dated February 29, 2008, available at <<http://www.state.gov/documents/organization/102588.pdf>> accessed on November 15, 2008

¹⁰⁵ 1st July 2005

came to be enforced it was too old to cater to the current needs of the anti-money-laundering law. To bring the necessary changes in light of the liberalization of economy and securities market in India, there was a need to have more comprehensive anti money-laundering law and that is how the Prevention of Money Laundering (Amendment) Act 2008¹⁰⁶ came into existence, the salient feature of which will be discussed later in this paper.

III.A. Salient Features of Prevention of Money Laundering Act, 2002

The aforesaid Act was enacted to prevent money-laundering and to provide for confiscation of property derived from, or involved in, money-laundering¹⁰⁷. The Act extends to the whole of India including J&K¹⁰⁸. The Act comprises of X chapters, 75 Sections, and a Schedule.

III.A.1. *Offence of Money Laundering and Punishment:*

Offence of money-laundering means the projection of tainted money (proceeds of the crime) as untainted either directly or indirectly or assisting in such act knowingly or knowingly is a party or is actually involved in such process or activity¹⁰⁹. The proceeds of the crime referred above include the normal crimes¹¹⁰ and the scheduled crimes¹¹¹. The Punishment prescribed for the offence of money laundering in cases of money obtained from normal crime is rigorous imprisonment for a term which shall not be less

¹⁰⁶ hereinafter referred to as PML Bill – 08

¹⁰⁷ Preamble of the said Act also refers to the Political Declaration and Global Programme of Action annexed to the resolution S-17/2 of General Assembly of the United Nations at its Seventeenth special session on 23rd February 1990, as well as the Sessions on 8th, 9th, and 10th June 1998 which calls upon the Member States to adopt national money-laundering (rather it should be anti-money-laundering) legislation and programme.

¹⁰⁸ The PML Bill -08 does not amend this portion of the Act to give this an extraterritorial application though the concept of 'Offence of Cross-border Implications' have been inserted. This aspect will be discussed in later part of this paper.

¹⁰⁹ Section 4 of PMLA -02

¹¹⁰ Crimes which are not mentioned specifically in the schedule of the Act (author's classification). The punishment gives specific treatment to one of the scheduled offences relating to NDPS Act. In view of this it is not clear whether the Act refers also to the crimes not mentioned in the schedule at all. However, with the coming of PML Bill -08 it appears that normal crimes would mean the scheduled crimes only which do not feature in the proviso clause of Section 4 (punishment for money laundering), inasmuch as the PMLA -08 updates the schedule with addition of more than 27 Acts and many Offences.

¹¹¹ The crimes which are mentioned in the Part A and Part B and now Part C (added in PML Bill -08) of the Schedule attached to the Act, if the total value involved in such offences is thirty lakh rupees or more (this limit has also been removed under PML Bill 08) <http://fiuindia.gov.in/faq-moneylaundering.htm>

than 3 years but which may extend to 7 years and shall also be liable to fine which may extend to five lakh rupees. However, for the proceeds of crime which is involved in money-laundering relates to any offence specified under Paragraph 2 of Part A¹¹² of the Schedule the punishment of rigorous imprisonment of 7 years has to be read as 10 years.

III.A.2. *Attachment of Property Involved in Money-laundering*

If the Director has reason to believe that a person is in possession of property involved in money-laundering or he is dealing in such property, the Director is empowered to attach the property¹¹³. As far as offences under the NDPS Act is concerned the Director is empowered to attach the laundered property in drug related cases soon after the case regarding offence is sent by the police officer or a complaint is filed before the court for taking cognizance of the offence. However, in other cases some safeguard is provided as to attachment can only be made only when the investigation is complete and a report is forwarded under Section 173 of Criminal Procedure Code. Under the proposed Bill this distinction has been removed and the safeguard is now available to all scheduled offences¹¹⁴. Further the attachment by the Director is provisional in nature for a period of 90 days¹¹⁵ and needs to be confirmed by the Adjudicating Authority under Section 8 of PMLA 02.

III.A.3 *Enforcement Paraphernalia*

Adjudicating Authority – The Act prescribes for formation of a three member Adjudicating Authority¹¹⁶ for dealing with matters relating to attachment and confiscation of property under the Act. The Adjudicating authority upon receipt of complaint or information of an offence under the Act¹¹⁷ issues a show cause notice under the Act¹¹⁸ as to why the said property not be declared to be property involved in money-laundering.

¹¹² These deal with the offences under the Narcotic Drugs and Psychotropic Substances Act, 1985, Sections 15, 18, 20, 22, 23, 24, 25A, 27A, 29 (now 16, 17, 19, and 21 also as per PML Bill 08)

¹¹³ See Section 5 of PMLA 02

¹¹⁴ See Section 5 of PML Bill 08

¹¹⁵ In the proposed PML Bill 08 it is increased to 150 days

¹¹⁶ Section 6 provides for composition and powers of such authority. A recent amendment vide the PML Bill 08 the “one or more Adjudicating Authority” has been replaced with “an adjudicating authority”. See also Prevention of Money Laundering (Appointment and Conditions of Service of Chairperson and Members of Adjudicating Authorities) Rules, 2007

¹¹⁷ Through Director under Section 5(5); 17(4); 18(10) – when the director attaches the property

*Administrator*¹¹⁹ – An officer not below the rank of a joint secretary to the Govt. of India is to perform the functions of Administrator for management of properties confiscated under the chapter of attachment and confiscation.

*Appellate Tribunal*¹²⁰ – This is to hear appeals against the orders of the Adjudicating Authority and the authorities under the Act. The Tribunal consists of a Chairperson (a person who is or has been a judge of the Supreme Court or a High Court)¹²¹ and two other members. According to the proposed bill the Chairman of the Tribunal can be removed from his office only after consultation with Chief Justice of India¹²².

*Special Courts*¹²³ – The Central Govt. in consultation with the Chief Justice of the High Court for trial of offence of money-laundering may by notification designate one or more courts or session as Special Court for such area as may be specified.

*Authorities under the Act*¹²⁴ – The following classes of authorities are prescribed under the Act

1. Director or Additional Director or Joint Director
2. Deputy Director
3. Assistant Director
4. Any other class of officer as may be appointed¹²⁵.

Further the Act prescribes¹²⁶ a list of officers such as officers of customs, police officers, officers of Reserve Bank, etc., who are required expressly to assist the authorities in enforcement of this Act. The enforcement paraphernalia is given extensive power to discharge the duties under the Act. The Adjudicating authority for the purposes of the Act is vested with powers of Civil Court¹²⁷ under the Code of Civil Procedure 1908. Further, powers are provided to the enforcement directorate to search a person, arrest a

¹¹⁸ See Section 8 of the PMLA 02 for complete procedure

¹¹⁹ See Section 10 of the PMLA 02

¹²⁰ See Section 25 of PMLA 02, see also Prevention of Money-Laundering (Appointment and Conditions of Service of Chairperson and Members of Appellate Tribunal) Rules, 2007

¹²¹ See Section 28 of PMLA 02. For members the requirement that ‘he is or has been a judge of the high court’ has been omitted under the proposed Bill 08

¹²² See Section 32 – A new proviso is added to it...

¹²³ See Section 43 of PMLA 02

¹²⁴ See Section 48 of PMLA 02

¹²⁵ The Central Government is authorized under Section 53 to empower any officer not below the rank of Director to the Central Govt. to act as an authority under the act.

¹²⁶ See Section 54 of PMLA 02

¹²⁷ See Section 11 of the PMLA 02

person, retention of property and has the powers of Civil Court while exercising power under Section 13 to impose fine on entities for their failure to make statutory disclosures. Though, such wide powers are given to the authorities under the Act at the same time a stopper is put in the form of punishment for vexatious search. Vexatious search by any authority or officer exercising powers under the Act is punishable with imprisonment up to two years or fine up to fifty thousand rupees¹²⁸.

In a recent case *Pareena Swarup Versus Union of India*¹²⁹, the Honb'le Supreme Court has dealt with the issue of constitutionality of the Adjudicating Authorities and Appellate Tribunal under PMLA 02. This writ petition under Art. 32 of the Constitution of India by way of Public Interest Litigation sought to declare various sections of the Prevention of Money Laundering Act, 2002 such as *Section 6* which deals with adjudicating authorities, composition, powers etc., *Section 25* which deals with the establishment of Appellate Tribunal, *Section 27* which deals with composition etc. of the Appellate Tribunal, *Section 28* which deals with qualifications for appointment of Chairperson and Members of the Appellate Tribunal, *Section 32* which deals with resignation and removal, *Section 40* which deals with members etc. as *ultra vires* of Arts. 14, 19 (1) (g), 21, 50, 323B of the Constitution of India. It was also pleaded that these provisions are in breach of scheme of the Constitutional provisions and power of judiciary. Court found merit in the arguments of the petitioner and held that "It is necessary that the Court may draw a line which the executive may not cross in their misguided desire to take over bit by bit and judicial functions and powers of the State exercised by the duly constituted Courts. While creating new avenue of judicial forums, it is the duty of the Government to see that they are not in breach of basic constitutional scheme of separation of powers and independence of the judicial function". An order to implement the amended rules was given. One can find some of these amendments in the proposed PML Bill 08 also.

¹²⁸ See Section 62 of PMLA 02. Though this amounts to safeguarding the general public from vexatious searches protecting their life and liberty under Article 21 of the Constitution, it is not encouraging for officers who do not want to take risk. However, proceedings under Section 62 can be initiated only after the approval of Central Govt. This somewhat gives a justification for the provision.

¹²⁹ CDJ 2008 SC 1701, judgment dated 30-09-2008 in WRIT PETITION NO.634 OF 2007.

III.A.4. *Reporting Requirements for Certain Entities*¹³⁰

Every banking company, financial institution and intermediary is under an obligation to maintain a record and furnish information to the Director within such time as prescribed of all transactions, the nature and value of which may be prescribed, whether such transactions comprise of a single transaction or a series of transactions integrally connected to each other and where such series of transactions take place within a month. The said records have to be maintained for a period of 10 years from the date of transactions¹³¹ between the clients and the banking company or financial institution or intermediary, as the case may be. Further aforesaid entities have to maintain the records of the identity of all its clients for a period of 10 years from the date of cessation of the transactions between the clients and them¹³².

III.A.5 *Summons, Searches and Seizures etc.*

Chapter V of the PMLA 02 provides for a comprehensive mechanism for survey, search and seizure. The authorities under the Act have power to enter any place for survey when the said authority has a reason to believe on the basis of material in his possession that any offence of money-laundering has been committed and the person in-charge of such place have to facilitate in the survey of such authority¹³³. If any Director is having some material to make him believe that an offence under the Act has been committed is empowered to authorize any officer subordinate to him to enter and search any building, place, vessel, vehicle, etc; break open any lock or door, box, locker etc; seize any record; place marks of identification; and examine on oath any person. However, such search and seizure has to be done only after a report has been forwarded to a Magistrate under Section 173 of the Code of Criminal Procedure relating to such offence¹³⁴. Further, if

¹³⁰ See Section 13 of PMLA 02

¹³¹ This prior to the proposed amendment (PML Bill 2008) was from the date of cessation of the transaction between the clients and the respective entities.

¹³² Section 13 of PMLA 02

¹³³ See Section 16 - Power of Survey. This procedure is not arbitrary as it has to be according to the procedure established by law under Art. 21 of the Constitution and must be fair and reasonable, for example the reason to believe has to be put down in writing and the proceeds of the survey has to be transferred to the Adjudicating Authority in a sealed envelope as soon as possible.

¹³⁴ See Section 17 of the PMLA 02. The proposed Bill adds to the Proviso further that such search and seizure cannot be done unless a complaint has been filed by a person authorized under the Act to investigate the offence mentioned in schedule before a magistrate or court for taking cognizance of the

any person has secreted about his person or in anything under his possession, ownership or control any record or proceeds of crime which may be useful for or relevant to any proceedings under this Act an authority authorized on this behalf by the Central Govt. by general or special order search that person and seize such record or property which may be useful for or relevant to any proceeding under this Act.¹³⁵ If on the basis of the material in possession an officer authorized in that behalf has reason to believe that a person has committed an offence under this Act may arrest that person informing him the grounds of arrest¹³⁶. Further the authorities have power to retain the property and the records seized under the Act for a period of not more than 3 months (90 days) pending the adjudication by adjudicating authority¹³⁷.

III.A.6. *Fines, Punishment, and Reverse Burden of Proof*

Failure in the reporting requirements mentioned above leads to a punishment not less than 10 thousand rupees which may exceed to one lakh rupees for each failure. The Act provides for a reverse Burden of Proof as far as a criminal case is concerned. Normal rule of evidence in any proceeding is that the burden of proof is on the plaintiff or the complainant¹³⁸. However, under the Act, the person charged of an offence of money laundering has to prove his innocence by showing that the property in dispute or money in dispute is untainted¹³⁹. Moreover, there is a presumption as to records or property seized from a person that such record or property belonged to that person unless rebutted by him¹⁴⁰. In cases where there are many transactions which are found to be interconnected the presumption would be towards their interconnectedness unless

scheduled offence (this is in alternative to the report requirement under Section 157 – PMLA mentions it as Section 173)

¹³⁵ See Section 18 of the PMLA 02. No such search or seizure can be made unless a report under Section 173 of Cr.P.C. has been made to the magistrate or a complaint has been filed by the person authorized to investigate. Where the authority is not empowered such he has to take the person within 25 hours to the Gazetted officer superior to him or the Magistrate for search.

¹³⁶ See Section 19 of PMLA 02

¹³⁷ Though the period under Section 5 of PMLA 02 has been increased from 90 to 150 the legislature has not changed it for retention of property and records under sections 17 and 18 of the Act.

¹³⁸ Section 101 of the Indian Evidence Act, 1872

¹³⁹ See Section 24 of PMLA 02. Even otherwise, in tax matters, the courts and tribunals have generally adopted the view that in matters of illegal and clandestine transactions, the facts would be within the special knowledge of the accused and prosecution of revenue is not expected to prove such special facts by leading in evidence.

¹⁴⁰ See Section 22 of PMLA 02

rebutted¹⁴¹. The offences under the Act are cognizable and non-bailable¹⁴². The cognizance of an offence under the Act can only be taken by Special Court when a complaint in writing is made by the Director or any officer authorized by Central Government in writing.

III.A.7 *Extending Reciprocity to Contracting States*

‘Contracting State’ is any country or place outside India in respect of which arrangements have been made by the Central Government with the Government of such country through a treaty or otherwise¹⁴³. The Act provides for entertaining the Letter of Request¹⁴⁴ from the Contracting States to identify and trace the proceeds of crime laundered from Contracting State and vice-versa to identify and trace the proceeds of crime laundered from India to Contracting State¹⁴⁵. The Act also provides for attachment, seizure and confiscation of property in a Contracting State on our behalf and in India on Contracting State’s behalf. The success of this part mainly depends on the bilateral treaties. The recent Bill proposes to add a provision wherein the mode of disposal of property seized is being prescribed¹⁴⁶.

III.B. Salient Features of PML Bill – 08

Minister of state for finance Pawan Kumar Bansal tabled a bill recently to amend the Prevention of Money Laundering Act, 2002 (PMLA - 02) in Rajya Sabha¹⁴⁷. The present Bill’s key features are as follows:

¹⁴¹ See Section 23 of PMLA 02

¹⁴² See Section 45 of the PMLA 02

¹⁴³ See Section 55 of the PMLA 02

¹⁴⁴ It is also known as Letters Rogatory. Section 77 of Civil Procedure Code 1908 – Letter of Request - In lieu of issuing a commission the Court may issue a letter of request to examine a witness residing at any place not within [India]. A letter rogatory, also known as a "letter of request", is a request from a court in India to a court in a foreign country requesting international judicial assistance in effecting service of process.

¹⁴⁵ See Chapter IX of the PMLA 02 generally for this section.

¹⁴⁶ See Section 60(7) PML Bill 08 –“ When any property in India is confiscated as a result of execution of a request from a contracting State in accordance with the provisions of this Act, the Central Government may either return such property to the requesting State or compensate that State by disposal of such property on mutually agreed terms that would take into account deduction for reasonable expenses incurred in investigation, prosecution or judicial proceedings leading to the return or disposal of confiscated property.”

¹⁴⁷ Money laundering bill tabled in Rajya Sabha, 18 Oct, 2008, 0054 hrs IST, ET Bureau

1. It seeks to bring certain financial institutions like Full Fledged Money Changers¹⁴⁸, Money Transfer Service and Master Card within the reporting regime of the Act.
2. Provisions to combat financing of terrorism by way of introducing new category of offences which have *cross-border implications*.
3. Offences with cross border implication is introduced by way of Part C to the Schedule of the Act with the removal of monetary threshold limit of Rs. 30 Lakhs¹⁴⁹. However, the monetary limit still remains for Part B offences.
4. Provisional attachment period is enhanced from 90 days to 150 days under Section 5 and additional safeguard has been introduced inasmuch as the property can be attached and a person can be searched only after completion of the investigation by the investigation agency¹⁵⁰.
5. Enforcement Directorate is now more empowered to search the premises immediately after the offence is committed and the police have filed a report under Section 157 of the Cr.P.C.
6. Protection of tenure of Chairman and Member of Appellate Tribunal¹⁵¹ inasmuch as requirement of consultation with Chief Justice of India before their removal. Moreover, the retirement age of chairman/member is increased from 62 to 65.
7. The requirement for appointment of member of the Appellate Tribunal that the person should be or has been a Judge of the High Court has been removed retaining other qualifications¹⁵².
8. In cases of cross-border money-laundering the present Bill enables the Central Government to return the confiscated property to the requesting country in order to implement the provisions of the UN Convention against Corruption.
9. Expanded the reach of the Act by adding many more crimes under various legislations¹⁵³ in Part A and Part B of the Schedule to the Act.
10. Delegated legislation is provided empowering Central Government to notify, from time to time, an activity for playing games of chance for cash or kind¹⁵⁴ as

¹⁴⁸ In addition to Banks who are Authorized Dealers to deal in foreign exchange, The Reserve Bank of India under Section 10 of the Foreign Exchange Management Act, 1999 may provide license to work as Authorised Money Changers (AMCs). An AMC may either be a Full Fledged Money Changer (FFMC) or a Restricted Money Changer (RMC). FFMCs are authorised to purchase foreign exchange from residents and non-residents visiting India, and to sell foreign exchange for certain approved purposes while RMCs are authorised only to purchase foreign exchange from residents and non-residents., <http://www.nirc-icai.org/articles/a14.htm>

¹⁴⁹ See Section 2(1) (y) of PMLA 02 which defines scheduled offence as (i) the offences under Part A of the Schedule; or (ii) the offences specified under Part B of the Schedule if the total value involved in such offences is 30 Lakh rupees or more;

¹⁵⁰ Investigating agency now needs to be really fast

¹⁵¹ This matter was at issue in the case of *Pareena Swarup vs. Union of India*, see supra note 129

¹⁵² Id.

¹⁵³ Twenty two other legislations have been included in the schedule so as to include the proceeds of crime under those legislation as tainted money under the Prevention of Money Laundering Law of the Country.

¹⁵⁴ The traditional Hindu festival of Diwali, which encourages gambling, epitomises how ingrained the activity is in Indian culture, however at this stage much of the gambling falls within the illegal domain. India has the largest middle-class in the world, and an economy that has grown at rate of more than 7 percent over the last 10 years. It is little wonder that the gambling industry has been and will be looking carefully for opportunities to enter the Indian market. Casino gambling expansion, or the discussion of expansion has recently been a common theme across India, from Goa and Daman in the west, to Haryana in

‘designated business or profession’ for the purpose of bringing them into the reporting regime under the Act.

III.B.1. *The Schedule to the Act*

Proceeds from a crime committed under the following legislations if shown as un-tainted would be treated as money-laundering and would be accordingly punishable under the Act.

Part A:

Paragraph 1	Offences under the Indian Penal Code
Paragraph 2	..the Narcotic Drugs and Psychotropic Substances Act, 1985
Paragraph 3	.. <i>the Explosive Substances Act, 1908</i> ¹⁵⁵
Paragraph 4	.. <i>the Unlawful Activities (Prevention) Act, 1967</i>

Part B

Paragraph 1.	Offences under the Indian Penal Code
Paragraph 2.	..the Arms Act, 1959
Paragraph 3	..the Wild Life (Protection) Act, 1972
Paragraph 4	..the Immoral Traffic (Prevention) Act, 1956
Paragraph 5	..the Prevention of Corruption Act, 1988
Paragraph 6	.. <i>the Explosives Act, 1884</i>
Paragraph 7	.. <i>the Antiques and Arts Treasures Act, 1972</i>
Paragraph 8	.. <i>the Securities and Exchange Board of India Act, 1992</i>
Paragraph 9	.. <i>the Customs Act, 1962</i>
Paragraph 10	.. <i>the Bonded Labour System (Abolition) Act, 1976</i>
Paragraph 11	<i>the Child Labour Prohibition and Regulation Act 1986</i>
Paragraph 12	<i>the Transplantation of Human Organ Act, 1994</i>
Paragraph 13	<i>the Juvenile Justice (Care and Protection of Children) Act, 2000</i>
Paragraph 14	<i>the Emigration Act, 1983</i>
Paragraph 15	<i>the Passports Act, 1967</i>
Paragraph 16	<i>the Foreigners Act, 1946</i>
Paragraph 17	<i>the Copyright Act, 1957</i>
Paragraph 18	<i>the Trade Marks Act, 1999</i>
Paragraph 19	<i>the Information Technology Act, 2000</i>
Paragraph 20	<i>the Biological Diversity Act, 2002</i>
Paragraph 21	<i>the Protection of Plant Varieties and Farmer’s Rights Act 2001</i>
Paragraph 22	<i>the Environment Protection Act, 1986</i>
Paragraph 23	<i>the Water (Prevention and Control of Pollution) Act, 1974</i>
Paragraph 24	<i>the Air (Prevention and Control of Pollution) Act, 1981</i>
Paragraph 25	<i>the Suppression of Unlawful acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act 2002</i>

northern India and to Sikkim further north in the Himalaya.
<http://www.gamblingcompliance.com/node/6896> India - A Regulatory Overview

¹⁵⁵ The italicized portion indicates the addition of new Acts under the Schedule vide PML Bill 08

Part C

Includes an offence which is the offence of cross border implications and is specified in Part A or Part B without any monetary threshold; or the offences against property under Chapter XVII of the Indian Penal Code.

The Schedule under each paragraph refers few specific sections describing the offence the proceeds from which would be treated as proceeds of a crime under Section 3 of the Act. There is a significant addition to these offences under the aforesaid Act also by the Amendment Bill of 2008.

From the aforesaid amendments, it is evident that the legislature is vigilant towards the illegal proceeds from various fields like illegal killing of animals, violation of environmental laws, violation of intellectual property laws, proceeds from selling of antiques and treasures against the law, violation of customs act, proceeds from internet-related crimes, cyber crimes, proceeds from bonded labour and child labour, illegal organ transplantation, proceeds from illegalities in securities market like insider trading, violation of laws relating to dealing of explosive substances and many more.

III.B.2. *Inclusion of new definitions*

The new Bill seeks to provide few new definitions and amends a few for further clarity and broadening of the Act.

*Authorized Persons*¹⁵⁶ – means an authorized person as defined in clause (c) of Section 2 of the FEMA, 1999¹⁵⁷, and includes a person who has been authorized or given general or special permission by the Reserve Bank of India and overseas principals with whom the person so authorised or having general or special permission conducts a service involving international money transfer;

*Designated Business or Profession*¹⁵⁸ – means carrying on activities for playing games of chance for cash or kind, and includes such activities associated with casino or such other

¹⁵⁶ Section 2(1) (da) of PML Bill 08.

¹⁵⁷ "authorised person" means an authorised dealer, money changer, off-shore banking unit or any other person for the time being authorised under sub-section (1) of section 10 (*FEMA*) to deal in foreign exchange or foreign securities;

¹⁵⁸ Section 2(1)(ja) of PML Bill 08.

activities as the Central Government may, by notification, so designate, from time to time;

The Definition of *Financial Institution*¹⁵⁹ has been amended so as to include also an authorized person and a payment system operator.¹⁶⁰ As well as the *Non-Banking Financial Company* would now include a person carrying on Designated Business or Profession as per clause¹⁶¹.

III.B.3. *Offence of Cross Border Implications*¹⁶²

The Bill introduces a new category of offence that has cross-border implications for fighting terrorism. This particular provision gives the Indian anti money-laundering legislation an extraterritorial exposure. Now under this provision a person who is presently outside India and conducts in such a way that it constitutes an offence at that place and which would have also been an offence under one of the Parts of the schedule referred to above and remits such proceeds to India OR commits an offence in India under one of the Parts referred to above and transfers the proceeds or part thereof outside India commits an offence of Cross-Border Implication. Thus, now cross-border illegal proceeds can be put under the scanner of anti-money laundering legislation in India.

III.B.4. *Regulating Payment System Operators*¹⁶³

Payment gateways such as Visa and MasterCard, money changers, money transfer service providers and casinos will soon come under the ambit of India's money laundering law and face mandatory reporting obligations.

¹⁵⁹ Section 2(1)(l) of PML Bill 08

¹⁶⁰ (rb) "Payment System Operator" means any person, who operates, maintains, facilitates or sustains a payment system involving the use of credit card or any other similar card or system, which enables payment to be effected between a payer and a beneficiary.

¹⁶¹ Section 2(1)(q) of PML Bill 08

¹⁶² Section 2(1)(ra) of PML Bill 08 - Offences of Cross Border Implications means

(i) Any conduct by a person at a place outside India which constitutes an offence at that place and which would have constituted an offence specified in Part A, Part B or Part C of the Schedule, had it been committed in India and if such person remits the proceeds of such conduct or part thereof to India; or

(ii) Any offence specified in Part A, Part B or Part C of the Schedule which has been committed in India and the proceed of the crime, or part thereof have been transferred to a place outside India or any attempt has been made to transfer the proceeds of crime, or part thereof from India to a place outside India.

¹⁶³ See supra note 152. Payment and settlement systems constitute an important component of any economy. Recognizing this, the Reserve Bank has initiated many reforms in the area of Payment and Settlement systems of the country, and had constituted infrastructural support for the reforms process, which is headed by the apex level National Payments Council. Regulation of payment and settlement systems is an important area of activity which may have to be based on adequate legal backing.,

III.B.5 *Strengthened Enforcement Directorate*

As noted earlier the draft legislation also empowers the Enforcement Directorate “to search premises immediately after the offence is committed”. The investigating agency can attach any property and search a person after completing the probe. It can enhance the period of provisional attachment of property from 90 days to 150 days.

III.B.6. *Enhanced reporting requirements*

At present, the mandatory reporting requirement is applicable on banks, financial institutions and intermediaries. Under the rules, every banking company, financial institution and intermediary has to maintain a record of all transactions for 10 years. Records of all transactions above the stipulated limit submitted to Financial Intelligence Unit (FIU), which manages the data and deciphers it into intelligence, to be used by various agencies. The new entities that are proposed to be brought under the PMLA through this amendment will now have to report details of transactions to FIU.

III.C. Financial Intelligence Unit - India (FIU-IND)¹⁶⁴

Financial Intelligence Unit – India (FIU-IND) was set by the Government of India¹⁶⁵ as the central national agency responsible for receiving, processing, analyzing and disseminating information relating to suspect financial transactions. FIU-IND is also responsible for coordinating and strengthening efforts of national and international intelligence, investigation and enforcement agencies in pursuing the global efforts against money laundering and related crimes. FIU-IND is an independent body reporting directly to the Economic Intelligence Council (EIC) headed by the Finance Minister¹⁶⁶. FIU-IND mandates a series of reporting requirements as outlined below:

III.C.1 *Cash Transaction Reports*

A. All cash transactions of the value of more than *rupees ten lakhs* or its equivalent in foreign currency;

¹⁶⁴ <http://fiuindia.gov.in/> There are 43 personnel working under this organization chosen from different organizations like CDBT, CBEC, RBI and SEBI

¹⁶⁵ vide O.M. dated 18th November 2004

¹⁶⁶ <http://fiuindia.gov.in/about-overview.htm>

B. All series of cash transactions integrally connected to each other which have been valued below rupees ten lakhs or its equivalent in foreign currency where such series of transactions have taken place within a month; These reports have to be filed on 15th day of the succeeding month.

III.C.2 *Suspicious Transaction Reports*

Every banking company, financial institution and intermediary shall furnish information of all suspicious transactions¹⁶⁷ whether or not made in cash. The report has to be filed not later than seven working days on being satisfied that the transaction is suspicious

III.C.3 *Counterfeit Currency Reports*

Every banking company, financial institution and intermediary, to furnish to FIU-IND information relating to all cash transactions where forged or counterfeit currency notes or bank notes have been used as genuine or where any forgery of a valuable security or a document has taken place facilitating the transactions. This report has to be filed not later than seven working days from the date of occurrence of such transaction

Financial Intelligence Unit of India is doing a great job in terms of information retrieval and remittance and is applauded by the international community, but one should not be satisfied with that there remains a lot to be done.

III.D. Role of Reserve Bank of India

The regulatory purview of the Reserve Bank extends to a large segment of financial institutions, including commercial banks, co-operative banks, non-banking financial institutions and various financial markets¹⁶⁸. The Board for Financial Supervision (BFS) continued to exercise its supervisory role over those segments of the financial institutions that are under the purview of the Reserve Bank.

¹⁶⁷ Suspicious transaction means a transaction whether or not made in cash which, to a person acting in good faith – (1) gives rise to a reasonable ground of suspicion that it may involve the proceeds of crime; or (2) appears to be made in circumstances of unusual or unjustified complexity; or (3) appears to have no economic rationale or bonafide purpose; or (4) gives rise to a reasonable ground of suspicion that it may involve financing of the activities relating to terrorism, (modified by Notification No. 4/2007 dated 24-05-2007)

¹⁶⁸ At end-March 2008, there were 79 commercial banks [excluding regional rural banks (RRBs)], 91 RRBs, 1,770 urban co-operative banks (UCBs), 4 development finance institutions (DFIs), 12,834 non-banking financial companies (NBFCs) (of which 376 NBFCs are permitted to accept/hold public deposits) and 19 primary dealers (PDs) (of which 10 are banks undertaking PD business as a departmental activity and nine are non-bank entities, also referred to as stand-alone PDs), <http://www.rbi.org.in/Scripts/AnnualReportPublications.aspx?Id=816>

Recently, the RBI has issued a series of master circulars to the banks, about the precautions to be exercised in handling their customers' transactions. Important amongst these is a guidance note issued about treatment of customer and key to knowing the customer. The identity, background and standing of the customer should be verified not only at the time of commencement of relationship, but also be updated from time to time, to reflect the changes in circumstances and the nature of operations of the account¹⁶⁹.

RBI plays a significant role in AML activities. RBI, recently blocked the application of Swiss bank UBS for a banking license in India on the ground that it was involved in \$8 billion money-laundering racket. RBI said it put the UBS application on hold because the bank failed to cooperate in a money-laundering case in which controversial Bombay-based businessman Hasan Ali Khan was involved. Khan is charged with large-scale breaching of India's currency controls. RBI investigators found the link between UBS and Khan, as the businessman had deposited \$8 billion at a Zurich branch of UBS. They cited it as direct evidence for blocking the license of the bank¹⁷⁰.

III.E. Role of Securities Exchange Board of India

Vulnerability of securities market to money-laundering activities have been discussed in the earlier part of this paper. Indian securities market is also prone to money-laundering activities. Intermediaries registered under the SEBI are under reporting obligation of PMLA 02. FIU-IND has also issued certain guidelines relating to KYC to be followed by these intermediaries.

The main source of money-laundering would be the Participatory Notes Transaction and Overseas Direct Investment Routes. The findings in the UBS Securities Case¹⁷¹ have highlighted serious regulatory concerns in that the PN/ODI route and its cover of anonymity is being used by certain entities without there being any real time check,

¹⁶⁹ DBOD.AML.BC.18/14.01.001/2002-03, dated August 16, 2002, <http://www.rbi.org.in/Scripts/AnnualReportPublications.aspx?Id=816>

¹⁷⁰ KUSHAL JEENA, Analysis: India to check money laundering, available at http://www.metimes.com/Security/2008/06/11/analysis_india_to_check_money_laundering/2895/

¹⁷¹ <http://www.sebi.gov.in/cmorder/ubsorder.pdf>

control and due diligence on their credentials. Such a lapse has very grim portents as far as the market integrity and interest of investors are concerned. The mechanism of opening up the Indian securities market through PN /ODI route to entities outside India imposes a commensurate onus on the registered intermediaries (FIIs) of maintaining high standards of regulatory compliance, exercise of high due diligence and independent professional judgment and therefore any gaps in measuring up to the onus may be fraught with critical repercussions in the market.

SEBI has almost taken a full circle on the issue of Participatory Notes. SEBI has taken certain important measures in favor of the Foreign Institutional Investors (FII) as well as the unregistered foreign investors who intend to invest in the Indian Securities market. Looking at the lackluster performance of the capital markets and in order to encourage inflow of foreign capital into India, SEBI has decided to remove the restrictions on issuance of Offshore Derivative Instruments (ODIs), popularly known as Participatory Notes (PNs), which had been imposed on FIIs in October last year¹⁷². This is an evidence of market forces compelling the regulator to change its tough stance of regulation. An example what money can do?

III.F. Problem areas for India in having a proper AML

Anti-money laundering efforts of India is commendable on paper. There are many problem areas for India in having an effective AML regime. There are several factors contributing to these problems and there is a need to concentrate the efforts on one direction aimed towards the focus of the problem. Some of the key problem areas are pointed as follows:

III.F.1. *Lethargy of Enforcement Mechanism*

India started its anti-money laundering exercise in the year 1998, a well start, but not properly tackled and saw the day of enforcement only in 2005 – seven years – a long time for enforcement. When the AMLA 02 with amendments in 2005 came into force, it was inherent with many lacunas as there were several developments in those seven years which the Act failed to address. Then, as obvious, a need was felt to have further

¹⁷² Mihir Naniwadekar, SEBI moves to tighten insider trading norms by prohibiting opposing transactions, <http://indiacorplaw.blogspot.com/2008/10/sebi-moves-to-tighten-insider-trading.html>

amendments. PML Bill 2008 is laid before the parliament. Lets hope that legislature may take less time this time.

III.F.2. *Growth of Technology*

Not only the growth of technology has helped the common man it has proved also a boon for these money-launderers and India is not an exception to this. Cyber finance is the growing concept in this developing economy. The speed at which the technology is growing is not matched up with the enforcement agencies, specifically highlighted by the lame situation of cyber crimes.

III.F.3. *Unawareness about the Problem*

Unawareness about the problem of money-laundering among the common people is an impediment in having proper AML regime. People in India, especially among the poor and illiterate, do not trust banks and prefer to avoid the lengthy paperwork required to complete a money transfer through a financial institution. The hawala system provides them same remittance service as a bank with little or no documentation and at lower rates and provide anonymity and security. This is because many don't treat this to be a crime and are not aware about the harmful effects of the crime.

III.F.4. *KYC Norms – Do they serve the purpose*

Now India has KYC Norms in place in both money market and capital markets. However, these KYC Norm don't desist the Hawala transactions, as RBI cannot regulate them. Further, KYC Norms become a mockery because of indifference shown by the implementing authorities. KYC norms are followed in letters but the requirement is to follow it in spirits. Increased competition in the market requires and gives motivation to the banks to lower their guards. Specifically, the franchisees of banks that are authorized to open accounts.

III.F.4. *Smuggling – a rampant activity*

India has illegal black market channels for selling goods. Smuggled goods such as food items, computer parts, cellular phones, gold, and a wide range of imported consumer goods are routinely sold through the black market. By dealing in cash transactions and avoiding customs duties and taxes, black market merchants offer better prices than those offered by regulated merchants. This problem though has lessened due to liberalization policy of the government.

III.F.4. Tax Laws

Justice *Learned Hand* in *Commissioner v. Newman* stated that "Over and over again courts have said that there is nothing sinister in so arranging one's affairs to keep taxes as low as possible. Everybody does so, rich or poor, and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions. To demand more in the name of morals is mere cant." Closer back home in India, the Supreme Court of India in *Azadi Bachao Andolan & Anr*¹⁷³ cited *Lord Tomlin in IRC v Duke of Westminster*¹⁷⁴ while upholding the validity of treaty shopping¹⁷⁵. There is a need to make a distinction between the tax avoidance and tax evasion. There are apprehensions that Double Taxation Treaties may lead to money-laundering channel¹⁷⁶.

III.F.5. Threshold Limit under PMLA 02.

The definition of money laundering creates two classes of scheduled offences. In respect of offences against the State and Drug related offences, any sum or property howsoever small may be seized and confiscated under this Act. In respect of other scheduled offences falling under schedule B, floor value of Rs. 30 Lakhs is prescribed so as to exclude relatively small offences, and properties. Unfortunately, this floor limit itself provides an escape route, as a person may engage with relative immunity in a series of transactions of money laundering below this limit. This has been discussed under the concept of smurfing in the earlier part of the paper¹⁷⁷.

III.F.6. Absence of comprehensive enforcement agency

As seen earlier, money-laundering has now become hybrid and is not only related to NDPS cases but many areas of operation. Separate wings of the law enforcement agencies are dealing with digital crimes, money laundering, economic offences and terrorist crimes. The agencies do not have the convergence among themselves but the

¹⁷³ 263 ITR 706

¹⁷⁴ In this case, Lord Tomlin had remarked that "Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however, unappreciative the Commissioners of Inland Revenue or his fellow tax gatherers may be of his ingenuity, he cannot be compelled to pay an increased tax"

¹⁷⁵ Parul Jain, Mauritius: Global Tax Management For Emerging Trans National Corporations, <http://www.mondaq.com/article.asp?articleid=61050>

¹⁷⁶ <http://www.thehindubusinessline.com/2003/12/06/stories/2003120600570400.htm>

¹⁷⁷ Gururaj, see supra note 18

criminals have. Criminals are working in a borderless world but the police in one State is still grappling with procedures on how to arrest a person residing in another State.

Apart from the above problem areas costs involved in having a AML regime is also relevant.

CONCLUSION AND SUGGESTION:

Combating money laundering is a dynamic process because the criminals who launder money are continuously seeking new ways to achieve their illegal ends. Moreover, it has become evident to the FATF through its regular typologies exercises that as its members have strengthened their systems to combat money laundering the criminals have sought to exploit weaknesses in other jurisdictions to continue their laundering activities.

Many important financial centers have now adopted legislation to curb drug-related money laundering. However, too many priority financial centers have still not adopted needed legislation or ratified the convention. There is also a substantial question of whether the drug trafficking-oriented money laundering laws that many governments adopted in the earlier part of this decade are adequate, given recent development in money-laundering practices and new technologies used in banking. Organized crime groups are increasingly a factor in major money-laundering schemes – and the multiple sources of their proceeds compounds the difficulty of linking the monetary transaction to a unique predicate offence like drug trafficking. Moreover, criminal organizations have distinct patterns of operations¹⁷⁸.

The need for a definitive policy is obvious. UN data reveals that terror group financing accounts for just 0.2 per cent of the total \$856 billion money laundered worldwide. While this amounts to just \$1.72 billion, this segment of money laundering has the potency to cause havoc for the global economy¹⁷⁹.

¹⁷⁸ Brett F. Woods, *Art and Science of Money Laundering: Inside the Commerce of International Narcotics Trafficking*, Paladin Press Colorado, 1998, p.5

¹⁷⁹ Money laundering: RBI takes note, <http://sify.com/finance/fullstory.php?id=13656127>

Suggestions

1. As we have seen earlier, money-laundering involves international activity at a greater level hence a suggestion borrowing from the words of Interpol expert Mr. Brown would be appropriate *“the key to making an impact in money laundering is to get all of the countries of the world to enact and enforce the same laws dealing with money laundering so the criminals have nowhere to go.”*

As it is open to the states to decide exactly which crimes would qualify as predicate offences to money laundering, this has resulted into serious inroad into the international harmonizing efforts of anti-money laundering law. Most countries have listed serious offences as predicate crimes but have nevertheless, adopted different approaches to what exactly constitutes a serious crime for the purpose¹⁸⁰. Thus there is a need to have a common list of predicate offences to solve the problem of crossroads, specifically keeping into mind the trans-national character of the money laundering crime and the need for a unitary and coherent approach at international level.

2. In order to reduce the vulnerability of the international financial system to money laundering, governments must intensify their efforts to remove any detrimental rules and practices which obstruct international co-operation against money laundering.

3. Offshore financial confidentiality is an issue. The states are reluctant to compromise with their financial confidentiality. There is a need to build a balance between financial confidentiality and this confidentiality turning to a money-laundering haven.

4. Money-laundering seems to be a victimless crime to most of the persons, however, in view of the harmful effects of the crime discussed in the earlier part of the discussion it is need of the day to educate people about such crimes and inculcate a sense of vigilance towards the instances of money laundering. Once the problem is visible to the eyes of people, it would contribute towards better law enforcement as it would be subject to public examination.

¹⁸⁰ See Unger, supra note 13

5. There is a need to sensitize the Private Sector about their role in anti-money laundering activities. An example would be the Wolfberg principles. Anti-money laundering should not be only the responsibility of the Government, but also the private players.

6. Continuous up-gradation and dissemination of information is necessary. FIU-IND website still does not have a link which talks about the proposed Bill of 2008 on AML. There is a need of reviewing the AML strategies periodically. The enforcement agencies now have to step in the shoes of money-launderers to find out their techniques of money laundering.

In the past 20 years, law enforcement authorities and FIUs in various countries have made major progresses in identifying the ways money laundering works. However, much emphasis continues to be placed on relatively small money laundering operations that tend to highlight the predicate crime. There are various official reports on this aspect, but the most public attention by far is directed to the most sensational cases¹⁸¹.

7. There is a requirement to have a convergence of different enforcement agencies, sharing of information is necessary.

8. It is suggested that a special cell dealing with money laundering activities should be created on the lines of Economic Intelligence Council (EIC) exclusively dealing with research and development of AML. This Special Cell should have link with INTERPOL and other international organizations dealing with AML. All key stakeholders, like, RBI, SEBI etc. should be a part of this.

9. There is a need to develop a political will to tackle the problem, so long as it will be just an international compliance show piece, any number of laws would not serve the purpose. The tussle between the Center and the State has to be removed for having an effective AML regime.

10. The laws should be implemented at the level of State Governments and it should not be only the responsibility of Central Government. The more decentralized the law

¹⁸¹ Id. 184

would be better the reach it would have. However, there should be an effective coordination between the Central and State agencies.

11. To have an effective AML regime one has to think regionally, nationally, and globally.

To conclude, researcher borrows the suggestion from the US Department of State in its International Narcotics Control Strategy Report:

“The Government of India should move forward expeditiously with amendments to the PMLA that explicitly criminalize terrorist financing, and expand the list of predicate offenses so as to meet FATF’s core recommendations. Further steps in tax reform will also assist in negating the popularity of hawala and in reducing money laundering, fraud, and financial crimes. The GOI should ratify the UN Conventions against Transnational Organized Crime and Corruption. The GOI needs to promulgate and implement new regulations for nongovernment organizations including charities. Given the number of terrorist attacks in India and the fact that in India hawala is directly linked to terrorist financing, the GOI should prioritize cooperation with international initiatives that provide increased transparency in alternative remittance systems. India should devote more law enforcement and customs resources to curb abuses in the diamond trade. It should also consider the establishment of a Trade Transparency Unit (TTU) that promotes trade transparency; in India, trade is the “back door” to underground financial systems. The GOI also needs to strengthen regulations and enforcement targeting illegal transactions in informal money transfer channels.”