CHAPTER -6
COMBATING MONEY LAUNDERING

6.1 INTRODUCTION:
Most nations became conscious regarding the evil effects of money laundering only during 1970s and thereafter. During this period, they passed the relevant laws, rules, and regulations to directly tackle the menace of money laundering. Earlier most countries targeted drug trafficking and other organized crimes as such and not directly the profits generated by these crimes. Once they decided to target the illegal profits, it was natural that the activity of laundering those profits is also criminalized and attacked.

These new anti money laundering laws, rules and regulations provide "some of the most effective weaponry against major crimes. These strike at the heart of major organized crimes by depriving persons involved of the profits and instruments of their crimes."\(^1\)

In view of lack of self-determination only relevant US and Indian laws, rules, regulations, agencies are discussed and not that of all other countries. However the principles and structures followed by the laws, rules, regulations, and enforcement agencies of other nations in this respect are broadly similar to that of the US.

6.2 LAWS AND ENFORCEMENT BY REGION:
The legislative aspect relating to combating of money laundering at national as well as at international levels is discussed below.

6.2.1 U.S.NATIONAL LAWS:

- IDENTIFICATION OF CASH MOVEMENTS

Many nations have passed the laws like the Bank Secrecy Act 1970 (BSA) of US and the Financial Transactions Reports Act 1988 (FTRA) of Australia to

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counteract the use of financial institutions by criminals to launder the proceeds of their illicit activities\textsuperscript{2}.

\textit{BSA} and \textit{FTRA} are the wellsprings of financial institutions reporting requirements. The objective of \textit{BSA} is to create a paper trail of suspicious activities for law enforcement, and to provide sanctions for laundering money\textsuperscript{3}.

\begin{itemize}
  \item \textbf{BANK SECRECY ACT 1970}

  \textit{BSA} imposes a criminal fine up to $500,000 or ten-year imprisonment or both along with civil penalties for its wilful violations. \textit{BSA}'s main purpose is to reduce the secrecy regarding certain financial transactions. The \textit{BSA} gives the authority to frame Regulations requiring financial institutions (including like casinos, money/securities businesses, Postal Service) / persons /citizens to file specific reports listed in coming paras. These reports provide in detail the who's, when's, where's and why's of certain transactions in order to report and record the activity that could be related to criminal operations\textsuperscript{4}.

  \item \textbf{SUSPICIOUS ACTIVITY REPORT (SAR)}

  Every financial institution must file an SAR, if it knows suspects or has reason to suspect that a transaction or a series of transactions involves illegally derived funds; is designed to evade BSA requirements, or has no business or apparent lawful purpose. The institution enjoys a safe harbor\textsuperscript{'} from civil liability for any disclosure contained in SAR.

  \item \textbf{CURRENCY TRANSACTION REPORT (CTR)}

  A financial institution must file a CTR for each deposit, withdrawal, currency exchange, or other payment or transfer exceeding $10,000 conducted by or through it. The CTR gives basic information that who conducted the

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\textsuperscript{4} (Richards, 1998:179; USDepartment of the Treasury and Department of justice, 1999).
transaction, on whose behalf, the amount, the description of the transaction, and where it originated and was destined.

iii. CURRENCY OR MONETARY INSTRUMENT REPORT (CMIR)
A CMIR must be filed by all persons physically transporting currency or monitory instruments exceeding $10,000 across national border and by all persons receiving a cross border shipment of currency/monitory instruments exceeding $10,000 for which a CMIR has not been filed. Failure to file CMIR can lead to seizure of the impugned funds.

iv. Foreign Bank/Security Account Report (FBAR)
US residents and citizens and the person doing business in the US must file a foreign bank/ security account report (FBAR) regarding accounts maintained with foreign banks or securities for aggregate deposits above $10,000.

v. IRS FORM 8300 REPORT
IRS Form 8300 is a mirror image report to CTR to be filed by certain businesses (for example airlines, auction houses, insurance companies, car dealers) for all the transactions if aggregate receipt in a day/rolling 12-month period is over $10,000.

vi. MAINTENANCE OF RECORDS AND IDENTIFICATION OF THE PURCHASER/BENEFICIARY
The BSA authorized Regulations also require financial institutions to maintain records of certain financial transactions for five years. Additionally the institution must obtain and record identifying information on the purchaser and the instrument purchased and in some cases on origin, beneficiary and intervening financial institutions.

Law enforcement value of these reports is immense. Australia's FTR Act too generates above reports, a very useful input for analyses and starting investigations by anti money laundering agencies.
vii. **‘KNOW YOUR CUSTOMER’ (KYC) POLICY**

The most important tool arising from the BSA is the 'know your customer' policy, which requires all financial institutions to verify and record the identity of all customers opening accounts and doing transactions over and above $3,000\(^5\).

➢ **MONEY LAUNDERING CONTROL ACT, 1996 (ML CA) OF THE US**

The relevant statute concerning criminalization of money laundering and forfeiture of infected money. This Act provides for Criminalizing Money Laundering and Providing for Civil and Criminal Forfeitures of 'Tainted' Funds/Property. The parallel Australian law is *the Proceeds of Crime Act 1987 (PCA)*.

The *MLCA* criminalized money laundering and provided for both civil and criminal forfeitures of funds or property implicated in the laundering. The *MLCA* also criminalized structuring, attempted structuring, and aiding and abetting in structuring to avoid filing of CTR’s\(^6\).

*MLCA* makes it unlawful to knowingly engage in a financial transaction with the proceeds of a specified unlawful activity under following four situations:

a. Intention to promote specified unlawful activity.

b. Intention to violate certain tax laws.

c. Designing in whole or in part concealment of the nature, location, source, ownership or control of the proceeds of unlawful activity. For instance using drug proceeds to purchase stock/ automobiles in the name of a third party to conceal the fact that the true owner is a drug dealer.


d. Avoidance of reporting requirements: intentionally structuring bank deposits to avoid the filing of CTR’s for more than $10,000 under BSA.

*MLCA* also makes international movement of illicit proceeds into/out of/through US unlawful in case of circumstances a, c and d mentioned *above*. *MLCA* additionally enables law enforcement to carry out under-cover 'sting' operations.

- **Underlying/Predicate Offences –**

  *MLCA* lists over 170 criminal offences (which include terrorism, health care fraud, and immigration offences), the handling of whose proceeds will be punishable as an offence of money laundering.

- **USA PATRIOT Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act.2001**

On 26th October 2001 to further counter money laundering and terrorism US enacted *USA PATRIOT Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act.2001* It is a landmark law, which provides significant tools to detect investigate and prosecute money laundering. It authorizes the forfeiture of assets related to terrorism. It set the groundwork for public- private cooperation with the financial institutions to shut off the flow of funds to terrorists.

**Its main features are:**

- Requiring wide range of financial institutions to establish anti-money laundering programs.
- Denying "shell banks" access to the US financial system;
- Developing a SAR reporting system for securities brokers/dealers;
- Requiring foreign correspondent banks to identify their owners and appoint an agent in the US to receive service of legal process.

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• Facilitating greater cooperation amongst enforcement agencies, private sector and financial institutions on money laundering and terrorist financing activities

U.S. NATIONAL STRATEGY ON MONEY LAUNDERING:
US National Strategy to counter money laundering is built around following four principal goals and designed to advance the prevention, detection, investigation, and prosecution of money laundering.

1. Strengthening Domestic Enforcement to Disrupt the Flow of Illicit Money.

2. Enhancing Regulatory and Cooperative Public-Private Efforts to Prevent Money Laundering.


6.2.2 AFGHANISTAN:
The Financial Transactions and Reports Analysis Centre of Afghanistan (FinTRACA) was established as a Financial Intelligence Unit (FIU) under the Anti Money Laundering and Proceeds of Crime Law passed by decree late in 2004. The main purpose of this law is to protect the integrity of the Afghan financial system and to gain compliance with international treaties and conventions. The Financial Intelligence Unit is a semi-independent body that is administratively housed within the Central Bank of Afghanistan (Da Afghanistan Bank). The main objective of FinTRACA is to deny the use of the

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Afghan financial system to those who obtained funds as the result of illegal activity, and to those who would use it to support terrorist activities. In order to meet its objectives, the FinTRACA collects and analyzes information from a variety of sources. These sources include entities with legal obligations to submit reports to the FinTRACA when a suspicious activity is detected, as well as reports of cash transactions above a threshold amount specified by regulation. Also, FinTRACA has access to all related Afghan government information and databases. When the analysis of this information supports the supposition of illegal use of the financial system, the FinTRACA works closely with law enforcement to investigate and prosecute the illegal activity. FinTRACA also cooperates internationally in support of its own analyses and investigations and to support the analyses and investigations of foreign counterparts, to the extent allowed by law. Other functions include training of those entities with legal obligations to report information, development of laws and regulations to support national-level AML objectives, and international and regional cooperation in the development of AML typologies and countermeasures.

6.2.3 BANGLADESH:

In Bangladesh, this issue has been dealt with by the Prevention of Money Laundering Act, 2002 (Act No. VII of 2002). In terms of section 2, "Money Laundering means (a) Properties acquired or earned directly or indirectly through illegal means; (b) Illegal transfer, conversion, concealment of location or assistance in the above act of the properties acquired or earned directly or indirectly through legal or illegal means." In this Act, “Properties means movable or immovable properties of any nature and description”. To prevent these illegal uses of money Bangladesh Govt. has introduced the Money Laundering Prevention Act. The Act was last amended in the year 2009 and all the Financial Institutes are following this act. Till today there are 26 Circulars

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12 http://fintraca.gov.af/about.aspx
14 http://www.thefullwiki.org/Money_laundering
issued by Bangladesh Bank under this act. To prevent Money laundering a banker must do the following:\(^{15}\):

- While opening a new account, the account opening form should be duly filled up by all the information of the Customer.
- The KYC has to be properly filled up.
- The TP (Transaction Profile) is mandatory for a client to understand his/her transactions. If needed, the TP has to be updated at the Client’s consent.
- All other necessary papers should be properly collected along with the Voter ID card.
- If there is any suspicious transaction is notified, the BAMLCO (Branch Anti Money Laundering Compliance Officer) has to be notified and accordingly the STR (Suspicious Transaction Report) reporting has to be done.
- The Cash department should be aware of the Transactions. It has to be noted if suddenly a big amount of money is deposited in any account. Proper documents will be required if any Client does this type of transaction.
- Structuring, over/ under Invoicing is another way to do Money Laundering. The Foreign Exchange Department should look into this matter cautiously.
- If in any account there is a transaction exceeding 7.00 lac in a single day that has to be reported as CTR (cash Transaction report)
- All the Bank Officials must go through all the 26 Circulars and must use in doing the Banking.

6.2.4 CANADA:

Financial Transaction and Reports Analysis Centre of Canada is accountable for search of money and terrorist financing cases that are originating or intended for Canada\(^{16}\). The financial intelligence unit was formed by the amendment of the Proceeds of Crime (Money Laundering) Act in December 2001 (via Bill C-25) and formed the Proceeds of Crime (Money Laundering) and Terrorist Financing Act.

Financial institutions in Canada are required to track large cash transactions (daily total greater than CAD$10,000.00 or equivalent value in other currencies) that can be used to finance terrorist activities in and beyond Canada's borders and report them to FINTRAC\(^{17}\).

6.2.5 EUROPEAN UNION:

The EU directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing" tries to prevent such crime by requiring banks, real estate agents and many more companies to investigate and report usage of cash in excess of €15,000. The earlier EU directives 91/308/EEC and 2001/97/EC also relate to money laundering\(^{18}\).

6.2.6 UNITED KINGDOM:

Money laundering and terrorist funding legislation in the UK is governed by four Acts of primary legislation\(^{19}\):-

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\(^{16}\) Money laundering, http://en.wikipedia.org/wiki/Money_laundering

\(^{17}\) http://www.fintrac.gc.ca/publications/brochure/05-2003/3-eng.asp

\(^{18}\) Money laundering, http://en.wikipedia.org/wiki/Money_laundering,


\(^{19}\) http://article.wn.com/view/2012/07/18/Top_HSBC_boss_quits_over_money_laundering_allegations/, http://en.wikipedia.org/wiki/Money_laundering

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• Terrorism Act 2000
• Anti-terrorism, Crime and Security Act 2001
• Proceeds of Crime Act 2002[^30]
• Serious Organized Crime and Police Act 2005

The Proceeds of Crime Act 2002 contains the primary UK anti-money laundering legislation, section 327-340 including provisions requiring businesses within the 'regulated sector' like banking, investment, money transmission, certain professions, etc. to report to the authorities' suspicions of money laundering by customers or others.

Money laundering is widely defined in the UK under section 340 of Proceed of Crime Act 2002. In effect any managing or participation with any proceeds of any crime can be a money laundering offence. An offender's possession of the proceeds of his own crime falls within the UK definition of money laundering.[^20] The definition also include activities which would fall within the conventional definition of money laundering as a process by which proceeds of crime are concealed or disguised so that they may be made to appear to be of legitimate origin.

Unlike certain other jurisdictions, UK money laundering offences are not restricted to the proceeds of serious crimes, nor are there any monetary limits, nor is there any necessity for there to be a money laundering design or purpose to an action for it to amount to a money laundering offence. A money laundering offence under UK legislation need not engage money, since the money laundering legislation include assets of any explanation. In consequence any person who commits an acquisitive crime i.e. one from which he obtains some benefit in the form of money or an asset of any description in the UK will inevitably also commit a money laundering offence under UK legislation.

This applies also to a person who, by criminal conduct, evades a liability for e.g. a taxation liability referred to by lawyers as obtaining a pecuniary

advantage as he is deemed thereby to obtain a sum of money equal in value to the liability evaded.

The principal money laundering offences hold a maximum penalty of 14 years imprisonment.

Further guideline is provided by the Money Laundering Regulations 2003\(^ {21}\) which was replaced by the Money Laundering Regulations 2007\(^ {22}\). They are directly based on the EU directives 91/308/EEC, 2001/97/EC and 2005/60/EC.

One consequence of the Act is that solicitors, accountants, tax advisers and insolvency practitioners who suspect as a result of information received in the course of their work that their clients have engaged in tax evasion or other criminal conduct from which a benefit has been obtained, are now required to report their suspicions to the authorities\(^ {23}\). In most circumstances it would be an offence, 'tipping-off', for the reporter to inform the subject of his report that a report has been made. These provisions do not however require disclosure to the authorities of information received by certain professionals in privileged circumstances or where the information is subject to legal professional privilege\(^ {24}\). Others that are subject to these regulations include financial institutions, credit institutions, estate agents which includes, trust and company service providers, high value dealers who accept cash equivalent to 15,000 Euro or more for goods, and casinos.

Professional guidance (which is submitted to and approved by the UK Treasury) is provided by industry groups including the Joint Money Laundering Steering Group the Law Society\(^ {25}\) and the Consultative Committee of Accountancy Bodies’ (CCAB). However there is no obligation on banking institutions to routinely report monetary deposits or transfers above a specified

\(^{21}\) Money Laundering Regulations 2003
\(^{22}\) Money Laundering Regulations 2007
\(^{25}\) Law Society AML Guidance
value. Instead reports have to be made of all suspicious deposits or transfers, irrespective of their value.

The reporting obligations include reporting suspicions relating to gains from conduct carried out in other countries which would be criminal if it took place in the UK. Exceptions were later added to exempt certain activities which were legal in the location where they took place, such as bullfighting in Spain.

There are more than 200,000 reports of suspected money laundering submitted annually to the authorities in the UK (there were 240,582 reports in the year ended 30 September 2010 – an increase from the 228,834 reports submitted in the previous year. Most of these reports are submitted by banks and similar financial institutions (there were 186,897 reports from the banking sector in the year ended 30 September 2010).\(^{27}\)

Although 5,108 different organisations submitted suspicious activity reports to the authorities in the year ended 30 September 2010 just four organisations submitted approximately half of all reports, and the top 20 reporting organisations accounted for three-quarters of all reports.

The offence of failing to report a suspicion of money laundering by another person carries a maximum penalty of 5 years imprisonment.

6.2.7 INDIA:


Section 12 (1) prescribes the obligations on banks, financial institutions and intermediaries (a) to maintain records detailing the nature and value of transactions which may be prescribed, whether such transactions comprise of a single transaction or a series of transactions integrally connected to each other,

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\(^{26}\) Section 340(2), Proceeds of Crime Act 2002
\(^{27}\) en.wikipedia.org/wiki/Proceeds_of_Crime_Act_2002
and where such series of transactions take place within a month; (b) to furnish information of transactions referred to in clause (a) to the Director within such time as may be prescribed and t records of the identity of all its clients. Section 12 (2) prescribes that the records referred to in sub-section (1) as mentioned above, must be maintained for ten years after the transactions finished. It is handled by the Indian Income Tax Department.

The provisions of the Act are frequently reviewed and various amendments have been passed from time to time.

The recent activity in money laundering in India is through political parties, corporate companies and share market. It is investigated by the Indian Income Tax Department.

Bank accountant must record all the transactions whose amount will be more than Rs. 10 Lakhs. Bank accountant must maintain these records for 10 years. Banks will also make cash transaction report (CTR) and Suspicious transactions report whose amount is more than RS. 10 Lakhs within 7 days of doubt. This report will be submitted to enforcement directorate and income tax department.28

6.2.8 INTERNATIONAL DIMENSION: MULTILATERAL CO–OPERATION:

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 assets.29 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” (1992) showed the essentially transnational nature of modern money laundering. 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.\(^\text{30}\)

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 place. 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 Substances. There are 183 parties to this convention and 87 signatories. India acceded to this treaty on 27\(^\text{th}\) March 1990.\(^\text{31}\)

\(^{30}\) [http://www.laundering.u-net.com/printversion/operation-green-ice.html]

1. The 1988 Vienna Convention –

The United Nations' 1988 *Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, known as the Vienna Convention, was an epoch making event in the development of a coordinated international response to the criminal activities of money laundering. The main aim of the Convention was to put an obligation upon the signatory nations to criminalize drug money laundering and to take steps to deprive drug traffickers of the proceeds of their criminal activities. The Convention urged its signatory nations to exchange information and enforce their domestic money laundering statutes. The convention allows for asset forfeiture, extradition, and general mutual assistance amongst law enforcement agencies. It establishes the principle that domestic bank secrecy provisions should not interfere with international criminal investigations.

2. The Financial Action Task Force (FATF) and Its Recommendations

FATF - The FATF was created in July 1989 by the Group of Seven (G-7) nations at their Heads of State and Finance Ministers Economic Summit. Presently FATF comprises 29 countries and 2 international organizations. These countries inter alia represent major financial centres of Asia, Europe, North America and South America. These countries are:

- Argentina, Australia, Austria, Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Greece, Hong Kong, China, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, The Netherlands, New Zealand, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, Turkey, The United Kingdom, The United States, And the two member international organizations are the European Commission and the Gulf Cooperation Council. FATF brings together the experts from areas of finance, law and enforcement.

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34 Scott, David. 1995 “Money laundering and international efforts to fight it”
THE FORTY RECOMMENDATIONS –

FATF in its publication *FA TF on Money Laundering - the Forty Recommendations* declares that FATF is an intergovernmental organization whose policies aim to prevent proceeds of crime from being utilized in future criminal activities and from affecting legal economic activities.\(^{35}\) FATF's main task is to combat global financial crime by having its members enact and enforce certain domestic, bilateral, and multilateral anti-money laundering laws and initiatives, based on its '40 Recommendations'. These Recommendations provide a basic framework for anti-money laundering efforts and are designed to be of universal application. They encompass general framework, criminal justice system and law enforcement (Nos. 1 to 7); the financial system and its regulation (Nos. 8 to 29); and international cooperation (Nos. 30 to 40). They are designed as guidelines only as each country's political and legal systems are different.\(^{36}\) These Forty Recommendations in brief are given below.

**A: GENERAL FRAMEWORK (# 1-3)**

- Every Country should take immediate steps to ratify and implement fully the Vienna Convention namely the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.
- Financial institutions' secrecy laws should be conceived so as not to inhibit implementation of FATF Recommendations.
- An effective anti-money laundering program should include increased multilateral cooperation and mutual legal assistance in investigations, prosecutions and extraditions in money laundering cases.

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\(^{35}\) FATF, 2001:1

B: ROLE OF NATIONAL LEGAL SYSTEMS IN COMBATING MONEY LAUNDERING (#4-7):

- Scope of the Criminal offence of Money laundering (#4-6)
- Every Country should take necessary measures including legislative ones to criminalize money laundering as set forth in Vienna Convention. Every country is to categorize drug money laundering as serious offence. Every country is to determine specifically the list as to what serious crimes would be designated as money laundering predicate offences.
- As set out in the 1988 Vienna Convention, offence of Money Laundering should be applicable at least to ‘knowing money laundering activity’ including the concept that the knowledge may be inferred from objective facts.
- Wherever possible, not only the employees but also the corporations should be subjected to criminal liability.

Provisional Measures & Confiscation (#7):

- Every Country should adopt measures similar to those set forth in the 1988 Vienna Convention, including legislative ones, to enable competent authorities to confiscate property laundered, proceeds from, instrumentalities used in or intended for use in the commission of any money laundering offence, or property of corresponding value, without prejudicing the rights of bona fide third parties. Such measures should include the authority to:
  1) Identify, trace and evaluate property, which is subject to confiscation;
  2) Carry out provisional measures, such as freezing and seizing, in order to prevent any dealing, transfer or disposal of such property; and
  3) Take appropriate investigative measures.

In addition to confiscation and criminal sanctions, every country should consider monetary and civil penalties, and proceedings including civil proceedings to void contracts entered into by parties, where they knew that as
a result of the contract, the State would be prejudiced in its ability to recover financial claims e.g. through confiscation or collection of fines and penalties.

C: ROLE OF THE FINANCIAL SYSTEM IN COMBATING MONEY LAUNDERING (#8-29):

- Recommendations ten to 29 should apply to banks and also to all kinds of non-bank financial institutions including money changers.
- Appropriate national authorities should consider applying Recommendations ten to 21 and 23 to the conduct of financial activities of commercial nature by businesses or professions, which are not financial institutions.

Customer Identification and Record-keeping Rules (#10-13):

- Financial institutions should not keep anonymous accounts or accounts in fictitious names. They should be required by law to identify based on official or other reliable identifying document and record the identity of their clients.

In case of legal entities, financial institutions should take measures

1) To verify the legal existence and structure of customer either from a public register or from the customer or both.
2) To verify that person representing the legal entity is so authorized and to identify that person.

- Financial institutions should take sufficient measures to get information about the true identity of the persons on whose behalf an account is opened or a transaction is conducted.
- Final institutions should maintain minimally for five years all necessary records on transactions for enabling them to comply with information requests of the competent authorities. Such records should be sufficient to reconstruct the individual transactions, if necessary to provide as evidence for prosecution of criminal behaviour.
Financial institutions should keep customer identification records, account files and business correspondence minimally for five years after the closure of the account. These records should be made available to competent authorities for investigations and criminal prosecutions.

Every country should pay special attention to money laundering threats

Inherent in new technologies, which favour anonymity and take measures to prevent their use for money laundering.

**Increased Diligence of Financial Institutions (#14-19):**

- Financial institutions should pay special attention to all complex, unusually large transactions or pattern of transactions having no apparent economic or visible lawful purpose. The background and purpose of such transactions be examined and recorded in writing and be made available to supervisors, auditors and enforcement authorities.
- Whenever financial institutions suspect that funds originate from a criminal activity, they should be required to promptly report it to competent authorities.
- Financial institutions and their directors and employees should be protected by law from any civil or criminal liability for breach of any restriction on disclosure of information imposed by law, if they report their suspicions in good faith to the competent authorities regardless of whether illegal activity factually occurred.
- Financial institutions and their directors and employees should not be allowed to warn their clients when the information on them is being reported to the competent authorities.
- Financial institutions reporting their suspicions should comply with instructions of the competent authorities.
Financial institutions should develop programs to counter money laundering. These programs should minimally include to counter money laundering:

- Developing internal policies, procedures and controls including the designation of compliance officers at management level.
- Continuing employee-training program.
- An audit program to test the system.

Insufficient Anti-Money Laundering Measures. (#20-21):

Financial institutions should ensure that anti-money laundering principles are applied to all their branches and majority-owned subsidiaries operating abroad especially in countries where these Recommendations do not or insufficiently apply.

Where local laws prohibit implementation, competent authorities in the country of mother institutions should be informed by the financial institutions that they are unable to apply these Recommendations.

Financial institutions should give special attention to the transactions done with the persons and financial institutions of the countries where these Recommendations are not applied. Whenever these transactions have no apparent economic or visible legal purpose, their background and purpose be examined and results be reported to supervisors, auditors and competent authorities.

Other Measures to Avoid Money Laundering (#22-25)

Each country should implement feasible measures to detect or monitor physical cross-border movement of cash and bearer negotiable instruments subject to necessary safeguards of proper use of such information and so as not to impede freedom of capital movements.

Each country should have a system where under banks and other financial institutions report all domestic and international currency
transactions above a fixed amount to a national central agency having a
computerized data base to be made available to competent authorities
to counter money laundering but subject to strict safeguards to ensure
proper use of such information.

- Each country should encourage development of modern and secure
techniques of money management and replace cash transfers including
by increased use of cheques, payment cards, direct deposit of salary
cheques, and book entry recording of securities.

- Each country should consider taking measures to prevent unlawful use
of shell corporations and other such entities.

Implementation and Role of Regulatory and other Administrative
Authorities (#26-29)

- The competent authorities supervising banks and financial institutions
and also other competent authorities should ensure that supervised
institutions have adequate programs to guard against money
laundering. These authorities along with other domestic judicial and
enforcement authorities should cooperate and provide their expertise
for investigations and prosecutions for money laundering cases.

- The Competent Authorities should be assigned to ensure effective
implementation of these Recommendations by way of supervisions and
regulation in other professions dealing with cash.

- The Competent Authorities should develop guidelines to help financial
institutions in detecting suspicious patterns of transactions by their
clients. These guidelines will work primarily as educational tool for
employees of financial institutions.

- The Competent Authorities should take sufficient legal measures to
guard against control or acquisition of major participation in financial
institutions by criminals and their comrades.
D. STRENGTHENING OF INTERNATIONAL CO-OPERATION (#30-40)

Administrative, Co-operations and Exchange of General Information.

- Each country should record, at least aggregate international flows of cash in any currency so that after combining with Central Bank information cash flows and re-flows from various sources abroad could be estimated.

- International authorities like Interpol and World Customs Organization be given the task of gathering and disseminating information and latest developments in money laundering and techniques of money laundering to competent authorities. Central Banks and bank regulators along with other national authorities should disseminate this information to financial institutions in individual countries.

Exchange of Information Relating to Suspicious Transactions (#32)

Every country should make efforts to improve system of information exchange between competent authorities relating to suspicious transactions, persons and corporations involved in those transactions but subject to privacy and data protection.

Other Forms of Co-operation (#33-35)

Basis and Means for Co-operation in Confiscation, Mutual Assistance and Extradition (#33-35):

- Every country should ensure on bilateral or multilateral basis that their different definitional standards concerning intention element in breach of law do not affect the ability or willingness of countries to provide each other with mutual legal assistance.

- International co-operation should be supported by bilateral and multilateral agreements based on shared legal concepts so that widest possible mutual assistance is available.
Every country should be encouraged to ratify and implement relevant international conventions on money laundering like 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.

Focus of Improved Mutual Assistance on Money Laundering Issues (#36-40)

Every country should encourage co-operative investigations including use of investigative techniques like controlled delivery.

The procedures for availing mutual assistance in foreign jurisdictions regarding criminal matters for use of compulsory measures like search, seizure and obtaining of evidence in money laundering investigations and prosecutions should be established.

Legal authority and arrangements should be in place in every country for taking expeditious action and to coordinate in response to requests by foreign countries to identify, freeze, seize and confiscate proceeds based on money laundering or the crimes underlying the laundering activity.

In the interests of justice, for the cases that are subject to prosecution in more than one country, conflicts over jurisdiction should be avoided and mechanisms should be applied to determine the best venue for prosecution of defendants.

Every country should have procedure to extradite the individuals charged with money laundering offence or related offences. Every country should recognize money laundering as an extraditable offence and should also consider simplifying extradition procedures by allowing direct transmission of such requests between appropriate authorities/ministries.

SPECIAL RECOMMENDATIONS ON TERRORIST FINANCING –

In order to combat the financing of terrorism, FATF has also come out with Special Recommendations. FATF agreed to the following Recommendations, which is combination with its Forty Recommendations on Money Laundering:
provide the basic framework to detect, prevent and stop the financing of terrorism, terrorist acts and other related heinous crimes.\(^{37}\)

I. Ratification and Implementation of UN Instruments

Every country should take immediate steps to ratify and implement the 1999 UN International Convention for the Suppression of the Financing of Terrorism.

Every country should immediately implement the UN Resolutions on prevention and suppression of the financing of terrorist acts, especially UN Security Council Resolution, 1373.

II. Criminalizing the Financing of Terrorism and Associated Money Laundering

Every country should criminalize the financing of terrorism, terrorist acts and terrorist organizations. Every country should ensure that such offences are designated as money laundering predicate offences.

III. Freezing and Confiscating Terrorist Assets

Every country should implement measures to freeze without delay funds or other assets of terrorists, those who finance terrorism and terrorist organizations in accordance with the UN Resolutions on the subject.

Every country should take measures, including legislative ones, which would enable the competent authorities to seize and confiscate property which is the proceeds of, or used in, or intended or allocated for use in the financing of terrorism, terrorist acts or terrorist organizations.

IV. Reporting Suspicious Transactions Related to Terrorism

If financial institutions, other businesses or entities suspect or have reasonable grounds to suspect that funds are linked with terrorism, terrorist acts or terrori...
terrorist organizations, they should be required to report promptly their suspicions to the competent authorities.

V. International Co-operation

Based on a mutual assistance treaty or other such arrangement or information exchange, every country should provide the greatest possible assistance for criminal, civil enforcement and administrative investigations, inquiries and proceedings on the subject of financing of terrorism, terrorist acts and terrorist organizations.

Every country should take measures to ensure that they do not provide safe havens for individuals charged with financing of terrorism, terrorists acts or terrorist organizations and should have procedures to extradite such individuals.

VI. Alternative Remittance

Every country should take measures to ensure that persons or legal entities include agents providing a service for transmission of money or value, including transmission through an informal value or money transfer system or network, be licensed or registered and subjected to all the FATF Recommendations applicable to banks and non-bank financial institutions. Every country should ensure that persons carrying out this service illegally are subject to administrative, civil or criminal sanctions.

VII. Wire Transfers

Every country should take measures to require financial institutions, including money remitters, to include accurate and meaningful originator information (name, address and account number) on funds transfers and related messages that are sent, and such information should remain with the transfer or related message through the payment chain.

Each country should take measures to ensure that financial institutions including money remitters conduct enhanced scrutiny of and monitor for
suspicious activity funds transfers, which do not contain complete originator information.

VIII. Non-profit Organization

Every country should review the adequacy of laws and regulations relating to entities that can be abused for financing of terrorism. Non-profit organizations are especially vulnerable and each country should ensure that they are not misused:

(1) By terrorist organizations posing as legitimate entities;

(2) To exploit legal entities as conduits for terrorist financing, including for the purpose of escaping asset-freezing measures;

(3) To conceal or obscure the clandestine diversion of funds meant for legitimate activities to terrorist organizations.

FATF AND EGMONT GROUP\textsuperscript{38}:

U.S. country has led the crucial effort to build international counter-money laundering cooperation, spearheading the creation of the Financial Action Task Force against Money Laundering (FATF), whose 40 Recommendations have set the standard for national counter-money laundering regimes, as well as the organization of the Egmont Group of financial intelligence units around the world.

3. Basle committee on banking regulations and supervisory practices (bcbrsp):

Established in 1975, this Committee consists of banking supervisory authorities and Central Banks of the Group of Ten countries. The Group of Ten actually has 12 members: Britain, Belgium, Canada, and France, Germany, Italy, Japan, Luxembourg, Netherlands Sweden, Switzerland, and US.

\textsuperscript{38}The first International Meeting of Organization devoted to Anti-Money Laundering. Brussels.
In December 1988, it issued a "Statement of Principles" outlining basic policies and procedures which should be in place in member countries' institutions in order to suppress the money laundering through the banking system, national and international. 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. The Statement sets out to reinforce existing best practices among banks and

a. Encourage vigilance against criminal use of the payment system;

b. Implementation by banks of effective preventive safeguards; and

c. Cooperation with law enforcement agencies\(^\text{39}\).

Further it seeks to deny the banking system to those involved in money laundering by the application of the four basic principles:

i. **Know Your Customer (KYC) –**
   a. 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.

ii. **Compliance with Laws –**
   a. 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.

iii. Cooperation with Law Enforcement Agencies

iv. Adherence to the Statement

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\(^{39}\) Basle Committee on Banking Regulations and supervisory Practices 1998.
4. UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

The UN Convention was adopted in Vienna on 19 December 1988 and came into force 11 November 1990. By 1997, 136 countries had signed and ratified the Convention, while 13 more had signed but not yet ratified it\(^4^0\).

Article 2(1) of the Convention states:

The purpose of this Convention is to promote co-operation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension.

“The Convention”, as Baldwin and Munro remark, “established a basis for placing international controls on money laundering thus setting the standard for international anti money laundering efforts to follow\(^4^1\).” It did so by requiring states to make money laundering itself an offence, to co-operate in money laundering investigations and related proceedings (including extradition), and to pass laws facilitating the tracing, seizing and forfeiture of proceeds of crime.

States parties are required under Article 3 to criminalise money laundering, adopt laws enabling the confiscation of proceeds derived from crimes detailed in the Convention, and facilitate the pre-confiscation identification, tracing, freezing or seizing of such proceeds and property.

Regarding bank secrecy, long a buffer between concerned authorities and criminal financial activities, Article 5(3) states:

In order to carry out the measures referred to in this article, each Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized. A Party shall not


decline to act under the provisions of this paragraph on the ground of bank secrecy.

The Convention imposed on Parties an obligation to afford each other the widest measure of legal assistance with respect to the offences established under Article 3. Article 7(2)(g) expressly states that mutual legal assistance may be requested in respect of the identification or tracing of “proceeds, property, instrumentalities or other things for evidentiary purposes.” Of relevance for financial institutions, Article 7(5) declares similarly to 5(3) that “A Party shall not decline to render mutual legal assistance under this article on the ground of bank secrecy.”

Finally, Art 9(1) requires parties to co-operate closely in aiming to suppress the crimes dealt with under the Convention. Art. 9(1)(b)(ii) expressly applies this duty to inquiries relating to the movement of proceeds or property derived from the commission of offences dealt with under the Convention. Each of these provisions may have some relevance for those working in, investigating or regulating the financial services industry. With the exception, however, of Arts. 5(3) and 7(5), pertaining to bank secrecy, the Convention nowhere affects industry interests in a direct way. In a sense, the UN Convention – intended as it was for ratification by the international community at large – represents the lowest common denominator in dealing with the financial aspects of international crime. It was left to other organisations with more closely similar interests – such as the Basle Committee and the G7 – to expand the policies behind the Convention into areas of more direct relevance for the financial services industry.

5. Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime

Popularly known as Strasbourg convention was intended to extend the provisions of international cooperation against the activities of international crime.

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organized criminality in general beyond the area of drug trafficking. 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 terrorism, Council common position on the application of specific measures to combat terrorism, 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.

6. **The 1990 council of Europe convention**
The Council of Europe adopted the Convention in November 1990 wherein signatory nations agreed to a common criminal policy on money laundering. The Convention provides for a common definition of money laundering and also for common measures to deal with it. The principles for international cooperation amongst the Council members including for non-member nations have been laid down.

7. **The 1991 European union directive**
The Directive on the "Prevention of the Use of the Financial System for the Purpose of Money Laundering" was adopted by the Council of the European Communities in June 1991. As per the Directive:

- Member nations are under obligation to "outlaw money laundering";
- Member countries' financial institutions must have in place internal systems to prevent money laundering including in respect of identification of customers and preserving proper records minimally for five years.

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8. International organization of securities commissions (IOSCO)

In October 1992, IOSCO adopted a resolution encouraging its members to take necessary steps to combat money laundering in securities and futures markets\(^\text{47}\). IOSCO in September 1998, in its *Objectives and Principles of Securities Regulation inter alia* proclaimed\(^\text{48}\) that:

(i) Each member country should have the domestic laws "to address the risks of money laundering"

(ii) Each member country's Regulator should ensure that market intermediaries have necessary policies and procedures "designed to minimize the risk of use of an intermediary's business as a vehicle for money laundering".

9. Financial intelligence units (FIUs) and Egmont group

At the initiative of the FATF, the member nations have established Financial Intelligence Units (FIUs) as cross-agency/private and public sector 'super' agencies designed as clearing houses of information and data to combat money laundering. FIUs serve as a central point for receipt, analysis, and dissemination of suspicious activity report data to the competent authorities.

It was on June 9, 1995 when twenty-four countries and eight international organizations met at the Egmont-Are berg Palace in Brussels, Belgium to discuss specialized anti-money laundering entities known as 'financial information/intelligence units (FIUs)' or 'disclosures receiving agencies'. Finance of US, Financial Intelligence Unit of the National Criminal Intelligence Service (NICS) of Britain, AUSTRAC (Australian Transactional Analysis Centre) of Australia are the variants of FATF recommended FIU. FIUs of different countries are now permanently associated and the organization is called Egmont Group. The member FIUs of the Egmont Group communicate and exchange financial information through a "virtual private


network”. As the first meeting of FIUs took place at the Egmont - Arenberg Palace in Brussels, this gathering started being called the "Egmont Group”\(^{49}\)

**10. Mutual legal assistance treaties (MLATS)**

In addition to above mentioned international initiatives the U.S. nations do enter into bilateral agreements/treaties with each other to increase the level of cooperation between them in international criminal matters including money laundering and asset forfeiture. Under such a Treaty Switzerland cooperated with US in one of the largest cash seizures of drug profits: over $170 million in a Swiss account belonging to Colombian Cartel members was held for forfeiture under a US court order\(^{50}\). Various international initiatives to reduce money laundering have been discussed in this section of the report; however, by no means they are exhaustive. In spite of all the international efforts, laundering of money has grown over the years.

The next section, while specifically discussing the Indian situation on anti money laundering front, briefly analyses various Indian laws having a bearing on money laundering along with recently enacted India’s anti money laundering law namely the Prevention of Money Laundering Act, 2002.

**11. 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 crime.

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)

12. 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 fashion. Towards this there are many organizations throughout the world working co-ordinately. Some of the prominent ones are discussed below:

1. International Money Laundering Information Network (IMoLIN)

The network is connected with 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). IMoLIN is an Internet-based network assisting governments, organizations and individuals in the fight against money laundering and the financing of terrorism 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 organization, four international organizations, and five international financial institutions on its website.

2 Wolfsberg AML Principles

This gives eleven principles as an important step in the fight against money laundering, corruption and other related serious crimes. Transparency International (TI), a Berlin based NGO in collaboration with 11 International Private Banks, names are 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 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 representative acting through international forum such as financial action task force and the Basel Committee of Bank Supervisors. The Wolfsberg Principles are a non-binding

52 http://www.wolfsberg-principles.com/, The original principles were made public on October 30, 2000 in Zurich Switzerland
set of best practice guidelines governing the establishment and maintenance of relationships between private bankers and clients.\(^5^4\)

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 financing\(^5^5\). The Egmont Group consists of 108 financial intelligence units (FIUs) 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 crime. Their ability to transform data into financial intelligence is a key element in the fight against money laundering and the financing of terrorism\(^5^6\). 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.\(^5^7\)

4. Asia/Pacific Group on Money Laundering (APG)\(^5^8\)

The Asia/Pacific Group on Money Laundering (APG) is an international organisation consisting of 38 member countries/jurisdictions 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 financing terrorism referred to the 40+90 Recommendations.

\(^{55}\) http://www.egmontgroup.org/ExecSecPR.pdf
\(^{56}\) http://www.egmontgroup.org/PRESSRELEASE_version_27_MAY_2008_G.pdf
\(^{58}\) http://www.apgml.org/
Part of this commitment includes implementing measures against terrorists listed by the United Nations in the "1267 Consolidated List". 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 crimes.

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: trans-governmental 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 relative phenomena, and much work to be remain done.

6.3 COMBATING MONEY LAUNDERING - INDIAN SCENARIO:

For India, the illegal and financial money power generated out of serious crimes, tax evasion, corruption etc. has been impacting even on national security, apart from causing serious damage to country's economic fibre. In case of India, Chugh and Uppal in their work *Black Economy in India* gives a line diagram (figure VI.i.) showing the consequences of generation of illegal/bad money. They compare India's parallel/black economy fed by illegal wealth with a kind of "cancer in a human body, which slowly but surely, spreads throughout leading to its ultimate delay".

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Further India is vulnerable to money laundering activities even if the India had a strict foreign exchange laws which make it difficult for criminals to launder money. International Narcotics Control Strategy Report by Bureau for
International Narcotics and Law Enforcement Affairs\textsuperscript{63} emphasizes India’s vulnerability to money-laundering activities in the following words:

“India’s emerging status as a regional financial centre, its large system of informal cross-border money flows, and its widely perceived tax avoidance all contribute to the country’s vulnerability to money laundering activities. Some of the frequent sources which are use in India for transfer of illegal proceeds are narcotics trafficking, illegal trade in endangered wildlife, trade in illegal gems particularly diamonds, smuggling, trafficking in persons, corruption, and income tax evasion. The fundamental reason behind it is the location between the heroin producing countries of the Golden Triangle and Golden Crescent, due that India continues to be a drug-transit country.”

It was, therefore, very important for India to have a specific law on the issue of money laundering, which could help to curb such serious crime of money laundering. It is noted that India till recently did not have any direct law on the subject of money laundering. President of India gave assent to its initiate law on money laundering on January 17, 2003:

The Prevention of Money Laundering Act, 2002, i.e. (POMLA). This law specifically passed by Indian Parliament to deals with the subject of money laundering.

India’s Statute book has much other legislation that has bearing on the sources of illegal money and activity of money laundering. These are enlisted below and will be discussed in brief

1) Foreign Exchange Management Act, 1999 (FEMA)
2) Customs Act, 1962
3) Income Tax Act, 1961
5) Central Excise Act, 1944


7) Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA) and Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act (SAFEMFOPA)

8) Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPSA) and Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (PIT NDPSA)

9) Prevention of Terrorism Act, 2002 (POTA)

10) Prevention of Corruption Act, 1988

6.3.1 FOREIGN EXCHANGE MANAGEMENT ACT, 1999 (FEMA):

Much of the money laundering takes place through cross border transactions and foreign exchange manipulations. Illegal money is sent out of the country and then repatriated back misusing import/export transactions or any of the export promotion schemes or Income Tax departments for tax Remittance Bonds/Gift Immunity schemes.

FEMA, [which is a replacement of old law viz. Foreign Exchange Regulation Act, 1973 (FERA)] attempts to put a check on illegal and manipulative foreign exchange cross-border transactions. It is pointed out that old law FERA was criminal in nature.

The foreign exchange offenders could be put to arrest under FERA, whereas new law FEMA is civil in nature. FEMA does not allow arrest for foreign exchange contraventions. Old law, FERA thus had rather more deterrent effect on foreign exchange hawala-racketeers, though many a time it was dubbed draconian.

It is pointed out that preamble of FEMA does not talk about control or regulation of foreign exchange transactions. It says that FEMA has been enacted "with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India".

Following are few variants of definitions attributed to money laundering. Among these are:

a. The manipulation of money from illicit sources through means that make the money appears to be from legitimate sources.

b. The conversion or transfer of property knowing that such property is derived from criminal offense, for the purpose of concealing or disguising the illicit origin of the property or assisting any person who is involved in the commission of such offense, or offenses to evade legal consequence of his action.

c. The concealment or disguise of the true nature, source, location, disposition, and movement rights, with respect to or ownership of property, knowing that such property is derived from a criminal offense.

d. The acquisition, possession or use of property knowing at the time of receipt that such property was derived from a criminal offense or from an act of participation in such offense.

e. The movement of money derived by organized crime groups from their criminal activities to a semi-legal business venture, reinvesting it further to a legitimate business until the trace of its criminally derived origin faded and making the same proceeds available again for use by the organized crime groups.
HOW THIS ACT HELP IN PREVENTING MONEY LAUNDERING ACTIVITIES

Criminals wishing to benefit from the proceeds of large-scale crime have to disguise their illegal profits without exposing themselves. In a broader sense this process could be defined as money laundering.

So, looking to this definition we can say that to some extent this FEMA has provided stringent provision to control the activities of money laundering.

Important provisions of FEMA, which have a bearing on the money laundering, are given below:

i. **Prohibition to deal in foreign exchange and foreign security** –
   No person can deal or transact in foreign exchange and foreign security except with general or special permission of the Reserve Bank of India. Reserve Bank of India (RBI) only can authorize a person to deal in foreign exchange or foreign securities as an authorized dealer, money changer, and offshore banking unit or in any other manner.

ii. **Restriction on acquisition, holding etc. of foreign exchange/security** –
   No resident person in India, unless as provided in FEMA, can acquire, hold, own, possess or transfer any foreign exchange, foreign security or immovable property situated outside India.

iii. **Allowing foreign exchange for current account transactions** –
   In case of current account transactions, any person can sell/purchase foreign exchange to/from authorized person. But Central Government in consultation with RBI can impose reasonable restrictions on certain current account transactions.

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65 section 3 of FEMA 1999  
66 section 10 of FEMA 1999  
67 section 4 of FEMA 1999  
68 section 5 of FEMA 1999
iv. **Restriction on foreign exchange for capital account transactions** –
Sale and purchase of foreign exchange for capital account transactions has been restricted to a large extent and will require permission of RBI/Central Government.\(^6^9\)

v. **Furnishing value etc. of export goods/services** –
It is mandatory for every exporter of goods and services to furnish true and correct material particulars and export/payment value of such goods and services. RBI can direct any exporter to get the export value/payment of goods/services exported repatriated within certain time period\(^7^0\).

vi. **Realization and repatriation of export proceeds** –
Every exporter is under obligation to take all reasonable steps to realize and repatriate the export proceeds due within the prescribed period.\(^7^1\)

vii. **Penalty for contraventions** –
FEMA contraventions can invite a penalty up to three times the amount involved if it can be quantified or up to Rs. two lakh, if amount cannot be quantified. For continuing contraventions, a further penalty extending to Rs. five thousand for every continuing day can also be imposed.\(^7^2\)

viii. **Civil imprisonment** –
If an offender fails to pay the penalty imposed, he shall be liable to civil imprisonment.\(^7^3\)

ix. **Power of search, seizure, survey etc.** –
Executive officers (Assistant Director and above) of Directorate of Enforcement of FEMA have been given powers of calling and collecting relevant information along with the powers of search, seizure, survey,

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69 section 6 of FEMA 1999
70 section 7 of FEMA 1999
71 section 8 of FEMA 1999
72 section 13 of FEMA 1999
73 section 14 of FEMA 1999

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inspection etc. as given to Income Tax officials so that investigation of the cases taken up under FEMA could be conducted successfully.\textsuperscript{74}

\textbf{6.3.2 CUSTOMS ACT, 1962:}

This federal Act deals with cross border trade (import and export into/from India) between India and other countries. There is tremendous scope of generating illegal wealth by manipulating import-export trade through activities like smuggling, under-invoicing, over-invoicing etc. India's Customs Act provides enough powers to prevent control and stop such activities.

\textbf{HOW THIS ACT HELP IN PREVENTING MONEY LAUNDERING ACTIVITIES:}

As we know that through money laundering activities huge amount of black / illegal money is converted into white money. If we look towards the sources of such money than we can see that major portion of illegal proceeds occurs form drug trafficking, smuggling and import export of gold and other expensive articles. Thus under this Act illegally imported or attempted to be improperly exported goods and the conveyances used for such activities are liable to confiscation.

\textbf{I. Search, seizure and arrest –}

Some specific tools to prevent and control such activities are provided in chapter XIII \textsuperscript{75} of Customs Act. Chapter XIII empowers Customs officials to search suspected persons, premises; summon persons to give evidence and produce documents; examine persons; seize the goods, documents and things; and arrest the guilty persons.

\textbf{II. Confiscation –}

Chapter XIV \textsuperscript{76} of Customs Act provides for confiscation of goods/conveyances, where provisions of customs law have been violated. In other

\textsuperscript{74} section 37 of FEMA 1999
\textsuperscript{75} sections 100 to 110 of Customs Act 1962
\textsuperscript{76} sections 111 to 127 of Customs Act
words, illegally imported or attempted to be improperly exported goods and the conveyances used for such activities are liable to confiscation. This law provides for confiscation of not only smuggled goods but also the sale proceeds of smuggled goods.

III. Financial penalty and imprisonment –
In addition to confiscations, customs law also provides for imposition of financial penalty by the adjudicating authority and imprisonment too ranging from six months to seven years for various offences as decided by Court of law.

6.3.3 INCOME TAX ACT, 1961:

This law takes care of the income tax that is levied on the income generated from all legal sources. However a person who is engaged in illegal activities that may also include criminal activities would never like to declare all sources of his income. When such activities are illegal, income from those activities/sources consequently is also illegal and bad.

There are certain provisions under this Act like the following to contain the evasion of income tax and also to deter people from generation of illicit income and bad money.

HOW THIS ACT HELP IN PREVENTING MONEY LAUNDERING ACTIVITIES:

Money laundering is an activity which is carried out for the purpose of cleaning or converting black or unaccounted money into white money. As huge sum of money is generated from illegal activities, the persons having such money are not able to disclose the source of such income. Because of this reason even if some person want to pay income tax on this amount they can’t do this.

Apart from this one of the reason or purpose of money laundering is the tax evasion. And for this purpose they want to make investment in properties etc.

\[\text{chapter XVI sections 132 to 140A of Customs Act}\]
Under this Act various provisions had laid down which creates obstacles in process of money laundering. Following are the few provisions which useful for prevention of money laundering activities.

1. **Filing of annual return** –

Every person exceeding certain threshold income has to furnish an annual return of his income of previous year to the income tax authorities for verification and assessment.\(^{78}\)

In case income of a person does not exceed the prescribed threshold but if he fulfils any one of the followings six conditions:

- Occupation of an immovable property exceeding specified floor area;
- Ownership or lease of a motor car;
- Subscription to a telephone;
- Incurring expenditure on travel to any foreign country for himself or for any other person;
- Holding a credit card;
- Membership of a club where entrance fee is Rs. twenty five thousand or more; it is mandatory for that person to file return of his income (Proviso to section 139). If a person has substantial disposable funds with him, ‘one in six criteria’ conditions, may force him to file tax return and disclose his income and its sources.\(^{79}\)

2. **Acquisition of immovable properties** –

Competent authority is empowered to acquire the immovable properties, which have been transferred with a purpose to evade tax on the apparent consideration of less than the fair market value of the property.\(^{80}\)

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\(^{78}\) Section 139 of Income Tax Act 1961
\(^{79}\) Nair, P.M. Combating Organized Crime Delhi: Konark Publishers Pvt. Ltd. 2002 Pg.151
3. **Prior clearance of transfer of immovable properties** –

The registration of transfer of immovable properties valued at over Rs. five lakhs is permitted only after clearance is received from Assessing Officer of Income Tax Department.\(^{81}\)

4. **Search, seizure, survey etc.** –

The executive officers of Income Tax Department have been given powers of calling and collecting necessary information and also the powers of search, seizure, survey, inspection etc. to unearth unaccounted/undisclosed income and money.\(^{82}\)

### 6.3.4 BENAMI TRANSACTIONS (PROHIBITION) ACT, 1988:

The objective of this Act is "to prohibit *benami* transactions and the right to recover property held *benami". When transactions are made in the false name of some other person or entity (existing or fictitious) and when that other person or entity does not pay any consideration and does not have any real interest in the said transactions, the same are called *benami* transactions. In these transactions, the real title rests with that person who is the real force and who has paid the consideration for such transactions. That person is thus the actual beneficiary. The purpose behind *benami* transactions is to avoid the legal consequences and also to defraud creditors as well as public revenues.

**HOW THIS ACT HELP IN PREVENTING MONEY LAUNDERING ACTIVITES:**

It is a common knowledge that criminals and black moneyed people in India hold their illegally generated dirty money in the form of *benami* properties. Transaction in which property is transferred to one person for a consideration paid or provided by another person. Under money laundering activities money is laundered through making investment in properties. Most important thing in

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\(^{81}\) Section 230A of Income Tax Act, 1961

\(^{82}\) Section 131 to 136 of Income Tax Act, 1961
the process of money laundering is to cover the identity of persons and the sources of money. So what criminals do is they generated dirty money form the benami properties in such case following provisions of the Act help to prevent such type of transactions.

**Section 2(a) of this Act defines a benami transaction as follows:**

2(a) "Benami transaction" means any transaction in which property is transferred to one person for a consideration paid or provided by another person.

Section 3 of this Act specifically prohibits benami transactions saying, "No person shall enter into any benami transaction". It also says that anyone who enters into any benami transactions can be punished up to three years imprisonment with or without fine.

Section 4 of this Act also prohibits the right to recover a property, which has been held benami. Further section 5 of the Act empowers the State to acquire benami properties without paying any compensation.

It is felt that though this Act has been on Statute book since 1988, it has not been able to effectively stop the practice of benami transactions in the country. It is a common knowledge that criminals and black moneied people in India hold their illegally generated dirty money in the form of benami properties.

### 6.3.5 CENTRAL EXCISE ACT, 1944:

Central excise duty levied on manufactured goods is an indirect tax, which is ultimately borne by the buyer of such goods. There are instances when manufacturers remove their goods/products in secret without payment of duties of central excise. This is then termed tax evasion. Non-payment of central excise duties can generate large illegal money and consequently there would be huge revenue loss to the national exchequer.
HOW THIS ACT HELP IN PREVENTING MONEY LAUNDERING ACTIVITIES:

Money laundering activities are carried out throughout the world. In various forms this activities of money laundering were carried out e.g. through hawala, through banking transactions, smuggling or under the aegis of import and export. At this particular point we are concern with the import and export activities in which, money is laundered in terms of kind i.e. in exchange of money they import or exports goods. So under this present Act wide power has been given to central excise officers, whereby they can place check on goods, documents relating to it and so on. Further to some extent this Act is also useful in preventing activities of smuggling.

1) Powers of summons and arrest –
To curve the nefarious activities of such duty evaders, law of central excise empowers Central Excise officers to summon persons to give evidence and produce documents; and to arrest the offenders who are liable to punishment. 83

2) Punishment –
The punishment prescribed for central excise offences, where duty evasion exceeds Rs. one lakh is imprisonment up to seven years along with fine 84.

3) Forfeiture –
Central Excise law empowers the court to forfeit to the State any goods (along with the machinery used in the manufacture of such goods) in relation to which central excise law has been contravened. 85


Indian Penal Code, 1861 (I.P.C.) - Serious offences against property or human beings that could be an important source of generating illegal/ dirty money

83 Section 13 and 14 of Central Excise Act, 1944
84 Section 9 of Central Excise Act, 1944
85 Section 10 of Central Excise Act, 1944
have been defined and the punishment also prescribed for committing those offences in the I.P.C. Principally, these offences are:

HOW THIS ACT HELP IN PREVENTING MONEY LAUNDERING ACTIVITIES:

Organized crime groups generate huge sums of money by drug trafficking, arms smuggling, Criminal intimidation, Counterfeiting currency notes or bank notes, Forgery, Cheating, Criminal misappropriation of property and criminal breach of trust, Dacoity, Robbery, Extortion, Kidnapping for ransom and financial crimes. But the money generated, profits earned are tainted and are in the nature of ‘dirty money’. The dirty money is of little use to organized crime groups as it raises the suspicions of law enforcement and leaves a trail of incriminating evidence.

The primary sources of criminal proceeds in the Asia/Pacific Group (APG) region were identified as trafficking in human beings and illicit drugs, gambling and the activities of organized crime group. Some other identified sources include kidnapping, arms smuggling, hijacking, extortion, public corruption, terrorism and tax evasion. It was also noted that the perpetrators of the predicate offences commonly launder their own proceeds.

This Serious offences could be an important source of generating illegal/ dirty money have been defined and the punishment also prescribed for committing those offences in the I.P.C. Principally, these offences are:

i. Kidnapping for ransom –

Of late, there have been many instances where prominent industrialists and businessmen have been kidnapped with a demand for huge ransom money for their release. Kidnapping of public figures including politicians is also committed to force the government to fulfill certain political demands. The offence of kidnapping for ransom has been defined and its punishment also prescribed I.P.C. in the following words:
Kidnapping for ransom, etc. - Whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction, and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes death or hurt to such person in order to compel the government or any foreign State or international inter-governmental organization or any other person to do so or abstain from doing any act or to pay ransom, shall be punishable with death, or imprisonment of life, and shall also be liable to fine\textsuperscript{86}.

ii. Theft –
Whoever, intending to take dishonestly any moveable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft\textsuperscript{87}.

The punishment for theft as prescribed under section 379 of I.P.C. could be simple or rigorous imprisonment extending up to three years with or without fine.

iii. Extortion –
It is common knowledge that certain criminal groups in Mumbai and may be in other big cities too regularly levy (extort) certain amount of money from business people, who have to pay the same to ensure trouble free operations of their business enterprises. The offence of extortion has been defined in of I.P.C in the following words:

Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security, or anything signed or sealed which may be converted into a valuable security, commits "extortion"\textsuperscript{88}.

\textsuperscript{86} Section 364A of I.P.C.
\textsuperscript{87} Section 378 of I.P.C.
\textsuperscript{88} Section 383 of I.P.C.
The punishment prescribed for extortion in section 384 of I.P.C. is the same as that of theft i.e. simple or rigorous imprisonment extending up to three years with or without fine.

iv. Robbery –
As per provisions of I.P.C. instances of thefts and extortion can become "robbery" if the offender during commission of such offences causes or attempts to cause any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt or of instant wrongful restraint. The offence of robbery has been defined under section 390 of I.P.C. The punishment prescribed for robbery as per section 392 is rigorous imprisonment up to fourteen years along with fine.

v. Dacoity -
In terms of I.P.C. the operation of robbery could take the form of `dacoity' if it is conjointly committed or attempted to be committed by five or more persons. The offence of dacoity has been defined in section 391 of I.P.C. Its punishment as per Section 395 can range from rigorous imprisonment of ten years along with fine to an imprisonment for life.

vi. Criminal misappropriation of property and criminal breach of trust –
There have been instances where certain persons dishonestly misappropriate or convert to their own use the property which come to their possession in good faith or with which they are entitled in the course of their normal duties - e.g. as a banker, merchant, factor, broker and so on. The offence of dishonest misappropriation of property has been defined in section 403 of I.P.C. and that of criminal breach of trust has been defined in sections 405 and 407 to 409 of I.P.C.

vii. Cheating –
Fraudulent or dishonest gain by way of concealment or misrepresentation of certain facts is a deception and would be covered by the offence of cheating.
I.P.C. deals with cheating in sections 415 to 420. Cheating has been defined in section 415 of I.P.C. in the following terms:

Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat."^89

Explanation: A dishonest concealment of fact is a deception within the meaning of this section.

viii. Forgery –
It is an offence where the relevant documents /records may be distorted and falsely presented to achieve wrongful gains. Fraudulent gains based on false or distorted documents would be covered under forgery. Sections 463 and 464 of I.P.C. cover the offence of forgery.

ix. Counterfeiting currency notes or bank notes –
The menace of counterfeiting currency notes has been acquiring serious proportions leading to national security ramifications. It has been reported in the press that terrorist activities are also being partly financed through counterfeiting currency notes operations. The offence pertaining to counterfeiting currency notes has been dealt with in sections 489A to 489E of I.P.C.

x. Criminal intimidation –
Criminal elements in social and business life have been using threats of causing injury in any manner to achieve unlawful material or any other gain. Such threats will then be covered by the offence of criminal intimidation that has been defined in I.P.C.\(^90\). It is pointed out that criminal intimidation is analogous to extortion. In extortion the immediate purpose is to gain monetary

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^89 Section 415 of I.P.C.
^90 Section 503 of I.P.C.
benefit whereas in criminal intimidation purpose is to induce the person threatened to do the acts that he is not legally bound to do.\footnote{Hidayatullah, M & Deb, R 1989: Ratanlal & Dhirajlal’s Indian Penal Code. Nagpur: Wadhwa & Co. Pvt. Ltd.}

\section{CODE OF CRIMINAL PROCEDURE, 1973 (Cr.P.C.)}

- **Seizure, attachment and forfeiture of 'proceeds of crime'** –
  Certain provisions in Cr.P.C. empower the police to seize suspect property and also empower the court to attach and forfeit the property derived from criminal activities. These criminal activities here have widest possible meaning. In other words they cover each and every offence that has been made punishable by any law of the country.

- Cr.P.C. gives the power to a police officer to seize suspect property and such police officer immediately thereafter has to report the seizure to the jurisdictional magistrate to seek further orders of the court regarding disposal of the said property.\footnote{Section 102 of Cr.P.C.}
  The provisions giving procedure for attachment and forfeiture of property which represents 'proceeds of crime' are given in chapter VIIA containing sections 105A to 105L of I.P.C.

- Cr.P.C. also provides for reciprocal arrangements for attachment and forfeiture of 'tainted property' in the countries with which Indian Government enters into/makes agreement/treaty to such effect.\footnote{Chapter VII A of Cr.P.C.}

- **Letter rotaters for investigations outside India** –
  Under the provisions of section 166A of Cr.P.C., an Indian Criminal Court at the request of investigating officer can also issue a letter of request to a court or an authority in foreign country for examination of the persons acquainted with the facts and circumstances of the case and also to record their statement and procure any document etc. from them. In case of illegal properties or proceeds of crimes, where the same have been dispatched abroad, these provisions could become a useful tool for anti money laundering officials.
• Likewise as per provisions of section 166B of Cr.P.C. foreign courts can also get the investigations conducted in India by sending their requests to Indian Courts.

6.3.7 CONSERVATION OF FOREIGN EXCHANGE AND PREVENTION OF SMUGGLING ACTIVITIES ACT, 1974 (COFEPOSA) AND SMUGGLERS AND FOREIGN EXCHANGE MANIPULATORS (FORFEITURE OF PROPERTY) ACT, 1976 (SAFEMFOPA):

➢ COFEPOSA –
COFEPOSA is a special legislation enacted to provide for preventive detention of the offenders whose activities have increasingly deleterious effect on the national economy adversely effecting national security as well.

HOW THIS ACT HELP IN PREVENTING MOEY LAUNDERING ACTIVITES:

As the volume of goods, services, and funds crossing our borders grows, government(s) must fight not only the crimes against ordinary citizens from which dirty money derives, but also the threats posed by the laundering of those funds -threats to trade, the integrity of financial institutions, and, ultimately, to nation security. Large-scale movements of illicit sector capital, particularly in small economies, can disable a government ' ability to plan and control the economy.

Thus to tackle this problem a special legislation COFEPOSA is enacted to provide for preventive detention of the offenders whose activities

   i. Preventive detention/ imprisonment –
The preamble of COFEPOSA states that the activities like smuggling and foreign exchange racketeering are highly organized activities of considerable magnitude that are conducted clandestinely. For effective prevention of these activities this law empowers the Government at the Centre and the States to
order preventive detention/ imprisonment of the persons who indulge in such activities\(^94\).

**ii. Proclamation for absconding person and attachment of property –**
The Act empowers appropriate court to declare a person, in whose case detention order was passed and who has absconded or conceals himself to avoid execution of the detention order; as proclaimed offender and also to start the process for attachment of his properties using the provisions of sections 82 to 85 of Cr.P.C\(^95\).

**iii. Advisory Board –**
Once a person is detained, it is enjoined upon the Government to make a reference of the order of detention to the Advisory Board within five weeks from the date of detention. The Advisory Board consists of one Chairman and two other members. The Chairman shall be a serving Judge of the appropriate High Court and the other members shall be serving or retired Judges of any High Court\(^96\). The maximum period for which a person who smuggles or is likely to engage in smuggling and other like activities into or out of `highly vulnerable area' can be detained for a maximum period of two years, if the detention is confirmed by the Advisory Board\(^97\).

➢ **SAFEMFOPA –**
This law provides for the forfeiture of `illegally acquired properties of smugglers and foreign exchange manipulators'. The preamble of the Act states that it is necessary to deprive persons engaged in the activities of smuggling, foreign exchange racketeering of their ill-gotten gains. The preamble further says that such people increase their resources by violations of tax laws and other laws and they operate clandestinely. Such people many a time hold their properties in the names of `their relatives, associates and confidants'.

\(^{94}\) Section 3 of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974
\(^{95}\) Section 7 of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974
\(^{96}\) Article 22(4) of the Constitution of India.
\(^{97}\) Section 9 and 10 of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974
The provisions of this law are applicable to offenders who have been convicted under the Customs Act and under Foreign Exchange Regulation Act (FERA), wherever their offence involved the amount or value exceeding Rs. one lakh. In case of the offenders who have previous conviction history under these laws or who were detained under COFEPOSA, the provisions of SAFEMFOPA would apply to their offences, irrespective of the amount involved.

I. Illegally acquired property –
The term ‘illegally acquired property’ has been defined by this Act in section 3(1)(c), which inter-alia says that if the source of the property of a person is attributable to any activity prohibited under any law, then such property would be called ‘illegally acquired property’.

II. Forfeiture –
This Act specifically prohibits any person to whom this Act applies to hold any illegally acquired property either in his name or in any other person's name. If the person, his relatives or associates hold any such property, then the property shall be liable to be forfeited to the Central Government free from all encumbrances.\(^98\)

If the proceedings for forfeiture under SAFEMFOPA have started, and the person meanwhile transfers such property, then such transfer shall be deemed to be null and void.\(^99\)

\(^98\) Section 4 to 7 of Smugglers and Foreign Exchange Manipulators (forfeiture of property) Act, 1976
\(^99\) Section 11 of Smugglers and Foreign Exchange Manipulators (forfeiture of property) Act, 1976
6.3.8 NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 (NDPSA) AND PREVENTION OF ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1988 (PITNDPSA):

- **NDPSA –**

  Trafficking in narcotic and like substances is one of the very important sources of generation of illegal money. This Act has got stringent provisions to control and regulate the trade and operations conducted in narcotic drugs and psychotropic substances.

**HOW THIS ACT HELP IN PREVENTING MOEY LAUNDERING ACTIVITIES:**

As we know that drug trafficking is one of the sources of dirty money. The major portion of illegal money which criminals have is generated from drug trafficking. This drug trafficking activity is transnational crime which has no boundaries. Since past few decade drugs trafficking activities increased speedily and to prevent such activities this present Act was enacted. Now let us see some relevant provision of this Act.

Some of the specific measures provided in NDPS Act in this regard are:

- Cultivation of coca, opium poppy and cannabis plant is permitted only under specific license and control of State\(^{100}\).
- Dealing in (production, manufacturing, possession, sale, purchase, transportation, warehousing, using, exporting, importing etc. of) narcotic drugs or psychotropic substances has been prohibited except as specifically authorized by the State\(^{101}\).
- Dealing with (acquisition, possession, use, conversion or transfer of) any property derived from any offence concerning narcotic drugs and psychotropic substances is prohibited\(^{102}\).

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\(^{100}\) Section 8 of NDPSA 1985  
\(^{101}\) Section 8 of NDPSA 1985  
\(^{102}\) Section 8A of NDPSA 1985
• Illegal/ unauthorized import, export and external dealings of/ in narcotic drugs and psychotropic substances is punishable with rigorous imprisonment ranging from 10 years to 20 years along with fine of Rs. one lakh to two lakh\(^{103}\).

• Competent authority is empowered to seize, freeze and forfeit illegally acquired property that has been derived from, or used in illicit traffic in narcotic drugs and psychotropic substances\(^{104}\).

• The Act also has a provision for creation of National Fund for Control of Drug Abuse to meet the expenditure \emph{inter alia} in connection with the measures taken for
  
  o Combating illicit traffic in narcotic drugs, psychotropic substances or controlled substances;
  o Controlling abuse of narcotic drugs and like substances;
  o Preventing drug abuse;
  o Educating public against drug abuse\(^{105}\).

\begin{itemize}
  \item \textbf{PITNDPSA –}
  
  This law has been enacted on the lines of COFEPOSA, 1974 discussed earlier. It specifically provides for imprisonment/ detention of any person (including a foreigner) to prevent him from engaging in illicit traffic in narcotic drugs and psychotropic substances.\(^{106}\)

  Every detection order made is subject to confirmation by the Advisory Board and the maximum period of detention can be two years from the date of detention\(^{107}\).
\end{itemize}

\begin{footnotes}
\footnotetext{103}{Section 23 and 24 of NDPSA 1985}
\footnotetext{104}{Section 68F and 68-1 of NDPSA 1985}
\footnotetext{105}{Section 7A of NDPSA 1985}
\footnotetext{106}{Section 3 of PITNDPSA 1988}
\footnotetext{107}{Section 9 and 11 of PITNDPSA 1988}
\end{footnotes}
6.3.9 PREVENTION OF TERRORISM ACT, 2002 (POTA):

POTA is a special law to fight terrorism. As per POTA terrorism includes use of firearms, lethal weapons, poisons etc. to strike terror in the people.

HOW THIS ACT HELP IN PREVENTING MOEY LAUNDERING ACTIVITIES:

It is pointed out again that most of the time terrorists use other serious crimes to support and sustain their activities. There is thus an inextricable nexus between terrorism and serious crimes like drug trafficking, abduction, murder etc.

Terrorism can feed other serious crimes or *vice versa*. In respect of India's special situation where organized crimes including terrorism and money laundering make it a victim.

It aptly illustrates the threats of serious crimes and terrorism, which India faces on its borders, in capital and other big cities from the 'Terror Club' of Dawood Gang, Bin Laden's Al Qaeda, Liberation Tigers of Tamil Eelam (LTTE) and United Liberation Front of Assam (ULFA) etc.

I. Terrorism and terrorist acts –
Terrorism/terrorist acts have been defined in POTA as follows:\(^{108}\):

Whoever-

a. with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature or by any other means whatsoever, in such a manner as to cause, or likely to cause,
death of, or injuries to any person or persons or loss of, or damage to, or destruction of property or disruption of any supplies or services essential to the life of the community or causes damage or destruction of any property or equipment used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act;

b. is or continues to be a member of an association declared unlawful under the *Unlawful Activities (Prevention) Act, 1967*, or voluntarily does an act aiding or promoting in any manner the objects of such association and in either case is in possession of any unlicensed firearms, ammunition, explosive or other instrument or substance capable of causing mass destruction and commits any act resulting in loss of human life or grievous injury to any person or causes significant damage to any property, commits a terrorist act.

Explanation: For the purposes of this sub-section, "a terrorist act" shall include the act of raising funds intended for the purpose of terrorism.

Under POTA terrorist acts invite punishment ranging from imprisonment of five years or for life along with fine to penalty of death depending on the severity of facts.

II. **Possession of arms/ammunition and hazardous explosives –**

As per section 4 of POTA possession of arms, ammunition in a notified area and also the possession of bombs, dynamite or hazardous explosives or the lethal weapons capable of mass destruction or biological (chemical substances of warfare in any area has been termed as terrorist act punishable with imprisonment which can extend upto whole life with or without fine upto Rs. 10 lakhs.
III. Forfeiture of proceeds of terrorism –

POTA specifically prohibits everyone to possess proceeds of terrorism\textsuperscript{109}. All proceeds of terrorism possessed by anyone are liable to be forfeited to the state. There cannot be any transfer of a property, which is 'proceeds of terrorism'; such transfer shall be deemed to be null and void as per provisions of POTA\textsuperscript{110}.

"proceeds of terrorism" shall mean all kinds of properties which have been derived or obtained from commission of any terrorist act or have been acquired through funds traceable to a terrorist act, and shall include cash irrespective of person in whose name such proceeds are standing or in whose possession they are found\textsuperscript{111}.

IV. Forfeiture of properties belonging to the terrorists –

For attachment of the properties belonging to the accused of terrorism; and later if they are convicted of any offence under POTA, their properties stand forfeited to the State\textsuperscript{112}.

V. Terrorist Organizations –

Union government can declare an organization as a terrorist organization if it is involved in preparation, promotion, encouragement, participation or commission of terrorism\textsuperscript{113}. There are twenty five organizations that have been declared 'terrorist organizations' and are listed in the Schedule to the POTA. They have been given in Appendix C. POTA prohibits and prescribes punishment also for any kind of support including fund raising for a terrorist organization\textsuperscript{114}.

\textsuperscript{109} Section 6 and 8 of POTA 2002
\textsuperscript{110} Section 15 of POTA 2002
\textsuperscript{111} Section 2(c) of POTA 2002
\textsuperscript{112} Section 16 of POTA 2002
\textsuperscript{113} Section 18 of POTA 2002
\textsuperscript{114} Section 21 and 22 of POTA
6.3.10 PREVENTION OF CORRUPTION ACT, 1988:

In developing countries like India, large amount of illegal/dirty money is generated because of corruption in public offices. Public officials abuse their positions of power to earn illegal gratification.

HOW THIS ACT HELP IN PREVENTING MONEY LAUNDERING ACTIVITIES

For the security of country it is very much important that it should be free from crime and corruption. As we have seen above the various provisions and authorities have been constituted under those Act to prevent various crimes. But if any officers of such Authorities being corrupt then the purpose of entire Acts or legislation will not serve. Because this lead to failure of performance of their duties. Thus to overcome such difficulties this present Act was enacted.

Criminals are performing their activities with the help of police, politician and other officers, so to restrict them this present Act is very help full. Now let us see the important provisions of this Act.

Punishment and prosecution for taking illegal gratification –

This law makes public servants, who indulge in corruption by accepting illegal gratification, liable to punishment of imprisonment ranging from six months to five years along with fine\textsuperscript{115}.

The meaning attached to `public servant' in the law is very wide. The definition of ‘public servant’ as given in section 2(c) of this Act is so wide that it practically covers everyone who is required to perform any public duty, whether it is under a local authority, state authority or a corporation, or in an educational institution receiving financial assistance from any government/public authority or in a registered cooperative society receiving financial aid from the State.

\textsuperscript{115} Section 7 of Prevention of Corruption Act, 1988
Regarding prosecution in a court, this law however puts a limitation saying that the court will take cognizance of corruption offences only when concerned govt./ authority competent to remove the public servant has given previous sanction to prosecute.

6.3.11 PREVENTION OF MONEY LAUNDERING ACT, 2002 (POMLA):

In the background of the laws discussed in foregoing paragraphs and in the pursuit of combating money laundering, Indian Parliament enacted specific anti money laundering law namely POMLA. Now there will be discussion on POMLA, which directly deals with the offence of money laundering.

1. **Preamble**

The preamble of POMLA specifies its main objectives as follows:

- Prevention, control and combating the activities concerning money laundering;
- Confiscation of property derived, or involved in, money laundering;
- Dealing with the matters connected with or incidental to money laundering.

2. **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-laundering. The Act extends to the whole of India including J&K. The Act comprises of X chapters, 75 Sections, and a schedule.

3. **Offence of Money Laundering and Punishment:**

Offence of money laundering means the outcrop 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

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116 concerning sections 7, 10, 11, 13 and 15 of Prevention of Corruption Act, 1988

117 Section 19 of Prevention of Corruption Act, 1988
activity\textsuperscript{118}. The proceeds of the crime referred above include the normal crimes and the scheduled crimes\textsuperscript{119}. 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 than 3 years but which may extend to 7 years and shall also be liable to fine which may extend to 5 lakh rupees. However, for the proceeds of crime which is involved in money laundering relates to any offence specified under paragraph 2 of the part A\textsuperscript{120} of the Schedule the punishment of the rigorous imprisonment of 7 years has to be read as 10 years.

4. Attachment of Property Involved in Money-laundering
Where the Director or any other officer but not below the rank of Deputy Director authorized by him, has reason to believe on the basis of material in his possession that any person is in possession of any proceeds of money laundering or such person has been charged of having committed a scheduled offence or such proceeds of crime are likely to be concealed, transferred or dealt with in any manner, which may result in frustrating any proceedings relating to confiscation of such proceeds of crime, then such officer may by order in writing, provisionally attach such property for a period not exceeding 150 days from the date of the order, in the manner provided in the Second Schedule of the Income Tax Act, 1961\textsuperscript{121}.

But no order of attachment should be made unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under Sec.173 of the Code of Criminal Procedure, 1973 or a complaint has been filed by a person, authorised to investigate the offence mentioned in the Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be. Further apart from the above, any property of any person may be

\textsuperscript{118} Section 4 of PMLA 2002
\textsuperscript{119}The crimes which are mentioned in Part A and Part B and now Part C of the Schedule Attached to the Act, if the total value involved in such offences is 30 lakh rupees or more, http://fiuindia.gov.in/faq-moneylaundering.htm
\textsuperscript{120}Section 15,18,20,22 to 24, 25A,27A,29 of The Narcotics Drugs and Psychotropic Substances Act, 1985
\textsuperscript{121}Section 5 of PMLA 2002
attached under this section if the Director or any other officer not below the rank of Deputy Director authorised by him has reason to believe (reasons to be recorded in writing) on the basis of the material in his possession, that if the property involved in money laundering is not attached immediately, then the non-attachment of the property is likely to frustrate any proceeding under the Act.

Every order of attachment will cease to have effect after the expiry of 150 days from the date of the order or on the date of the order made by the Director, whichever is earlier.

The Director or any other officer who provisionally attaches the property should, within a period of 30 days from such attachment, file a complaint, stating the facts of such attachment before the Adjudicating Authority.

5. **Adjudicating Authority:**

The Act prescribes for formation of a three member Adjudicating Authority for dealing with matters relating to attachment and confiscation of property under the Act.

Section 8 deals with the process of adjudication. On receipt of a complaint from the Director or any other officer who provisionally attaches any property or an application made by such officer for retention of seized record or property, the Adjudicating Authority may, on reason to believe that any person has committed an offence of money laundering or is in possession of proceeds of crime, serve a notice of not less than thirty days on such person calling upon him to indicate the sources of his income, earning or assets, out of which or by means of which he has acquired the property attached or seized, the evidence on which he relies and other relevant information and particulars and show cause why all or any of such property should not be declared to be the properties involved in money laundering and confiscated by the Central Government. Where a notice specifies any property as being held by a person on behalf of any other person, a copy of such notice shall also be served upon
such other person. Similar notice is required to be served on all persons when more than one person holds such property jointly.

Where on conclusion of a trial for any scheduled offence, the person concerned is acquitted, the attachment of the property or retention of the seized property or record and net income, if any, shall cease to have effect.

Where the attachment of any property or retention of the seized property or record becomes final, the Adjudicating Authority shall, after giving an opportunity of being heard to the person concerned, make an order confiscating such property.

6. Appellate Tribunal: 122
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 judge of the Supreme Court or a High Court) 123 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 India 124.

7. Special Courts 125:
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.

8. Authorities under the Act 126:
The following classes of authorities are prescribed under the Act

- Director or Additional Director or Joint Director
- Deputy Director
- Assistant Director
- Any other class of officer as may be appointed.

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122 Section 10 of the PMLA 2002
123 Section 28 of the PMLA 2002
124 Section 32 of the PMLA 2002
125 Section 43 of the PMLA 2002
126 Section 48 of the PMLA 2002
Further the Act prescribes 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 equipment is given extensive power to discharge the duties under the Act. The Act gives the Adjudicating authority the same power which is vested to the powers of Civil Court under the Code of Civil Procedure 1908. Further, powers are provide to the enforcement directorate to search a person, arrest a person, retention of property and has the powers of Civil Court while exercising power 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 the 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 rupees.

In a recent case Pareena Swarup Versus Union of India, the Hon’ble 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 the qualifications for appointment of Chairperson and Members of Appellate Tribunal, Section 32 which deals with the 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

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127 Section 54 of PMLA 2002
128 Section 11 of PMLA 2002
129 Section 13 of PMLA 2002
130 Section 62 of the PMLA 2002
131 CDJ 2008 SC 1701, Judgment dated 30/09/2008
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 a new avenue of judicial forums, it is the duty of 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 one of these amendments in the proposed PML Bill 08 also.

9. Obligations of banking companies, financial institutions and intermediaries:

The Prevention of Money Laundering Act, 2002 lays down the following obligations on banking companies, financial institutions and intermediaries\(^\text{132}\).

Every banking company, financial institution and intermediary should –

- maintain a record 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;
- furnish information of such transactions to the Director;
- verify and maintain the records of the identity of all its clients.

Where the principal officer of a banking company or financial institution or intermediary, as the case may be, has reason to believe that a single transaction or series of transactions integrally connected to each other have been valued below the prescribed value so as to defeat the provisions of this section, such officer should furnish information in respect of such transactions to the Director within the prescribed time.

\(^{132}\) Section 12 of PMLA 2002
The records referred above should be maintained for a period of ten years from the date of transactions between the clients and the banking company or financial institution or intermediary, as the case may be.

The records of all clients should be maintained for a period of ten years from the date of cessation of transactions between the clients and the banking company or financial institution or intermediary, as the case may be.

If the Director, in the course of any inquiry, finds that a banking company, financial institution or an intermediary or any of its officers has failed to comply with the provisions contained in section 12, then, without prejudice to any other action that may be taken under any other provisions of this Act, he may, by an order, levy a fine on such banking company or financial institution or intermediary which shall not be less than ten thousand rupees but may extend to one lakh rupees for each failure. The Director shall forward a copy of the order passed above to every banking company, financial institution or intermediary or person who is a party to the proceedings.

10. Maintenance of records:
"Records" include the records maintained in the form of books or stored in a computer or such other form as may be prescribed\textsuperscript{133}.

The Act makes it mandatory for every banking company, financial institution and intermediary to maintain a record 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\textsuperscript{134}.

In exercise of the powers conferred under sub section (1) and (2) of Section 73 of the Act the Central Government in consultation with the RBI notified vide Notification number 9/2005 dated 1st July, 2005, “The Prevention of Money-Laundering (Maintenance of Records of the nature and value of transactions,

\textsuperscript{133} Section 2(1) (W) of PMLA 2002
\textsuperscript{134} Section 12(1) (a) of PMLA 2002
the procedure and manner of maintaining and time of furnishing information and verification and maintenance of records of the identity of clients of the banking companies, financial institutions and intermediaries) Rules 2005”. Maintenance and retention of records are covered under Rules, 3, 4, 5 and 6.

**Records of transactions to be maintained**

Rule 3 deals with the nature and value of transactions and its records to be maintained by every banking company, financial institution or intermediary.

The following records should be maintained –

I. all cash transactions of the value of more than rupees ten lakhs or its equivalent in foreign currency;

II. 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;

III. all transactions involving receipts by non-profit organisations of value more than rupees ten lakh, or its equivalent in foreign currency;

IV. all cash transactions were 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;

V. all suspicious transactions whether or not made in cash and by way of

1. deposits and credits, withdrawals into or from any accounts in whatsoever name they are referred to in any currency maintained by way of:

   o cheques including third party cheques, pay orders, demand drafts, cashiers cheques or any other instrument of payment of money including electronic receipts or credits and electronic payments or debits, or
   
   o travellers cheques, or
1. transfer from one account within the same banking company, financial institution and intermediary, as the case may be, including from or to Nostro and Vostro accounts, or any other mode in whatsoever name it is referred to

2. credits or debits into or from any non-monetary accounts such as d-mat account, security account in any currency maintained by the banking company, financial institution and intermediary, as the case may be;

3. money transfer or remittances in favour of own clients or non-clients from India or abroad and to third party beneficiaries in India or abroad including transactions on its own account in any currency by any of the following –
   o payment orders, or
   o cashiers cheques, or
   o demand drafts, or
   o telegraphic or wire transfers or electronic remittances or transfers, or
   o internet transfers, or
   o Automated Clearing House remittances, or
   o lock box driven transfers or remittances, or
   o remittances for credit or loading to electronic cards, or
   o any other mode of money transfer by whatsoever name it is called;

4. loans and advances including credit or loan substitutes, investments and contingent liability by way of –
   o subscription to debt instruments such as commercial paper, certificate of deposits, preferential shares, debentures, securitized participation, interbank participation or any other investments in securities or the like in whatever form and name it is referred to, or
   o purchase and negotiation of bills, cheques and other instruments, or
   o foreign exchange contracts, currency, interest rate and commodity and any other derivative instrument in whatsoever name it is called, or
   o letters of credit, standby letters of credit, guarantees, comfort letters, solvency certificates and any other instrument for settlement and/or credit support.
5. collection services in any currency by way of collection of bills, cheques, instruments or any other mode of collection in whatsoever name it is referred to.

**Information in the records**

Apart from the records of transactions to be maintained, the records should also contain the following information \(^{135}\) (Rule 4) –

- The nature of the transaction(s);
- the amount of the transaction and the currency in which it was denominated;
- the date on which the transaction was conducted; and
- the parties to the transaction.

**Procedure and manner of maintaining information**

Rule 5 lays down the procedure for maintaining information.

Every banking company, financial institution and intermediary should maintain information in respect of transactions with its clients in accordance with the procedure and manner as may be specified by its Regulator, from time to time.

Every banking company, financial institution and intermediary should evolve an internal mechanism for maintaining such information in such form and at such intervals as may be specified by its Regulator from time to time.

It is the duty of every banking company, financial institution and intermediary to observe the procedure and manner of maintaining information as specified by its Regulators.

\(^{135}\)Rule 4 of *The Prevention of Money-Laundering (Maintenance of Records of the nature and value of transactions, the procedure and manner of maintaining and time of furnishing information and verification and maintenance of records of the identity of clients of the banking companies, financial institutions and intermediaries) Rules 2005*. 
Preservation of records

All the records should be preserved for a period of 10 years from the date of transactions between the client and the banking company, financial institution or intermediary as the case may be\(^{136}\).

11. Furnishing of information

The Prevention of Money Laundering Act, 2002, makes it mandatory for every banking company, financial institution and intermediary to furnish information of transactions to the Director within such time as may be prescribed\(^ {137}\). However, if the principal officer of a banking company or financial institution or intermediary, as the case may be, has reason to believe that a single transaction or series of transactions integrally connected to each other have been valued below the prescribed value; such officer shall furnish information in respect of such transactions to the Director within the prescribed time.

Procedure and manner of furnishing information

Rule 7 lays down the procedure and manner of furnishing information.

i. Every banking company, financial institution and intermediary, as the case may be, should communicate the name, designation and address of the Principal Officer to the Director. (Principal Officer is an officer designated by a banking company, financial institution and intermediary for the purpose of Section 12 of PMLA, 2002.)

ii. The Principal Officer should furnish the information referred to in rule 3 to the Director on the basis of information available with the banking company, financial institution and intermediary, as the case may be. A copy of such information should be retained by the Principal Officer for the purposes of official record.

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\(^{136}\) Rule 6 of The Prevention of Money-Laundering (Maintenance of Records of the nature and value of transactions, the procedure and manner of maintaining and time of furnishing information and verification and maintenance of records of the identity of clients of the banking companies, financial institutions and intermediaries) Rules 2005”.

\(^{137}\) Section 12(1) (b) of PMLA 2002
iii. Every banking company, financial institution and intermediary may evolve an internal mechanism for furnishing information referred to in Rule 3 in such form and at such intervals as may be directed by its Regulators.

iv. It is the duty of every banking company, financial institution and intermediary to observe the procedure and the manner of furnishing information as specified by its Regulator.

**12. Reports prescribed under PMLA, 2002**

The Prevention of Money laundering Act, 2002 and the Rules there under requires every reporting entity (banking company, financial institution and intermediaries) to furnish the following reports:

- Cash Transaction reports (CTRs)
- Suspicious Transaction Reports (STRs)
- Counterfeit Currency Reports (CCRs)
- Non Profit Organisation reports (NPRs)
- Due dates for furnishing information to the Director

<table>
<thead>
<tr>
<th>Description</th>
<th>Due Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>All cash transactions of the value of more than rupees ten lakhs or its equivalent in foreign currency.</td>
<td>15th day of the succeeding month</td>
</tr>
<tr>
<td>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</td>
<td></td>
</tr>
<tr>
<td>All transactions involving receipts by non-profit organisations of value more than rupees ten lakh, or its equivalent in foreign currency</td>
<td></td>
</tr>
<tr>
<td>All cash transactions were forged or counterfeit currency</td>
<td>Not later than</td>
</tr>
</tbody>
</table>
notes or bank notes have been used as genuine or where any forgery of a valuable security or a document has taken place for facilitating the transactions

| All suspicious transactions whether or not made in cash | Not later than seven working days on being satisfied that the transaction is suspicious |

The fact of submitting information on all suspicious transactions to the Director should be kept strictly confidential.

- **Cash transaction reports**
  Cash transaction reports refer to:
  - All cash transactions of the value of more than rupees ten lakhs or its equivalent in foreign currency.
  - 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.

**13. Summons, searches and seizures**
The power of the authorities to survey, search and seize property is covered under Chapter V of the Prevention of Money Laundering Act, 2002.
14. Appellate Tribunal
Chapter IV of the Prevention of Money Laundering Act, 2002 deals with the establishment of the Appellate Tribunal and appeals to be made to the Appellate Tribunal.

The Tribunal consists of a Chairperson and two other Members. The Chairman and one Member of ATFP (Appellate Tribunal for Forfeited Property) holds additional charge of the post of Chairman and Member of Tribunal under PMLA, 2002.

15. Nature of offences under the Act
The offences under the Act will be cognizable and non-bailable.

16. Authorities under the Act
The Director, Financial Intelligence Unit, India, under the Ministry of Finance, Department of Revenue, will act as the Director to exercise the exclusive powers conferred under clause (b) of sub-section (1) of section 12 and its proviso, section 13, sub-section (2) of section 26 and sub-section (1) of section 50 of the Prevention of Money Laundering Act, 2002 and the said Director, Financial Intelligence Unit, India, shall also concurrently exercise powers conferred by sub-section (3) and sub-section (5) of section 26, section 39, section 40, section 41, section 42, section 48, sub-section (2) of section 49, section 66 and section 69 of the aforesaid Act.

The Director, FIU-IND is the competent authority for the purpose of the provisions relating to maintenance of records and filing of information. The Directorate of Enforcement is the competent authority for the provisions relating to search, seizure, confiscation of property, prosecution, etc.

17. Reciprocal arrangement with foreign countries for assistance
The POMLA also provides for mutual assistance between India and other countries to deal with money laundering offences including for attachment, seizure and confiscation of property and also for transfer of accused persons (chapter IX sections 55-61).
6.3.12 PREVENTION OF MONEY LAUNDERING (AMENDMENT) ACT, 2009:

The Prevention of Money Laundering Bill, 2008 was introduced in the Rajya Sabha on October 17, 2008. The Bill was then referred to the Parliamentary Standing Committee on Finance (Chairperson – Shri Ananth Kumar), which submitted its report on December 19, 2008. The Bill was then again introduced in the Rajya Sabha on February 19, 2009 and passed by the Lok Sabha on February 24, 2009. The Prevention of Money Laundering (Amendment) Act, 2009 came into force from June 1, 2009.

❖ Summary of the Standing Committee’s report
  o The Committee believed that enacting the Bill was an essential step to strengthen the country’s legal framework for preventing money laundering and counter financing of terrorism.
  o Apart from plugging other avenues generating illegal funds such as hawala, etc., international guidelines should be taken into account for effective enforcement of anti-money laundering law.
  o In order to comprehensively cover money transfer service providers, fully fledged money changers and international payment gateways, the definitions of “authorised person” and “payment system operator” need to be aligned with the definitions of the Payment and Settlement System Act, 2007.
  o The government should consider expanding the ambit of the law to cover Financial Action Task Force (FATF) recommended Designated Non Financial Businesses such as gold or gem dealers, lawyers, real estate agents, etc.
  o Since it was difficult to track the transfer of funds and financing of terrorist activity in the absence of bilateral agreements with other countries, the Committee recommended that MoUs for mutual co-operation should be concluded with other countries.
Enforcement agencies should strengthen their machinery to keep abreast of the emerging trends of money laundering and terror funding. This includes having appropriate software especially with regard to suspicious transactions, strong reporting instruments to monitor transactions, quarterly audit to verify Know Your Customer information, etc.

Inclusion of “prohibition of manipulative and deceptive devices, insider trading and substantial acquisition of securities or control” may deprive investors of refund of shares. The Bill should have a specific provision to make the proceeds from such offence not liable to confiscation and to enable refund of such proceeds.

An appropriate threshold may be fixed with regard to possession of counterfeit currency to protect genuine bank dealings.

Adequate safeguards should be put in place to ensure that the enforcement authorities use their power of search and seizure in a judicious manner so that it does not result in any undue harassment of individuals.

Only a sitting or retired judge of the Supreme Court or High Court should be eligible for appointment as Chairperson of the Appellate Tribunal. Other than Chartered Accountants, similar professionals such as Company Secretaries should be eligible to become members of the Tribunal.

The government must take necessary steps to become a full fledged member of FATF to enable sharing of information and multi-lateral intelligence.

- **Important changes brought out by the amendment Act of 2009**

  - New definitions of authorised person; designated business or profession; offence of cross border implications; and Payment system operator was introduced.

  - Changes were made in the definition of financial institution, non-banking financial company and scheduled offence.
o Provisions with regard to attachment of property involved in money laundering and search and seizure were amended.

o The age of retirement of Chairperson and Members of the Adjudicating Authority was increased from 62 years to 65 years.

o Provision was made for mandatory consultation with the Chief Justice of India before removal of the Chairperson or a Member of the Appellate Tribunal.

o Amendment was made with regard to provision for attachment, seizure and confiscation, etc., of property in a contracting State or India.

o Certain offences added in Part A and Part B of the Schedule to the Act. Offences added include those pertaining to insider trading and market manipulation as well as smuggling of antiques, terrorism funding, human trafficking other than prostitution, and a wider range of environmental crimes.

o A new category of offences which have cross-border implications was introduced as Part C.

❖ Rules under the Prevention of Money Laundering Act, 2002

The following rules have been notified under the Prevention of Money Laundering Act, 2002:

1) The Prevention of Money-laundering (the Manner of forwarding a copy of the Order of Provisional Attachment of Property along with the Material, and copy of the Reasons along with the Material in respect of Survey, to the Adjudicating Authority and its period of Retention) Rules, 2005 - Notification No. GSR 442(E), dated 01-07-2005


3) The Prevention of Money-laundering (Maintenance of Records of the Nature and Value of Transactions, the Procedure and Manner of Maintaining and Time for Furnishing Information and Verification and
Maintenance of Records of the Identity of the Clients of the Banking Companies, Financial Institutions and Intermediaries) Rules, 2005


5) The Prevention of Money-laundering (the Forms and the Manner of Forwarding a Copy of Order of Arrest of a Person along with the Material to the Adjudicating Authority and its period of Retention) Rules, 2005 - Notification No. GSR 446(E), dated 01-07-2005.

6) The Prevention of Money-laundering (the Manner of Forwarding a Copy of the Order of Retention of Seized Property along with the Material to the Adjudicating Authority and the period of its Retention) Rules, 2005 - Notification No. GSR 447(E), dated 01-07-2005.


11) The Prevention of Money-laundering (Salaries, Allowances and other Conditions of The employees of Appellate Tribunal) Rules, 2008 - Notification number GSR 430(E), dated 5-6-2008.
6.3.13 PREVENTION OF MONEY LAUNDERING (AMENDMENT) BILL, 2011:

The Prevention of Money Laundering (amendment) Bill of 2011 was introduced in the Lok Sabha on 27th December, 2011. It was referred to the Standing Committee on Finance on 5th January, 2012.

The Prevention of Money-Laundering (Amendment) Bill, 2011, inter alia, seeks to -

a) Introduce the concept of ‘corresponding law’ to link the provisions of Indian law with the laws of foreign countries and provide for transfer of the proceeds of the foreign predicate offence in any manner in India;

b) introduce the concept of ‘reporting entity’ to include therein a banking company, financial institution, intermediary or a person carrying on a designated business or profession;

c) enlarge the definition of offence of money-laundering to include therein the activities like concealment, acquisition, possession and use of proceeds of crime as criminal activities and remove existing limit of five lakh rupees of fine under the Act;

d) make provision for attachment and confiscation of the proceeds of crime even if there is no conviction so long as it is proved that offence of money-laundering has taken place and property in question is involved in money-laundering;

e) confer power upon the Director to call for records of transactions or any additional information that may be required for the purposes of the Prevention of money-laundering and also to make inquiries for non-compliance of reporting obligations cast upon them;

f) make the reporting entity, its designated directors on the Board and employees responsible for omissions or commissions in relation to the reporting obligations under Chapter IV of the Act;
g) provide that in any proceedings relating to proceeds of crime under the aforesaid Act, unless the contrary is proved, it shall be presumed that such proceeds of crime is involved in money-laundering;

h) provide for appeal against the orders of the Appellate Tribunal directly to the Supreme Court;

i) provide for the process of transfer of the cases of Scheduled offence pending in a court which had taken cognizance of the offence to the Special Court for trial of offence of money-laundering and also provide that the Special Court shall, on receipt of such case proceed to deal with it from the stage at which it is committed;

j) Putting all the offences listed in Part A and Part B of the Schedule to the aforesaid Act into Part A of that Schedule instead of keeping them in two Parts so that the provision of monetary threshold does not apply to the offences.

**Overview of Prevention of Money Laundering Bill, 2011**

There are 33 clauses of amendments brought about in the Bill of 2011.

1) New definitions of “beneficial owner”, “client”, “corresponding law”, “dealer”, “person carrying on designated business or profession” and “reporting entity” included in the Bill.

2) Definitions of “financial institution”, “intermediary” substituted.

3) Amendment of Section 3 of PMLA Act, 2002 to include acts of concealment, acquisition, possession and use of the proceeds of crime within the provision of offence of money-laundering.

4) Amendment of Section 4 to omit the fine of five lakh rupees.

5) Amendment of Section 5 relating to attachment of property involved in money-laundering to facilitate attachment of proceeds of crime in all cases, irrespective of in whose possession the property is, and also provides for attachment in cases where report has been filed under the corresponding law of any other country.
6) Amendment of Section 8 relating to adjudication to delink the attachment of the property to the pendency of the proceedings relating to the Scheduled offence and links it to the money laundering offence.

7) Amendment of Section 9 and 10 relating to vesting of property in Central Government by taking away the power to confiscate the attached property from the Adjudicating Authority and vesting it with the Special Court.

8) Substitution of Section 12 to introduce the expression “reporting entity” in the place of “banking company, financial institution or intermediary”

9) Insertion of new Section 12A relating to access to information to empower the Director to call for records of transaction or any additional information that may be required and for the power to make enquires for non-compliance of reporting entities to the obligations imposed upon such reporting entities.

10) Amendment of Section 13 relating to powers of Director to impose fine by the Director on the designated Directors and the employees of the reporting entities.

11) Substitution of Section 14 not to make liable to any civil or criminal proceedings against the reporting entity, its directors and employees in certain cases for furnishing information under clause (b) of sub-section (1) of section 12.

12) Substitution of Section 15 relating to procedure and manner of furnishing information by reporting entities.

13) Amendment of Section 17 relating to search and seizure and includes provision for freezing any property, so that it can be seized or attached and confiscated later.

14) Amendment of Section 18 relating to search of persons.

15) Substitution of Sections 20 and 21 relating to retention of property and retention of records respectively. It proposes, to increase the period of withholding of releasing of property or records, as the case may be, from the existing forty-five days to ninety days so as to allow sufficient
time to the officers of Enforcement Directorate to file appeal and obtain a stay in the cases required.

16) Amendment of Section 22 relating to presumption as to records or property also to include cases such as where any record or property is produced by any person or it has been seized from the custody or control of any person or has been frozen under the Act or under any other law for the time being in force.

17) Amendment of Section 23 relating to presumption in inter-connected transactions to include the Special Court also along with the Adjudicating Authority for the purposes of adjudication or confiscation under section 8 or for trial of the money-laundering offence.

18) Substitution of Section 24 relating to burden of proof.

19) Amendments to Section 26, 28, 44, 50, 54, 63 etc.

20) Substitution of Section 42 relating to Appeals to High Court with a new section relating to Appeal to Supreme Court. This clause provides that any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law arising out of such order.

21) Insertion of new sections 58A and 58B relating to Special Court to release the property and relating to letter of request of a contracting State or authority for confiscation or release the property.

22) Amendment of Section 60 relating to attachment, seizure and confiscation, etc., of property in a contracting State or India.

23) Substitution of Section 69 relating to recovery of fine or penalty.

24) Amendment of Section 70 relating to offences by companies. Inserts a new Explanation after the existing Explanation to clarify that a company may be prosecuted, notwithstanding whether the prosecution or conviction of any legal juridical person shall be contingent on the prosecution or conviction of any individual.
25) Amendment of Schedule as it substitutes Part A with new Part so as to include the existing paragraphs 1 to 25 of Part B in Part A and also amends Part C.

6.3.14 THE RESERVE BANK OF INDIA'S INITIATIVES:

In the background of above documents India's Central Bank - Reserve Bank of India's Department of Banking Operations and Development has consistently been taking measures to evolve and establish appropriate systems and procedures `to help control financial frauds, and identify money laundering and suspicious activities'. As Indian banking system comprises over 60,000 branches of more than 100 banks, taking foolproof AML measures has been quite a challenge for RBI supervisors. Comprehensive guidelines /instructions have therefore been issued time to time to the Chairpersons and CEOs of all commercial banks for strict compliance. These guidelines act as a safeguard for banks from being unwittingly used for transfer or deposit of criminal funds or for financing terrorism. These instructions inter alia cover following areas:

- ‘Know Your Customer' (KYC) procedures for new and existing clients
- Cash transaction norms: ceiling and monitoring
- Risk management and monitoring procedures
- Internal control systems.
- Terrorism finance.
- Internal audit /inspection
- Identification and reporting of suspicious transaction.
- Adherence to Foreign Contribution Regulation Act, 1976 (FCRA)
- Record keeping
- Training of staff and management.

These have been issued under Section 35(A) of the Banking Regulation Act, 1949 and non-compliance of any of these will invite penalties.
TheCircularsissuedtime to time by RBI on `KYC' and monitoring of cash transactions is given in Appendix D: Guidelines for customer identification are given in appendix E. and anti money laundering guidelines for authorised money changers issued by RBI in December 2005 are given in Appendix F

So here we have seen various legislations in Indian and U.S. to curb the menace of Money Laundering. Apart from legislative approach RBI had also played an important role in preventing Money laundering. RBI has issued various guidelines from time to time to protect over economy form Money laundering.

But what I think is that only by enacting legislation this problem will be not solved. In order to solve this problem it can be done only through proper implementation of these legislations. And this can be done when people understand their responsibility and co-operate Government in implementation of law. Thus unless and until people would not ready to do so; thousands of legislations will be helpless.

6.3.15 THE SUPREME COURTS OF INDIA ON ANTI-MONEY LAUNDERING MEASURES IN INDIA:

Since the PMLA is fairly recent, the apex court has not had the opportunity to explore its contours too much. Most of the litigation has deal with the procedural aspects of the PML As opposed to the substantive crime of money laundering. Some instances of the manner in which the apex court has dealt with the PMLA are given below.

A. CENTRE FOR PIL V/S UNION OF INDIA

This case dealt with investigation in the 2G spectrum scam. This issue that came up before he Court was the appointment of a Special Public Prosecutor, to conduct the prosecution on behalf of the CBI and the Enforcement Directorate under the PMLA.

The Court emphasised a great deal on the peculiar factual matrix of this case, pointing out that court intervention had been solicited on a large scale in the
case on the behest of both the parties. As a consequence of this, the Court had directed and monitored CBI investigation and ordered a special court to be set up. Owing to the sensitive nature of this case, the Court felt that in the matter of appointment of the Special Public Prosecutor, utmost fairness and objectivity should be observed. Mr. K.K. Venugopal, learned senior counsel for CBI and ED was asked to suggest certain names. Mr. U.U. Lalit’s name was suggested and accepted with unanimity by counsels for all the parties. However, this case arose when the Union Government went back on its word and suggested that it had the sole discretion to make the appointment of the SPP. For this purpose, its argumentation was two-fold. The first point made by it was that the appointment of the SPP was the prerogative of the Union, and this power could not be abridged. Secondly, it placed a reliance on Section 46(2) of the PMLA.

With respect to the first contention, the Court struck it down, observing that the Constitution itself recognises only three concepts rights, duties and discretion. The Court was emphatic in distinguishing last one from prerogative, saying that the implication of using the word discretion instead of prerogative was to ensure that the exercise of power was not unbridled.

With respect to Section 46(2), the argument was more layered. Since the 2G case involves money laundering as well as other offences, the submission of the Union was that invocation of the PMLA procedures was unavoidable. Section 46 deals with the application of the Code of Criminal Procedure, 1973 to proceedings before a special court that has been set up under the PMLA. According to this provision, a person shall not be qualified to be appointed as an SPP unless—he has been in practice as an Advocate for not less than seven years, under the Union or a State. However, the Court held that a person who has been an Advocate—under the Union simply means a lawyer on the panel of either the State or Central government. It does not translate to the requirement that the appointee should be an officer or employee of the union. The importance of this observation was compounded in this case because of the public element involved in the appointment of the SPP in large scale money
laundering cases. In conclusion, the Court held that Article 136, read with Article 142 empowered the Court to make the appointment of Mr. Lalit, and that the said appointment was valid. While this reasoning of the Court is sound, it is the submission of this researcher that the Court went unnecessarily further into describing the connection between such appointments and the CrPC. For this they referred to Section 46(3) of the PMLA as per which an SPP shall be deemed to be a Public Prosecutor within the meaning of Section 2(u) of the CrPC. This last section defines the term —Public Prosecutor— to mean any person appointed under Section 24 of the CrPC. The Court construed this to mean that a harmonious reading of Section 46 of the PMLA and Section 24 of the CrPC required that the requirements of the appointment procedure set out in Section 24 should be satisfied even in cases of the appointment of the SPP under Section 46. However, the purpose of a deeming provision is to include instances which would otherwise be excluded. Hence, the purpose of Section 46(3) would be to include the SPP within the meaning of a Public Prosecutor under the CrPC even if the express requirements of the statute were not complied with. While this did not make a difference to this case, since the SPP in question had been appointed in accordance with Section 24 of the CrPC anyway, this might turn out to be a confusing precedent for the future.

B. BINOD KUMAR V/S. STATE OF JHARKHAND

This was a case from the High Court at Ranchi. There were allegations that vast amounts of money had been amassed by certain politicians, including former Chief Minister Madhu Koda but there were no specific allegations of money laundering. The scam ran into hundreds of crores (reports suggest Koda and his associates laundered upto INR 3536 crores\(^{139}\)) and involved investment in shares and property in India and multiple jurisdictions and required a thorough investigation of at least 32 companies. The Division Bench of the High Court had ordered that investigation be transferred to the CBI under Section 45(1A) of the PMLA. The basic issue that arose before the Court whether the High Court was empowered to make such an order, since

the ED under the PMLA was already provided for as an investigating agency. The main contention of the appellants was that money laundering falls squarely within the domain of the ED and the CBI is not entitled to encroach upon this territory since it has been clearly demarcated. Secondly, as per them, the PMLA is a self contained code and therefore it is only the ED, provided under the statute, which can investigate the crimes in question. Third, it was argued that the PMLA is a law that has been enacted under Article 253 of the Constitution to give effect to India’s international obligations to combat money-laundering. Therefore it overrides anything that is inconsistent with it. It was also argued that the CBI had neither the expertise, nor the powers suited to investigating the crimes in question. This last contention is a direct reflection of the fact that money-laundering is a crime which involves techniques that change rapidly over time. Therefore, an especially trained agency is required for its investigation. Further, it often involves investigation in multiple jurisdictions, something the ED had been especially empowered to do as per its convenience under the CBI. The Court however felt that it was unnecessary to deal with the question at all. The crux of its reasoning was that money laundering is not a stand-alone crime. It is committed only when gains received from some other offence are taken and attempted to be passed off as lawful gains. These other offences have been provided for as Scheduled Offences in the PMLA.

PMLA The investigation that had been handed over to the CBI was that of these other offences, and not directly that of money laundering. Hence, the order of the High Court was upheld.

C. PAREENA SWARUP V/S. UNION OF INDIA

The constitutionality of several provisions of the PMLA dealing with the Adjudicating Authorities and the Appellate Tribunal were challenged by way of this case. A large part of the case also dealt with the validity of the

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141 Pareena Swarup v. Union of India, 2008 (13) SCALE 8
Prevention of Money-Laundering (Appointment and Conditions of Service of Chairperson and Members of Appellate Tribunal) Rules, 2007 and Prevention of Money Laundering (Appointment and Conditions of Service of Chairperson and Members of Adjudicating Authorities) Rules, 2007. What is interesting about this case is the fact that the Court didn’t really have to decide any of the issues since they were resolved by consensus between the parties. The challenge was made broadly on three grounds, in respect of all of which amendments were proposed or adopted by the Government. First, it was argued that the Rules did not explicitly specify the qualifications of members to be appointed to the aforementioned authorities. This was one of the simpler arguments, and the State was more than willing to accommodate the petitioner’s concerns on this count. The amendment passed as a result of this case require that all members hold qualifications in “chartered accountancy or a degree in finance, economics or accountancy or having special experience in finance or accounts by virtue of having worked for at least two years in the finance or revenue department...or being in charge of the finance or accounting wing of a corporation for a like period.”

Secondly, it was the contention of the petitioners that the members of the authorities’ setup under the Act were appointed under the Revenue Secretary and therefore were not free, independent judicial officers. This was also contended to be an affront to judicial independence because a Committee headed by the Revenue Secretary was empowered to select from high court judges and district court judges. It was argued that the judiciary should have a greater role in the selection of the officers. To resolve this issue it was decided that an amendment would be introduced by way of which the appointment of Chairman of the adjudicating authority would be only on the recommendation of the Chief Justice of India. Further, once such an appointment is made, the removal cannot be carried

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through without consultation with the CJI. What the Court did in effect was that it replaced the Chairman of the Selection Committee with the CJI or a judge nominated by him.\footnote{Sai Vinod Nayani, State of Tribunals in India, available at http://spicyipindia.blogspot.in/2011/12/guest-post-state-of-tribunals-in-india.html (last accessed Apr. 9, 2012).}

Experts worry that the impact of this restricted role of the Executive might be felt by way of increased expenditure on the authority on the PMLA followed by its slow decline into dysfunction.\footnote{MJ Akbar, Babu-Friendly Tribunals, THE BUSINESS STANDARD October 8, 2008, available at http://business-standard.com/india/storypage.php?autono=336688 (last accessed Apr. 9, 2012).}

The most problematic contention was that the procedures under the Act led to a breach of the separation of powers between the Judiciary and the Executive. The functions of an essentially executive authority were to be evidently quasi-judicial in function. However, the Court rightly pointed out that money laundering sometimes required the kind of expertise that judicial officers did not necessarily have, so it was more plausible to have a body of experts as provided under the PMLA i.e. the adjudicating authority. They further pointed out that the exercise of adjudicatory functions by executive agencies was not unheard of even within our constitutional scheme. To bolster their reasoning, they gave the example of the Narcotic Drugs and Psychotropic Substances Act, 1985. While all the issues in this case were amicably resolved, one cannot help contemplate what the fate of this petition would have been had it been allowed to take its natural course. For one, since it is a case that often involves the abuse of public positions for money laundering, the judiciousness of allowing a consensual settlement of sorts is something that needs contemplation.
D. RAM JETHMALANI V/S. UNION OF INDIA

This landmark case in the area of money laundering law marks the only real attempt of the Supreme Court to actively curb money laundering, by mandating efficacious measures. The facts of the case arise in the following background. The cases of Hasan Ali and his accomplice Tapuria stand out as particularly egregious instances of the lack of implementation of the money-laundering laws in India. Hasan Ali, 53-year-old, son of Hyderabad Excise Officer is known to have unaccounted money to the tune of Rs. 20,000 to 35,000 crore. His account at the Swiss Bank, UBS holds up to USD 8 billion, and he is liable for a tax default of about Rs. 50,000 crore in India. A Writ petition was filed in based on reports in the media and scholarly articles, regarding the lack of action taken by the State authorities in countering the large sums of unaccounted money in foreign banks, particularly those in jurisdictions that are tax havens with strong privacy laws. The main contention was that the fundamental rights of the people under Articles 21, 14, 19 were violated by selectively disregarding such large scale tax evasion on the part of persons like Hassan Ali.

The Petition

The Petitioners contended that such a dereliction of duty to enforce the tax default on the part of State authorities reflects a complete lack of control over unlawful activities of two kinds, one, tax evasion and two, those criminal activities that are funded by the black money economy. Moreover, such black money in Swiss banks was laundered and rerouted back into India for illegal activities, thus contributing to the creation of networks of international finance. Large scale criminal activities like terrorism, arms smuggling, narcotic trade and similar activities which are fuelled by the black economy are also detrimental to the security and integrity of India. The petitioners also contended that this money was quite likely to be that of powerful persons and the lack of action on the part of the State indicated gross apathy towards

145 2011(6) SCALE 691
prosecution of individuals. Particularly, Hassan Ali Khan & Tapuria had been served with an Income Tax demand to the tune of Rs. 40,000 crore and 20,580 crore respectively. The Enforcement Directorate had, in 2007, reported that Hassan Ali indulged in dealings amounting to USD 1.6 billion between 2001-05. The ED also carried out a raid in Hassan Ali’s Pune residence, which led to the discovery of evidence of deposits of USD 8.04 billion with UBS Bank, Zurich. Despite this, however, no investigation had been commenced by the State into the matter. The petitioners had contended that the Union of India had faltered on several levels.

Both Hassan Ali and Tapuria were in India and hence falling within the jurisdiction of Indian Courts and investigative authorities.

Union of India, despite repeated RTI applications, was not divulging information regarding the Indian account-holders in Swiss Banks

The Swiss Bank, UBS, Zurich, one of the biggest wealth management companies’ in the world, had in particular, fallen in bad light with the Indian authorities as it was involved in several untoward scams earlier in the decade.

**Issues**

- On this premise and based on the specific arguments advanced by the Petitioners, there were two main issues were sought to be addressed by the Court
- Whether the Supreme Court must constitute a Special Investigation Team (SIT) under a former Supreme Court Judge to monitor investigations cases of black money
- Whether the Court must mandate that the Union must endeavour to first obtain and then disclose the list of Indian bank account holders in banks in Liechtenstein

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Arguments of the Petitioners:

Re: Constitution of SIT the petitioners argued that an SIT ought to be constituted under the supervision of former Supreme Court judges to continually monitor investigation and prosecution of black money cases.

Re: Disclosure of bank account information in banks in Liechtenstein The council for the Petitioners submitted that a few years ago, an employee of a bank in Liechtenstein had offered to divulge names of bank account holders to the government of Germany. Germany had secured these names on had consequently initiated proceedings against 600 individuals. The government of Germany had also offered the list of names to other countries if they chose to initiate prosecutions against these individuals, outside the framework of the Indo-German Double Tax Avoidance Agreement. In this light, it was unclear why, despite several RTI applications, the Union had not revealed the names of these account holders. Moreover, no steps to recover moneys or punish these individuals had been taken so far.

Arguments of the Respondents

Re: Constitution of SIT The Solicitor General responded to the arguments of the Petitioner by submitting that the Union of India had done everything in their power towards prosecution and investigation of black money cases. While they had no principal objection against the submission of the petition, they argued that a Court monitored investigation was permissible but OK but not a SIT. They submitted that there was already a High Level Committee constituted under the Dept of Revenue in the Ministry of Finance, which was a body that was capable of exercising all the functions and powers sought to be entrusted to the SIT proposed by the Petitioners. Moreover, the Respondents submitted that cases of money laundering necessarily involve many jurisdictions as these bank accounts were located in different countries with laws and Double Tax Avoidance Agreements that protected the privacy of these account holders. Re: Disclosure of bank account information in banks in Liechtenstein The Solicitor General responded to the case of the Petitioners by
submitting that the list of names of bank account-holders in the possession of the Indian Government were obtained through the DTAA with Germany, as Germany had specifically asked the Union of India to take the said information through the DTAA. The DTAA specifically contained a prohibition on disclosure of information obtained through the DTAA, through its confidentiality clause.

Any actions on the part of the Union in breach of this DTAA would jeopardize India’s relations with Germany. Moreover, the disclosure of the names of all the account-holders would be in gross violation of the right of privacy of individuals who were using these Swiss Bank accounts for legitimately earned money, thus falling outside the purview of a potential investigation or prosecution for money laundering. The State argued that even if it were to disclose this list, only those names of persons against whom investigation had been commenced and proceedings had been initiated would be disclosed.

Judgment

Re: Constitution of the SIT The Supreme Court recognized that although a High Level Committee had been set up with extensive powers, the charge-sheet of Hassan Ali had not even been vetted by this committee, nor was the Committee monitoring the investigation and ensuring speedy progress. Moreover, the court opined that several jurisdictions, even as regards those persons within Indian jurisdiction, against whom sufficient evidence exists in the hands of the Indian authorities, the Government had not done enough. Thus, the Court held that the Union of India ought to constitute an SIT with very broad powers of investigation and prosecution of black money cases. The SIT would be required to constantly report developments to the Supreme Court. It would comprise of all the members of the High Level Committee along with the Director of the Research and Analysis Wing (RAW), viz.:

- Director, RAW
- Two former judges of the SC
- Secretary, Department of Revenue, as the Chairman;
Re: Disclosure of bank account information in banks in Liechtenstein Article 26(1) of the DTAA (on Exchange of Information) on confidentiality of information exchanged under the DTAA reads as follows:

The competent authorities of the Contracting States shall exchange such information as is necessary for carrying out the provisions of this Agreement.

Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by this Agreement. They may disclose the information in public court proceedings or in judicial proceedings.

Thus, it was clear that Article 26 of the DTAA governed only exchange of information that was undertaken for the purpose of carrying out the provisions of the Agreement. Since the list of names of bank account holders in Liechtenstein was not information necessary for carrying out provisions of the Indo-German DTAA, the Court held that Liechtenstein was not covered within the ambit of the Indo-German DTAA. The Court also held that the fact that Germany asked India to treat the information as granted under Article 26...
of the DTAA is immaterial. Moreover, there was no bar of secrecy imposed on disclosing such information for the purpose of court proceedings.

The Court struck down the argument of the Union that these court proceedings were limited to merely tax proceedings, on the basis that such a reading of Article 26(1) would render the last sentence in the Article redundant. For this, the Court cited Article 31 of the Vienna Convention on the Law of Treaties to state that the treaty should be interpreted so as to give the words used its ordinary meaning.

The Court also pre-empted arguments on part of the State that the burden of establishing case against black money would lie on the Petitioners, thus requiring petitioners to produce information on bank accounts harbouring black money, by holding that the burden of protecting fundamental rights lay on the State. The State would thus be required to obtain and disclose all information towards the prosecution of black money cases, in order to uphold the fundamental rights of the rest of the honest tax-paying individuals.

On the right to know under Article 19(2), the Court recognized that the countervailing right to privacy of the bank account holders was a fundamental right read into Article 21 by the Supreme Court in case law. This fundamental right to privacy guaranteed to persons ensures within its ambit that human beings free of public scrutiny if they are acting in conformity with law. Therefore, the right of persons under Article 32 to petition the court in public interest against money laundering must be balanced by the right under Article 21 of account holders in Swiss Banks.

Therefore the Court held that the State tax authorities cannot be mandated to disclose account details of all account holders, even in the absence of investigation to reveal that the account holders are suspected offenders under the PMLA.
Government’s Response to the Judgment

The establishment of the SIT with unprecedented powers to investigate in this case was not reacted to positively by the Centre, and specifically, the Finance Ministry. Attorney General Goolam Vahanvati, presenting the Centre’s case before a bench consisting of Justices Kabir and Nijjar, requested a modification of the terms of creation of this body, claiming that it would result in the ultimate destabilization of a large number of probe mechanisms set up under different laws including the NDPS Act, the IT Act, the FEMA and others by creating a super-force’, especially one with a composition as limited as that of the SIT,. This argument stemmed from the fact that such members as the RBI Deputy Director were expected to take up duties as heavy as investigating the majority of all money laundering cases in the country, despite clearly having their own functions to discharge.\(^{146}\)

Further, concerns were related about the fitness of certain members, such as the A Director, being a nameless, faceless entity, to sit at the helm of a court-appointed body. The Centre took strong objection to the fact that an extremely high-level, extremely powerful body, with multi-jurisdictional operation would render redundant several legislatively created committees and bodies, could be created without any parliamentary consideration. The plea was objected to on the grounds that it was a review in disguise, and the necessity of the body was created by the slow movement at the centre.\(^{147}\)

The response of the Government to this groundbreaking judgment of the Supreme Court was the filing of a recall petition in Jethmalani v. UOI\(^{148}\) before Altamas Kabir and S. S. Nijjar, JJ. It was argued by the State that the cases cited by the Judges in the judgment


\(^{147}\) Govt struggles with its many committees on black money available at http://www.indianexpress.com/news/govt-struggles-with-its-many-committees-on-b/819876/,

\(^{148}\) 2011(10)SCALE753
of Ram Jethmalani v. Union of India\textsuperscript{149}, in the matter of constitution of the SIT were incorrect, as these cases did not actually constitute SITs ultimately. The State thus prayed that the Court modify the order to remove that part of the order that mandates the constitution of the SIT. The Court however held that this petition was essentially a review petition, and therefore the Supreme Court was precluded from hearing a petition for modification or recall.

A very important area of law where constitutional values frequently come in friction with each other is that of ‘court directed investigations’. This has picked up pace in the recent years as evidenced by the Court’s ordering of a C.B.I investigation (Nandi gram firing incident for instance), appointing an S.I.T (Gujarat fake encounter case) as well as constituting an SIT in the Jethmalani PIL. Ordering an investigation and supervising it are primarily executive functions and not judicial functions, as investigation ‘comes under Police’ which is a state subject under law and order (Entry 2, List II) of the Seventh Schedule of the Indian Constitution. Where the court decides to direct or supervise an investigation through the constitution of an SIT, it takes up the mantle of the executive, which may prima facie be a violation of the principle of separation of powers\textsuperscript{150}. Moreover, since law and order is a state subject, directing and overseeing investigations comes under the legitimate, constitutional domain of the state’s powers. Thus a court ordered investigation through an SIT is also in breach of the principle of federalism. However, it is submitted that where the issue is a gross violation of fundamental rights, the court must do everything it can to ensure a free and fair investigation, if needed supervise it. That is precisely what happened in State of West Bengal v. C.P.D.R\textsuperscript{151}, where the court first held that there had been a complete abrogation of fundamental rights and under such circumstances, the court thought it appropriate to order a C.B.I investigation. Citing Minnerva Mills\textsuperscript{152}, the court observed:

\begin{itemize}
  \item [\textsuperscript{149}] 2011(6) SCALE 691
  \item [\textsuperscript{150}] Ram Jethmalani v. Union of India, 2011 (4) UJ 2237 (SC).
  \item [\textsuperscript{151}] C.P.D.R, AIR 2010 SC 1476
  \item [\textsuperscript{152}] Minnerva Mills, 1980 AIR 1789 (Supreme Court),at74.
\end{itemize}
“Three Articles of our Constitution, and only three, stand between the heaven of freedom into which Tagore wanted his country to awake and the abyss of unrestrained power. They are Articles 14, 19, 21 and 31 C has removed two sides of that golden triangle which affords to the people of this country an assurance that the promise held forth by the preamble will be performed by ushering an egalitarian era through the discipline of fundamental rights, that is, without emasculation of the rights to liberty and equality which alone can help preserve the dignity of the individual.”

Articles 14 and 19 do not confer any fanciful rights. They confer rights which are elementary for the proper and effective functioning of democracy. They are universally regarded by the Universal Declaration of Human Rights. The court in the past that opined that if Articles 14 and 19 are put out of operation; Article 32 will be drained of its life blood. Ours is a controlled Constitution; in that sense, Articles 14, 19, 21 represents the foundational values which form the basis of the rule of law, the essence of which is a part of Basic Structure. These are the principles of constitutionality which form the basis of judicial review apart from the rule of law and separation of powers. Going along these lines, it may be concluded that where fundamental rights in their essence are infringed to the extent that there is an absolute abrogation of their existence, the court must, if it considers necessary, order and direct/supervise an investigation. The power of judicial review being an integral part of the basic structure of the Constitution, no Act of Parliament can exclude or curtail the powers of the Constitutional Courts with regard to the enforcement of fundamental rights. This therefore does not amount to infringement of either the doctrine of separation of power or the federal structure.

Moreover, it is submitted that this case displays several consequentiality justifications despite the above criticisms. Hassan Ali’s offences have finally been investigated. In the meantime, his bail application was granted by the Bombay HC but this order was set aside by Supreme Court in late 2011 that

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154 Minerva Mills, 1980 AIR 1789 (Supreme Court).
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155 Minerva Mills, 1980 AIR 1789 (Supreme Court).
156 Union of India v. Hassan Ali Khan, 2011 (11) SCALE 302