Tushar Mehta
Solicitor General of India

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
TRANSFERRED CASE (CRL) NO. 4 OF 2018

IN THE MATTER OF:-

DIRECTORATE OF ENFORCEMENT ..... PETITIONER

VERSUS

RAJBHUSHAN DIXIT & ANR. ..... RESPONDENTS

WRITTEN SUBMISSIONS

BEHALF OF TUSHAR MEHTA, SOLICITOR GENERAL OF INDIA

DETAILS OF OFFENCES BEING INVESTIGATED BY DIRECTORATE OF ENFORCEMENT

1. As on date 4,700 cases are being investigated by Directorate of Enforcement. The number of the cases taken up for investigation each year in last 5 years varies from 111 cases in 2015-16 to 981 in 2020-21, as per following details:

Financial Year	Number of cases taken up for the investigation under PMLA
2015-16	**111**
2016-17	**200**
2017-18	**148**
2018-19	**195**
2019-20	**562**
2020-21	**981**

2. It is evident from the data as captured above that very small number of cases are being taken up for investigation under the PMLA as compared to annual registration of the cases under the Money Laundering Act in **UK (7,900), USA (1,532), China (4,691), Austria (1,036), Hongkong (1,823), Belguim (1,862), Russia (2,764).**

3. In comparison, in a much larger country like India, it is pertinent to mention here that during last five years (2016-17 to 2020-21), only **2086 cases** were taken up for investigation under the PMLA out of registration of FIR of approx. 33 lakh for predicate offence by Police and other enforcement agencies.

BACKGROUND TO THE FIGHT AGAINST MONEY-LAUNDERING

Introduction

4. The validity of the PMLA, 2002 shall have to be judged from the antecedent events which took place globally. As narrated hereunder the world community has recognized the serious menace of money laundering and its severe impact on the economy, not only of the country in which the predicate offence takes place, but even affecting the economy of other countries where "proceeds of crime" is laundered.

5. All developed and developing nations, as narrated hereunder came together and provided for an internationally acceptable structure of money laundering law requiring all signatory nations to comply with common standards. The Act in question is a product of the said common structure. The real purport, meaning and interpretation of the Act, 2002 shall have to be adjudged in the context of the following international events and binding obligations of India.

6. Firstly, PMLA being a part of the global response of the world community and being ***in tune with the international standards*** as per the obligation of India, as a nation, the approach of this Hon'ble court may be required to be different.

7. It is submitted that PMLA is ***not a conventional penal statute*** but is a statute which is aimed at necessarily ***preventing*** money laundering, ***regulating*** certain activities relatable to money laundering, aims at ***confiscating*** the "proceeds of crime" and the property derived therefrom and also requires offenders to be ***punished*** by the competent court after filing of a complaint.

8. In offences like money laundering, there are rarely identified victims. The economy of the entire nation eventually became the victim. Prior to 1988, there was no structured legislation dealing with the money laundering and majority of criminal justice systems were familiar with more traditional forms like confiscation – known forfeiture and there was no concept of "proceeds of crime".

9. It seems that for the first time in ***R. v. Cuthbertson*** **[1981] AC 470 [SGI Compilation – Volume I – pg. 1 to 12]**, the House of Lords recognized the concept of "proceeds of crime". The old position, ***Pecunia non olet***[1] which meant, money does not stink, has given way to a modern understanding of how ill-gotten money affects the macro-economic strength of the country.

Early era

10. It is submitted that one of the first countries to take legislative action in order to fill this gap, was England. Following one of the main recommendations of the ***Hodgson Committee***, the British Parliament empowered courts to confiscate the proceeds of drug trafficking through the **Drug Trafficking Offences Act 1986** [later replaced by the Drug Trafficking Act 1994].

[1] Statement attributed to Emperor Vespasianus on raising taxes on public toilets (Concise Oxford Dictionary of Quotations, Oxford, 1986, 262)

11. The first major globalised advance in this regard came with the conclusion in Vienna in December 1988 of the ***UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*** (known variously as 'the 1988 UN Convention', 'the UN Drugs Convention' or 'the Vienna Convention') [**SGI Compilation – Volume I – pg. 13 to 43**]. It is submitted that, this important international instrument, to which approximately 185 countries [including India] are now bound, has had a major impact on subsequent initiatives. Over the course of the next decade, through the 1990's, it was widely viewed as constituting the minimum standard of conduct required of members of the international community in this important area of concern.

12. In this regard, it is submitted that central to the approach adopted at the said time was the imposition of an obligation for each participating country to criminalise a fairly comprehensive list of activities concerning drug trafficking which have a major international impact, ranging from production and cultivation to the organisation, management and financing of trafficking operations. Article 3(1)(a) of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and Article 3(1)(b) requires that money laundering be established as a criminal offence.

Evolutionary Era

13. It is respectfully submitted that, potentially the most important international instrument to be concluded since 1988 in the area of anti-money laundering is *the* ***UN Convention against Transnational Organised Crime of 2000*** (the 2000 UN Convention) [**SGI Compilation – Volume I – pg. 70 to 161**]. It is further submitted that, the cornerstone of the 2000 UN Convention is Art. 3, which sets out its scope of application. In essence, it clarifies that it applies to the prevention, investigation and prosecution of stipulated offences (including money laundering) and other serious crimes (defined in Art. 234 by reference to a threshold of punishment) '*where the offence is transnational in nature and involves an organised criminal group*'. It is of interest to note that the term 'organised criminal group' is in turn defined (in Art. 2(a) in such a manner as to ensure that the operation of the text is not confined or restricted to Mafia-type criminal organisations.

14. It is submitted that many of the detailed provisions which follow are designed to ensure that participating countries have in place adequate domestic law powers and from that base, are able to engage in meaningful international cooperation. The influence of both the 1988 UN Convention on drugs and the 1990 Convention on money laundering is clearly evident in both the internal structure of the text and in the drafting of specific provisions. The 2000 Convention includes provisions for the extension of coverage to new areas of concern, such as the protection of witnesses and victims, the inclusion of specific treatment of corporate liability and the manner in which it addresses the close interface between organised crime and corruption. It is respectfully submitted that a subsequent provision calls upon participating countries 'to use as a guideline' relevant international anti-money laundering initiatives in establishing their domestic regulatory and supervisory regimes.

15. It is submitted that, whilst taking considerable care to ensure that its provisions were fully compatible with the 1988 UN Convention, the Committee of Experts which drafted the 1990 Convention agreed to extend its obligations beyond the area of drug trafficking. In so far as money laundering, (which was governed by Art. 6 of the 1990 Convention), is concerned, the basic approach adopted was summarised by the UK House of Lords Select Committee on the European Communities as follows[2]:

> *"Article 6 of the (1990) Convention requires State Parties to establish an offence of international money laundering. The property involved in any conversion or transfer could be proceeds not only of drug trafficking or terrorism but of any criminal offence (described as the 'predicate offence') and the State Party prosecuting need not have criminal jurisdiction over the predicate offence. Although this constitutes a very wide definition of money laundering, it is open to States on signature or ratification to limit the definition for themselves to more limited categories of predicate offence."*

16. It is respectfully submitted that on 31st October 2003, the UN General Assembly adopted a new ***United Nations Convention Against Corruption***. [**SGI Compilation – Volume I – pg. 162 to 226**] It is submitted that the Preamble to the 2003 UN Convention recognised the importance of preventing, detecting and deterring international transfers of illicitly acquired assets, and strengthening international cooperation in asset recovery.

17. It is further submitted that the 2003 Convention contains a similar statement to that in the 2000 Convention to the effect that countries should follow initiatives at international level when designing their domestic frameworks. The 2003 Convention also calls on countries to ensure that the relevant authorities have the ability to cooperate and exchange information at national and international levels within the conditions prescribed by their domestic laws, and to consider establishing a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential money laundering.

18. It is respectfully submitted that, whilst similar to the wording used in the 2000 Convention, Art. 14(3) of the 2003 Convention goes further in explicitly referring to the need to carry out *due diligence on beneficial owners* of customers or transactions. The 2003 Convention also makes explicit reference to the need to conduct enhanced scrutiny of accounts sought or maintained by politically exposed persons and their associates (the 2003 Convention uses the language 'individuals who are, or have been, entrusted with prominent public functions and their family members or close associates').[3] The 2003 Convention also calls on countries to consider implementing measures to monitor the movement of cash and other instruments across their borders, subject to safeguards to ensure proper use of information without impeding the movement of legitimate capital. It is respectfully submitted that, the framers of the 2003 Convention appreciated the importance of ensuring the individual countries put in place measures to ensure that transfers of funds could be properly tracked, and that a 'paper trail' be created which could assist law enforcement authorities in investigating the transfers of illicit assets.

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[2] HL Select Committee on the European Communities 'Money Laundering' December 1990, Session 1990-91, 1st Report (with evidence).

[3] UN Convention Against Corruption.

19. Furthermore, the 2003 Convention also calls on State Parties to take appropriate measures to prevent the establishment of banks that have no physical presence and that are not affiliated with a regulated financial group, and to consider preventing their financial institutions from having correspondence banking relationships with such institutions.[48]

Work of the Financial Action Task Force

20. Originally, the Financial Action Task Force was established by the heads of state or government of the seven major industrial nations (Group of Seven, G-7) joined by the President of the European Commission, at their Summit meeting in Paris in July 1989 (also known as the Sommet de L'Arch). Subsequently, its membership has expanded to include OECD and financial centre jurisdictions, as well as the European Commission and the Gulf Cooperation Council. Its best known for its **40 Recommendations**, it has become the single most important international body in terms of the formulation of anti-money laundering policy and in the mobilisation of global awareness of the complex issues involved in countering this sophisticated form of criminality. FATF standards have been adopted by over 180 jurisdictions across the world.[4] It is a specialist body which concentrates on the international fight against money laundering. In consonance with the treaty-based efforts across the world, the Financial Action Task Force, was carrying out its own evolution and enforcement push on the issue of money laundering across the world as a dedicated body dealing with the issue.

21. In this regard, the FATF issued its **first 40 Recommendations** on anti-money laundering in **1990** [**SGI Compilation – Volume I – pg. 244 to 250 (1990 Recommendation)**]. It is submitted that FATF has sought to remain sensitive to the ***dynamic nature*** of this form of criminal activity. It has thus attempted to recognise and respond to the fact that money laundering techniques are constantly evolving. In particular, it was recognised from the beginning that its package of counter measures, reflected in the **1990 Recommendations**, would require periodic adjustment. However, it was decided not formally to amend these Recommendations before the first round of mutual evaluations was completed, so that all members were assessed on the same basis. Until that stage was reached, the grouping had to rely on adopting so-called interpretative notes. In the course of 1995 and 1996, however, it became possible for FATF to undertake a major review designed to update the 1990 package. In this regard, several amendments to both the Recommendations and the Interpretative Notes were agreed and became effective in late June 1996.

22. It is respectfully submitted that, from 2001 onwards, consideration was given to a further review of the Recommendations. The decision to embark on a further stocktaking review and the subsequent developments served to highlight the need for such an initiative. By way of illustration, in their July 2000 report to G-7 heads of state and government, meeting in Okinawa, Finance Ministers called upon the FATF to consider the scope for revising its Recommendations in four areas:

[48] UN Convention Against Corruption, art 52(4)
[4] FATF Annual Report 2010-11.

- *'gatekeepers' to the international financial system (ie professionals such as lawyers and accountants);*
- *The international payments system (especially the inclusion of originator identification in international wire transfers);*
- *Corporate 'vehicles' (with particular reference to the obtaining and sharing of information on the beneficial ownership and control of such 'vehicles'); and*
- *Stolen state assets (in particular enhancing international cooperation to address this issue).*

23. It is respectfully submitted that, throughout the 1990s, the external relations programme of FATF was characterised, in the main, by its incremental nature and its emphasis on encouragement and diplomatic persuasion. More recently, however, a more robust stance on compliance with anti-money laundering standards has been adopted in respect of non-FATF members. In this context, the G7 (later G8) has also played an important role. The FATF has fashioned its Non-Cooperative Countries or Territories ("NCCT") initiative, the substance of which was set out in a report issued on 14 February 2000. It is submitted that central to the operation of the process were 25 criteria – said to be consistent with the 40 Recommendations – which identify 'detrimental rules and practices' in the international effort to combat laundering. The criteria over a broad range of matters, from loopholes in financial regulation to the allocation of inadequate anti-money laundering resources. They are, in turn, formulated in such a manner as to embrace both jurisdictions suffering from formal non-compliance as well as those where the anti-laundering regime is ineffective in practice. The Report also established a review process through which a range of jurisdictions would be subject to examination, and clarified the concrete steps which could be taken against delinquent countries and territories to encourage compliance. These include a range of counter measures which can be deployed against those which might be disinclined to fall into line. Ultimately, it was noted, these might include '*conditioning, restricting, targeting or even prohibiting financial transactions with non-cooperative jurisdictions*'.

24. The FATF in **2003** [**SGI Compilation – Volume I – pg. 251 to 277 (2003 Recommendations**)], the FATF substantially amended its 40 Recommendations for the second time, providing greater detail in several areas – including customer due diligence and the need to identify beneficial owners (a definition of whom was provided for the first time), and introducing new areas of coverage (such as the role of financial intelligence units (FIUs). It is submitted that, a significant change brought about by the amendment to the 40 Recommendations was the introduction of the 'risk-based approach' to customer due diligence, which has been enshrined at EU level in the Third Directive. The FATF had already, in October 2001, introduced eight new Special Recommendations (expanded to nine in October 2004) addressing terrorist financing.

25. It is respectfully submitted that, the most recent update to the FATF Recommendations followed in extensive consultation with member countries that commenced in June 2009 and culminated in 2012. The revised Recommendations received input from the private sector, governments and various other interested parties and aim to strengthen international safeguards against money laundering and provide authorities with further tools to combat financial crime. The principal changes were as follows:

(a) Requiring countries to assess the risks that they face and target their AML/CTF regimes to address areas of particular risk.

(b) Consolidating the AML Recommendations with those on terrorist financing; the Special Recommendations on terrorist financing have therefore been removed.

(c) Encouraging more effective international cooperation between national authorities including in relation to conducting joint investigations, asset tracing, freezing and confiscation, and information-sharing.

(d) Expanding the list of money laundering predicate offences to include tax crimes.

(e) Encouraging regulated entities to subject high risk clients to enhanced due diligence measures and allowing them to apply more flexible checks to low risk clients.

(f) Imposing more rigorous requirements on financial institutions when assessing risks inherent in the launch of new products or developing technologies.

(g) Extending the application of sanctions so that governments may apply them, not only to regulated organisations, but also to their directors and senior management.

(h) Strengthening requirements on financial institutions to apply enhanced due diligence measures to politically exposed persons (PEPs) and requiring measures to be taken by those institutions when dealing with domestic PEPs or those entrusted with prominent functions by international organisations.

26. The **FATF – 40 Recommendations** [**SGI Compilation – Volume I – pg. 278 to 417** (**2012 Recommendation**)], issued in their latest avatar in 2012, makes the following broad recommendations :

a. **Recommendation 1**: The said recommendation provides a Risk-based approach is to be taken to anti-money laundering. Essentially, this means that each country should assess the risks that it faces and take appropriate preventative action in response. A risk-based approach is considered to be the foundation of an effective anti-money laundering program and for implementing other FATF recommendations.

b. **Recommendation 2**: This requires countries to implement a national policy regarding anti-money laundering. It provides that there should be a designated authority for regulation purposes. It is also vital that law enforcement, financial intelligence units, government bodies, and others cooperate with one another. The sharing of knowledge and information ultimately leads to further prevention and means that delinquent activities can be spotted sooner rather than later.

c. **Recommendations 6/7/35**: In order to comply with the United Nations Security Council (UNSC) resolutions, the FATF makes several recommendations regarding financial sanctions. It is recommended that member states implement targeted financial sanctions against persons or entities that pose risks for money laundering. The UNSC regulations require that member states freeze the funds and assets of the listed individuals and groups immediately, and ensure that no further funds or assets be made available to them in the future. FATF member countries should create their own sanctions lists that financial institutions can consult prior to establishing a relationship with prospective clients. Any companies that offer financial services should closely analyze sanction lists before accepting new business.

d. **Recommendation 10**: Apart from criminal sanctions, the FATF recommendations have a significant portion on regulation and monitoring of financial activities in general. It provides for Customer due diligence, which is the process of assessing risks posed by potential and current customers. The process of Know Your Customer (KYC) is envisaged which helps prevent people from opening accounts anonymously or under a false name. The Due diligence measures should be observed whenever a financial institution begins a new business relationship, when specific types of transactions take place, when there are doubts surrounding the customers' identity, and when there is suspicion of money laundering.

e. **Recommendation 12**: The FATF specifically deals with Politically exposed persons (PEPs) who are individuals who are entrusted with a prominent public position and therefore may be more susceptible to acquiring money through illegal means, which also means that they are statistically more likely to launder money. The FATF recommends that financial institutions implement anti-money laundering measures and KYC for foreign PEPs and the risks that they present. It requires that all PEPs should be actively monitored during their customer lifecycle, and that also includes any family and close associates. It further requires that financial institutions should take a risk-based approach with PEPs, including identifying their sources of wealth, regular monitoring, and introducing senior management approval.

f. **Recommendation 15**: The FATF recommends that countries be aware of how criminals may make use of new technologies and new business practices that arise, particularly in the financial sector. A risk assessment should take place prior to the official release of any new products, business practices, or technological developments. Appropriate measures should be taken to manage and prevent any risks that may pop up. Recommendation 15 is also accompanied by an interpretive note regarding virtual assets which ostensibly covers cryptocurrency. The note outlines an incoming provision for the treatment of virtual assets by financial authorities and any other obliged entities. The FATF recommends that countries apply a risk-based anti-money laundering approach to these assets.

g. **Recommendation 19**: It provides that some countries are naturally at a higher risk for money laundering than others due to the factors peculiar to each country. When doing business with individuals or entities from higher risk countries, the FATF recommends that financial institutions apply enhanced due diligence measures. Enhanced due diligence measures include enhanced reporting and auditing, limiting business relationships within those countries, and prohibiting any new branch or office openings. Additionally, the FATF recommends that member states should advise their financial institutions about the anti-money laundering legislative weaknesses of higher risk countries.

h. **Recommendation 20**: It specifically provides that the reporting of suspicious transactions. If the relevant authorities do not receive any reports, then would not be possible impossible for them to catch financial crimes. The reporting of suspicious transactions is vital to making anti-money laundering measures work efficiently. The FATF recommends that financial institutions report any suspicious transactions to the relevant authorities immediately. It provides that suspicious transactions should have

a mandatory reporting obligation, and should be reported regardless of the amount or if the transaction is completed. Different member states have different reporting timelines, but generally they should be reported sooner rather than later in order to effectively stop criminal activity.

i. **Recommendations 22/23**: The regulatory mechanism travels beyond suspicious transactions, KYC and reporting requirements. The FATF provides for Designated non-financial businesses and professions (DNFBPs) who are also required to follow many of the customer due diligence and record keeping guidelines outlined by the FATF. DNFBPs are defined as the following: casinos, real estate agents, dealers in precious metals and precious stones, trust and company service providers, notaries, lawyers, other independent legal professionals and accountants. Each profession has their own set of recommendations as outlined by the FATF. Some DFNBPs are required to perform additional measures, depending on their profession.

j. **Recommendation 32** –The FATF recommends that countries should have adequate measures in place to detect the physical cross-border transportation of currency and other items of value. Countries should ensure that the relevant authorities have the legal means to stop or restrain anyone conducting this activity illegally. The relevant sanctions should be placed upon those who make false declarations or disclosures, especially if it is tied to money laundering and terrorist financing activities.

k. **Recommendations 36-40**: One of the main reasons the FATF was created was to have an international regulatory body for anti-money laundering measures. International cooperation is a cornerstone of the FATF, and as a result is extremely necessary for the FATF to work efficiently. A large part of the internal cooperation recommendations involves mutual legal assistance. The FATF recommends that countries should provide the widest possible range of mutual legal assistance in relation to money laundering, terrorist financing, investigations, prosecutions, and related proceedings. Additionally, the FATF also recommends that countries should have relevant treaties in place to facilitate cooperation. There are also recommendations regarding the freezing and confiscation of assets. The FATF recommends that countries should have the authority to take swift action in response to foreign countries requesting assistance. This action includes the identifying, freezing, and confiscating of assets. Extradition is also an important aspect of these recommendations. The FATF recommends that countries should effectively execute extradition requests in relation to money laundering and terrorist financing as quickly as possible. Countries should also do their best to ensure that they are not a safe haven, in particular for individuals tied to terrorist financing.

27. It is submitted that specifically, the glossary to the FATF Recommendations, refers to "Designated categories of offences", which would effectively be equivalent to the list of predicate offences suggested by the organisation. The said List amongst other offences includes *corruption and bribery; fraud; counterfeiting currency; counterfeiting and piracy of products; environmental crime (for example, criminal harvesting, extraction or trafficking of protected species of wild fauna and flora, precious metals and stones, other natural resources, or waste); murder, grievous bodily injury; kidnapping, illegal restraint and hostage-taking; robbery or theft; smuggling; (including in relation to customs and excise duties and taxes); tax*

crimes (related to direct taxes and indirect taxes); extortion; forgery; piracy; and insider trading and market manipulation.

28. Further, in order to understand the evolving nature of the international measures against money laundering it is relevant to note that the FATF, as mentioned above, further requires that countries should require financial institutions and *designated non-financial businesses and professions* (DNFBPs) to identify, assess and take effective action to mitigate their money laundering, terrorist financing and proliferation financing risks. *Designated non-financial businesses and professions* include *Casinos; Real estate agents; Dealers in precious metals; Dealers in precious stones; Lawyers, notaries, other independent legal professionals and accountants; Trust and Company Service Providers*.

29. It is clear that therefore, the measures against money-laundering have evolved over the period of time. Further, the efforts against money laundering are not just post-facto anymore and there is a significant body of international push towards taking preventive or regulatory or monitoring steps through keeping a watch on suspicious or doubtful transactions.

Global monitoring of the implementation measures

30. It is submitted that an essential part of the FATF activities is assessing the progress of its members in complying with the FATF recommendations. The FATF attempts to accomplish this activity through ***assessments performed annually*** by the individual members and through ***mutual evaluations***. As part of an ongoing process, the FATF completes mutual evaluations of all the FATF members.

31. FATF has a secretariat located within the OECD in Paris which, among other things, services the regular meetings of the FATF membership. These meetings, attended by multi-disciplinary national delegations, currently focus on four priorities.

1. *effective implementation of the 2012 revised 40 Recommendations*
2. *preparing a fourth round of mutual evaluations,*
3. *liaising with the private sector and to develop cooperation in the detection of money laundering; and*
4. *strengthening global cooperation in the fight against money laundering and terrorist financing.*

Mutual Evaluation

32. The FATF **conducts** mutual evaluations of its members' levels of implementation of the FATF Recommendations on an ongoing basis. These are peer reviews, where members from different countries assess another country. The *FATF Methodology for assessing compliance with the FATF Recommendations and the effectiveness of AML/CFT systems* sets out the evaluation process.

33. Assessments focus on two areas, **effectiveness** and **technical compliance**.

- The emphasis of any assessment is on **effectiveness**. A country must demonstrate that, in the context of the risks it is exposed to, it has an effective framework to protect the financial system from abuse. The assessment team looks at 11 key areas, or immediate outcomes, to determine the level of effectiveness of a country's anti-money laundering efforts.

- The assessment also looks at whether a country has met all the **technical** requirements of each of the 40 FATF Recommendations in its laws, regulations and other legal instruments to combat money laundering, and the financing of terrorism and proliferation.

34. A mutual evaluation report provides an in-depth description and analysis of a country's system for preventing criminal abuse of the financial system as well as focused recommendations to the country to further strengthen its system. The Methodology is used by the FATF, the FATF-Style Regional Bodies (FSRBs) and other assessment bodies such as the IMF and the World Bank.

Conditions for putting jurisdictions under enhanced follow-up

35. Upon evaluation, a country will be placed immediately into enhanced follow-up if any one of the following applies:

- It has 8 or more Non-compliant NC/ Partially compliant (PC) ratings for technical compliance.
- It is rated NC/ PC on any one or more of R.3, 5,10,11 and 20 "big six" recommendations. It has a low or moderate level of effectiveness for 7 or more of the 11 effectiveness outcomes.
- It has a low level of effectiveness for 4 or more of the 11 effectiveness outcomes.

Jurisdictions under monitoring based on their commitments and compliances are then put in two types of list

FATF Grey list

36. Jurisdictions are placed under enhanced follow-up/increased monitoring if FATF evaluation identifies strategic deficiencies in their regimes to counter money laundering, terrorist financing, and proliferation financing. When the FATF places a jurisdiction under increased monitoring, it means the country has committed to resolve swiftly the identified strategic deficiencies within agreed timeframes and is subject to increased monitoring. This list is often externally referred to as the "grey list". As on October 2021, there are 23 jurisdictions which have been placed in grey list for enhanced monitoring by FATF. These jurisdictions include countries like Cambodia, Panama, Philippines, Pakistan, South Sudan among others. Pakistan was nominated in the grey list by the FATF in June, 2018, for serious deficiencies in compliance of FATF standards on Terror Financing (TF) and Targeted Financial Sanctions (TFS).

FATF Black list

37. The **FATF blacklist** has been issued by the FATF since 2000, and lists countries which FATF judges to be non-cooperative in the global fight against money laundering and terrorist financing, calling them "Non-Cooperative Countries or Territories" (NCCTs). FATF describes "High-risk jurisdictions subject to a Call for Action" as having "significant strategic deficiencies in their regimes to counter money laundering, terrorist financing, and financing of proliferation. For all countries identified as high-risk, the FATF calls on all members and urges all jurisdictions to apply enhanced due diligence, and in the most serious cases, countries are called upon to apply counter-measures to protect the international financial

system from the ongoing money laundering, terrorist financing, and proliferation financing risks emanating from the country". As of 21 February 2020, only two countries were on the FATF blacklist: North Korea and Iran.

Consequences of grey listing of a country

38. Even though the list does not lead to any legal consequences, it means that the countries have failed to prevent international money laundering and terrorist financing, and are, hence, on a global watch list. Thus, even though being added to the grey list does not imply any economic sanctions per-se, it serves as a signal to the global financial and banking system about heightened risks in transactions with the country in question.

- On getting grey listed the country's rating gets downgraded by global bodies and thus this impacts the bond/credit market of the country.
- It particularly impacts the banking and financial sector of the country as international banks and other intermediary financial institutions are likely to demand a higher level of due diligence from the banking and financial sector of the grey listed country.
- It also affects cross-border capital flows, especially for the trade sector as other countries look over grey listed countries with a lot of speculation.
- Documentary requirements for export and import payments, such as letters of credit, may become more challenging to fulfill, potentially raising costs and hampering business for companies engaged in trade. A recent study by the International Monetary Fund reported that grey-listing cuts capital inflow by an estimated 7.6% of gross domestic product (GDP), while foreign direct investment (FDI) and portfolio flows are also hit.
- The economy gets affected adversely due to a lack of investment opportunities and this takes a toll on the financial needs of the country.
- The borrowing capacity of the country gets affected adversely.
- The country is deemed as a high-risk country which also affects the tourism sector.
- There comes the problem of enhanced economic pressures like degrading currency value, trade deficit, and rise in inflation.
- The major FATF-related risk to the economy stems from the possibility of the government being unable to implement the action plan in a satisfactory manner. This would severely curtail foreign investment and trade flows, making it difficult for the country to access global capital markets.

Other measures

39. It is submitted that, the results obtained through the use of these monitoring procedures have served to highlight the issue of the need to take action when a member country has failed to reach a satisfactory level of compliance. It is submitted that the FATF has put in place a graduated approach; the steps taken ranging from a requirement to make periodic reports on progress to plenary meetings, through invoking Recommendations to, ultimately, ***the threat to suspend the membership*** of delinquent countries. The history surrounding the measures within the realm of international diplomacy demonstrate that the procedures are real and not illusory. In most instances in the past, the sanctions invoked were sufficient to bring about the desired modifications.

40. The FATF country assessments attempt to focus not only on the country's formal compliance with the recommendations, but on how effectively the standards have been implemented. The assessment approach, after consultations with IMF and World Bank, concentrate on (1) areas where countries have a record of poor compliance; (2) key or core areas of the standard or where the standard has been amended; and/or (3) areas where individual countries face particular risks, either domestic or cross border. It is submitted that FATF states that the country assessments are conducted with a more targeted, risk-based approach aimed at assessing a country's actual compliance with the standards.

41. In addition to monitoring the progress of countries in meeting the FATF recommendations regarding money-laundering, the FATF has taken a number of steps since the 2008-2009 financial crisis to protect the international financial system from abuse. These actions include identifying jurisdictions that may pose a risk to the international financial system and updating reports on such topics as Best Practices on Confiscation (asset recovery); best practices on Managing the Anti-Money Laundering and Counter-Terrorist Financing Policy Implications of Voluntary Tax Compliance Programs; and Trade Based Money Laundering. The recommendations are periodically revised and new methodologies for analyzing money laundering evolve over time. In addition, a number of the recommendations require changes to laws and other procedures that take time for member countries to implement. To assist member countries in complying with the recommendations, the FATF has issued various interpretative notes to clarify aspects of the recommendations and to further refine the obligations of member countries.

42. Apart from the abuse, the FATF has taken the following step in order enhance the compliance requirements and developing safeguards against breach of FATF Recommendations:

a. Issued a statement warning all FATF members and all jurisdictions to protect their financial systems from risks associated with Iran's failure to address ongoing deficiencies in its anti-money laundering regime and in combating financial terrorism

b. Completed an analysis of the impact of the global financial and economic crises on international cooperation in the area of money laundering and terrorist financing and reported to the G-20 in September 2009 on responses to the financial crisis.

c. Completed a report on the potential for money laundering and other vulnerabilities in the football sector.[5] [**SGI Compilation – Volume II – pg. 963 to 1004**]

d. Issued a list of best practices that can assist member countries in implementing measures to freeze the assets or funds of terrorists or of terrorist-related activities. The FATF argues that freezing these assets or funds is important because it (1) denies funds to terrorists, which forces them to use more costly and higher-risk ways to finance their operations; (2) deters those who might be willing to finance terrorism; and (3) is one element of a broader effort to follow the money trail of terrorists, terrorist groups, and terrorist activity. Issued a report on money laundering and the risk posed under New Payment Methods (prepaid cards, mobile payments, and Internet payment services).[6] [**SGI Compilation – Volume II – pg. 1005 to 1121**]

[5] FATF, Money Laundering Through the Football Sector, July 2009
[6] *Money Laundering Using New Payment Methods*, Financial Action Task Force, October 2010

e. Completed research on the use of Trusts and Company Service Providers for money laundering, indicating that Trusts and Company Service Providers have often been misused, wittingly or not, in money-laundering activities.[7] [**SGI Compilation – Volume III – pg. 1122 to 1225**]

f. Published a report on the rise in organized piracy on the high seas and related kidnapping for ransom.[8] [**SGI Compilation – Volume III – pg. 1226 to 1273**]

g. Published a report analyzing money-laundering methods used for corruption, identifying key vulnerabilities of the current anti money-laundering system, and discussed the barriers for the recovery of corrupt proceeds once they are discovered.[9] [**SGI Compilation – Volume III – pg. 1274 to 1327**]

h. Published a report on the extent and nature of trade-based money laundering, which FATF identifies as one of the three main methods by which criminal organizations and terrorist financiers move money for the purpose of disguising its origins and integrating it back into the formal economy.[10] [**SGI Compilation – Volume III – pg. 1328 to 1420**]

i. Published a report on the illegal money flows associated with money laundering and trafficking in human beings and smuggling of migrants.[11] [**SGI Compilation – Volume III – pg. 1421 to 1506**]

j. Published a report on money laundering and financial inclusion, which focuses on anti money laundering measures that meet national goals of facilitating access to formal services for financially excluded and underserved groups, including low-income, rural, and undocumented groups.[12] [**SGI Compilation – Volume IV – pg. 1507 to 1598**]

k. Published a report on the vulnerability of politically exposed persons, which is defined as an individual who is or has been entrusted with a prominent public function that potentially can be abused for the purpose of committing money laundering offenses and related activities, including corruption and bribery, as well as conducting activity related to terrorist financing.[13] [**SGI Compilation – Volume IV – pg. 1747 to 1782**]

l. Approved a report on money laundering counterfeiting currency and the risk that counterfeit currency can seriously destabilize a country's currency and as such represents a serious threat to national economies. The report examines the methods that are used for putting the proceeds of the illicit trade in counterfeit currency into the regular financial system and how counterfeit currency is used for the purpose of terrorist financing and other crimes[14]. [**SGI Compilation – Volume IV – pg. 1783 to 1868**]

m. In October 2013, the FATF published a report on the use of Hawala organizations to launder money and finance terrorist activities[15]. [**SGI Compilation – Volume IV – pg. 1869 to 1938**]

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[7] *Money Laundering Using Trust and Company Service Providers*, Financial Action Task Force, October 2010
[8] *Organized Maritime Piracy and Related Kidnapping for Ransom*, Financial Action Task Force, July 2011
[9] *Laundering the Proceeds of Corruption*, Financial Action Task Force, July 2011
[10] *APG Typology Report on Trade Based Money Laundering*, Financial Action Task Force, July 20, 2012
[11] *Money Laundering Risks Arising From Trafficking in Human Beings and Smuggling of Migrants*, Financial Action Task Force, July 2011
[12] *Anti-Money Laundering and Terrorist Financing Measures for Financial Inclusion*, Financial Action Task Force, February 2013
[13] *Politically Exposed Persons*, Financial Action Task Force, June 2013
[14] *Money Laundering and Terrorist Financing Related to Counterfeiting of Currency*, Financial Action Task Force, June, 2013
[15] *The Role of Hawala and Other Similar Service Providers in Money Laundering and Terrorist Financing*, Financial Action Task Force, October, 2013

n. In October 2014, FATF published a report on the use of legal and beneficial ownership information regarding corporate entities to prevent the circumvention of anti-money laundering and terrorist financing measures in ways that can disguise and convert the proceeds of criminal activity before introducing them into the financial system.[16] [**SGI Compilation – Volume IV – pg. 1939 to 1986**]

o. The FATF published a report in July 2015 on the growing use of gold in place of cash and traditional financial markets as a method for laundering funds as regulators and law enforcement measures have become more successful in the traditional financial markets.[17] [**SGI Compilation – Volume IV – pg. 1987 to 2028**]

p. In October 2015, FATF published a report detailing the laundering of funds through the physical transportation of cash.[18] [**SGI Compilation – Volume IV – pg. 2029 to 2136**]

q. In February 2016, the FATF published new guidelines for a risk-based approach for evaluating money or value-transfer services, or financial services that involve the acceptance of cash, checks, or other financial instruments through a clearing network[19]. [**SGI Compilation – Volume IV – pg. 2137 to 2207**]

r. In June 2016, the FATF published a report on the consolidated standards on information sharing.[20] [**SGI Compilation – Volume V – pg. 2423 to 2456**]

s. In September 2016, the FATF published a report at the request of the G-20 on ways to improve the implementation of the international standards on transparency, including on the availability of beneficial ownership information, and its international exchange.[21] [**SGI Compilation – Volume IV – pg. 2208 to 2216**]

t. As the FATF begins its fourth round of country evaluations, it adopted in 2013 a new methodology for countries to use in evaluating their compliance with the FATF Recommendations.[22] The Methodology is composed of two components: 1. The first is a technical compliance assessment that will address the specific requirements of each of the FATF Recommendations, principally as they relate to the relevant legal and institutional framework of the country, and the powers and procedures of competent authorities. 2. The second is an effectiveness assessment that will assess the extent to which a country achieves a defined set of outcomes that are central to a robust anti money laundering system and will analyze the extent to which a country's legal and institutional framework is producing the expected results. [**SGI Compilation – Volume V – pg. 2217 to 2383**]

Conclusion

43. Thus, from the above analysis it is seen that placement on the grey list on its own may have limited effects but together with a deteriorating balance-of-payments situation, it may compound economic challenges for the country and severe affect its international reputation.

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[16] Transparency and Beneficial Ownership: FATF Guidance, October, 2014
[17] Money Laundering/Terrorist Financing Risks and Vulnerabilities Associated With Gold, Financial Action Force, July, 2015
[18] *Money Laundering Through the Physical Transportation of Cash*, Financial Action Task Force, October, 2015
[19] *Guidance for a Risk-Based Approach: Money or Value Transfer Services*, Financial Action Task Force, February, 2016
[20] *Consolidated FATF Standards on Information Sharing*, Financial Action Task Force, June, 2016
[21] *FATF Report to the G-20: Beneficial Ownership*, Financial Action Task Force, September, 2016
[22] *Methodology for Assessing Technical Compliance With the FATF Recommendations and the Effectiveness of AML/CFT Systems*, Financial Action Task Force, February, 2013

Considering that India is at the forefront of the global effort to combat money laundering, terror financing and corruption, it would be severely detrimental to India's international reputation and political standing if it is placed under enhanced follow-up alongside Pakistan which is known to have engaged in terror financing activities. Further, the Hon'ble Prime Minister's proposed nine point agenda for India & the world and called upon Financial Action Task Force to tackle the menace of money laundering, corruption and extradition of fugitive economic offenders. Thus, India is expected to lead by example by making all efforts to ensure FATF standards are effectively complied with and India continues to enjoy international goodwill and credit worthiness.

Role of the IMF and World Bank

44. It is submitted that between 2002 and 2003, the International Monetary Fund (IMF) and the World Bank participated in a year-long pilot program to conduct assessments of national approaches to detecting and controlling money laundering and terrorist financing in various countries using the methodology developed by the FATF.[23] In March 2004, the IMF and World Bank agreed to make the program a permanent part of their activities. The IMF has worked with the World Bank and the FATF to conduct over 70 anti-money laundering assessments and has contributed to the design of various program measures, and provided a large number of technical assistance and research projects.[24] **[SGI Compilation – Volume V – pg. 2384 to 2422]**

45. The FATF has incorporated an anti-money laundering evaluation as part of its annual Article IV country consultations[25], and country Financial Sector Assessment Programs (FSAP).[26] The IMF's efforts are driven in part by its conclusion that money laundering, terrorist financing, and associated criminal activities are crimes that have real effects on the economy, on financial sector stability, and on external stability more generally. The IMF in its Report - ***Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT) Report on the Effectiveness of the Program***, states that the potential economic effects that arise from such financial crimes are the following[27]:

- **a.** Loss of access to global financial markets.
- **b.** Destabilizing capital inflows and outflows.
- **c.** Money laundering or terrorist financing activities may give rise to significant levels of criminal proceeds or "hot money" flowing into and out of financial institutions in a country in ways that are destabilizing. In such cases, financial flows are not driven by the economic fundamentals, but by differences in controls and

[23] *Twelve-Month Pilot Program of Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT) Assessments: Joint Report on the Review of the Pilot Program*. The International Monetary Fund and the World Bank, March 10, 2004
[24] *Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT) Report on the Effectiveness of the Program*, International Monetary Fund, May 11, 2011,
[25] An Article IV consultation, required by Article IV of the IMF's Articles of Agreement, is part of the IMF's surveillance program of member countries' economic and financial policies and includes discussions with government and central bank officials and representatives of business, labour, and civil society
[26] The Financial Sector Assessment Program (FSAP) is a comprehensive and in-depth analysis of a country's financial sector. The assessment is composed of two components: a financial stability assessment, and a financial development assessment.
[27] IMF Report, *Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT) Report on the Effectiveness of the Program*, Annex 4

regulations that make money laundering a safer activity in some countries than in others.

d. Financial Sector Fraud - Money laundering may also be associated with broader problems of financial sector fraud. Such fraud can undermine confidence in a country's financial system, which can lead to large outflows of capital from the banking system, or the loss of access to international financial markets as a result of deterioration in the country's reputation.

e. Financial Sector Supervision - Money laundering and terrorist financing may reflect deeper problems with the supervision of the financial system in a country. Where important financial institutions within a country are owned or controlled by criminal elements, the authorities may encounter difficulty supervising these institutions or in identifying and addressing problems before domestic financial stability is undermined.

f. Economic Paralysis - Incidents of terrorism and terrorist financing may undermine the stability of a country's financial system, either as a result of a history of terrorist incidents or through the effect of a single, but significant, incident.

g. Tax Fraud - Money laundering associated with tax fraud potentially can undermine financial or macroeconomic activity by (1) affecting the government's revenue stream to a point where its fiscal balance is significantly undermined; and (2) threatening the stability of a country's banking system through volatile financial inflows and outflows by injecting large amounts of "hot money" arising from tax evasion. The IMF estimates that large-scale tax fraud is the most prevalent and significant of all proceeds-generating crimes.

h. Problems with economic policymaking - Where the illegal sector forms a significant part of the economy and criminal proceeds remain in cash outside the banking system, such activities can distort consumption, investment and savings, trade and exchange rates, and the demand for money. As a result, official data on economic fundamentals may not fully reflect the underlying economic realities and economic policymakers may be thwarted in assessing the state of the economy and in making economic policy.

i. Adverse effects on growth - Corruption, especially corruption at the national level, has the potential to negatively affect fiscal balances, foreign direct investment, and growth. In extreme cases, unchecked criminal activity can threaten state functions and the rule of law, with associated adverse economic effects. Money laundering, terrorist financing, and related crimes may undermine the stability of the country in which they originate and have adverse spillover effects on the stability of other countries. In 2011, the IMF published the results of its assessment of the effectiveness of the anti-money laundering program[28]. This survey concluded that out of the 161 countries surveyed between 2004 and 2011 by the IMF, compliance with all of the FATF Recommendations was 42.5% and full compliance on any of the FATF Recommendations was rare, occurring in just 12.3% of the cases. The survey also indicated that it appears to be easier for countries to adopt legislation

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[28] *Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT) Report on the Effectiveness of the Program*

and to establish government institutions than it is to ensure that the system functions well on an ongoing basis.

Developments on the sidelines

46. The Council of Europe adopted the **1990 Convention** titled ***Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (1990)*** in line with the 1988 UN Convention. It is respectfully submitted that, important though the 1988 UN Convention has proved to be, it was not the intention or the expectation that efforts to combat money laundering and promote international cooperation to counter the financial aspects of drug trafficking and other forms of transnational criminal activity would rest exclusively on that instrument. In this regard, one important early development was the conclusion in 1990 of the ***Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime*** ("1990 Convention"), which entered into force in September 1993. Some 46 European countries including the UK, were parties to it, as was Australia which, along with the US and Canada, had participated in its negotiation.[29]

47. It is of importance to note that since 1990, a firm trend has emerged in favour of decoupling money laundering from the original preoccupation with drug trafficking. This is, in turn, reflected both in domestic legislative practice and in international instruments and political declarations. By way of illustration, in a Joint Action of 3 December 1998, the members of the EU agreed to ensure that no reservations are made or upheld in relation to Art. 6 of the EU 1990 Convention in so far as serious offences are concerned. [**SGI Compilation – Volume II – pg. 655 to 657 (EU Joint Action Plan)**] It is submitted that these domestic and international developments mirror an awareness of the practical and policy disadvantages of the narrow approach. As the UN Secretariat, during the said time, stated in the aforesaid aspect as under[30] [**SGI Compilation – Volume II – pg. 798 to 822**]:

> *'The international community, through the adoption of the 1988 Convention [UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances] has expressed its universal abhorrence of drug-related money laundering. However… there would seem to be little justification for the proscription of money laundering arising from some profit-generating criminal activities and not others. Double standards, particularly in criminal law, are not conducive to the maintenance of the rule of law or to international co-operation, and there may be difficulties in providing that particular proceeds are attributable to particular predicate offences. In any event, drug trafficking may not remain – or for that matter still be – the most profitable form of trans-border criminal activity."*

48. In light of the above, it was no surprise that one of the central outcomes of the 'stocktaking' review of its Recommendations carried out by FATF in 1995-96 was to agree: '*to make criminalizing non-drug money laundering mandatory*.'[31] This was reflected in the

[29] EU Action Plan to Combat Organized Crime, Civil Original Jurisdiction No.C251, 15.8.97 (1997) Recommendation 13.
[30] Money laundering and associated issues: the need for international cooperation; UN document E/Constitution.15/1992/4/Add.5, 23 March 1992, pp 22-23.
[31] FATF Annual Report 1995-1996.

revisions to the FATF's Recommendations that took place in 1996, and has been carried forward in the subsequent revisions made to the Recommendations 2003 and 2012. In this regard, the Recommendation 3 of the FATF's 40 Recommendations now states that '*Countries should apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences*.' The interpretive notes to Recommendation 3 state that countries can do this either by making all offences 'predicate offices' for money laundering purposes, or by specifying a threshold linked either to a category of 'serious offences', to a list of predicate offices, to a specified term of imprisonment applicable to an offence, or by a combination of these approaches.[32] As of today, the FATF's list of predicate offices now expressly includes tax crimes. The other aspects of FATF's recommendations would be dealt with separately. **[SGI Compilation – Volume II – pg. 706 to 753 (FATF Annual Report 1995-96)] ; [SGI Compilation – Volume II – pg. 754 to 793 (FATF Annual Report 2010-11)]**

49. In 2005 the Council of Europe significantly amended the 1990 Convention titled as ***Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005)*** **[SGI Compilation – Volume I – pg. 44 to 69].** The 2005 Council of Europe Convention was the result of several years of work by the Council of Europe's Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL), and took account of the significant revisions made to the FATF's 40 Recommendations in 2003. Furthermore, the 1990 Convention expanded the definition of money laundering beyond its previous association with drug trafficking. The 2005 Convention, expands upon this to provide a list of offences that State Parties are required to ensure constitute 'predicate offences' for money laundering purposes. The list, which is contained in the Appendix to the 2005 Convention and is similar to (although not identical) the list of offences contained in the 'designated' categories of offences in the Glossary to the FATF's 40 Recommendations.

50. It is respectfully submitted that, the breadth of the offences contained in this list illustrates the distance travelled since the 1988 UN Convention and the restriction of money laundering to drugs-related crime. As envisaged by the FATF Recommendations, under the 2005 Convention, states are free to choose how they define the 'predicate offences' for money laundering purposes (provided that they include the offences listed above), for example, by providing a list of those offences, a category offences, or by reference to offences that have a maximum term of imprisonment of one year or more (or, for states that have minimum thresholds for offences, those with imprisonment of a minimum of six months).[33] **[SGI Compilation – Volume I – pg. 227 to 243]**

51. It is submitted that the 2005 Convention includes measures that are *preventive in nature*. In particular, Art. 13 of the 2005 Convention provides that each State Party must adopt measures requiring persons who engage in activities that are *likely to be used for money laundering* purposes to identify and verify the identity of their customers (and where applicable, their beneficial owners), and to conduct ongoing due diligence, and put in place supporting measures (such as record-keeping, and training). It is further submitted that,

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[32] FATF, The FATF Recommendations (2012)MIL rec 3, Interpretive Note
[33] Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005).

parties to the 2005 Convention are also required to ensure that relevant persons are subject to monitoring and supervision to ensure compliance with their obligations.

52. Parallelly, under UN auspices, the final text of the ***UN International Convention for the Suppression of the Financing of Terrorism*** was adopted by the General Assembly on 9 December 1999. The said Convention also, in some part, dealt with the link between money laundering and terrorism.

EU First Directive on Money Laundering (1991)[34]

53. Correspondingly, it is respectfully submitted that apart from the above-mentioned global initiatives, the European Union took certain specific actions which may further illustrate the global development of the approach against money-laundering. It is submitted that all EU member states are also participants in the FATF process, and therefore, the content of the **1991 Money Laundering Directive** ('First Directive') would be strongly influenced by the (then current) FATF 40 Recommendations. The First Directive, imposed obligations on credit institutions and financial institutions in relation to customer identification and record-keeping, internal controls and training of staff. The First Directive also imposed a system of mandatory reporting of suspicious transactions. [**SGI Compilation – Volume I – pg. 418 to 423**]

EU Second Directive on Money Laundering (2001)[35]

54. The First Directive was amended, in 2001 by the second anti-money laundering directive ('Second Directive'). The Second Directive widened the number of institutions that fell within the scope of reporting obligations to include professionals and other non-financial firms (including legal professionals acting in financial or real estate transactions, auditors, external accountants and tax advisers, estate agents, money transfer operators, casinos and dealers in high value goods). In this regard, exemptions were provided for lawyers, accountants and tax advisors in circumstances where they were ascertaining the position of their clients in relation to judicial proceedings. In line with the 1996 changes to the FATF Recommendations, the Second Directive also expanded the range of predicate offences for money laundering purposes. [**SGI Compilation – Volume I – pg. 424 to 430**]

EU Third Directive on Money Laundering (2005)[36]

55. It is respectfully submitted that the principal aim of the Third Directive was to bring the EU legislation into line with the revisions to the FATF Recommendations in the previous years. As the UK's Financial Services Authority has stated, '*the main purpose of the Directive is to provide a common EU basis for implementing the revised FATF Recommendations on Money Laundering (issued in June 2003). It also takes account of the new risks and practices which have developed since the previous Director.*' The Commission, in its Explanatory Memorandum to its Proposal for the new Directive, explained that the Commission wished to build on the existing EU level legislation, stating that 'the Commission's starting point is

[34] Council Directive 91/308/EC.
[35] Council Directive 2001/97/EC.
[36] Directive 2005/60/EC.

that the new Directive should build on the current acquis and that the existing provisions, in particular as regards the treatment of the professions, should not be called into question where there is no need to do so'. **[SGI Compilation – Volume I – pg. 431 to 452]**

56. Furthermore, the Third Directive includes a definition of '*serious crimes*' that constitute 'predicate offences' for money laundering purposes, including all offences punishable by a maximum sentence of one year or more, or a minimum sentence of six months or more (in jurisdictions where minimum sentences are applied), as well as other specified offences including serious fraud and corruption.

57. The Third Directive also expanded the range of institutions within scope to include life insurance intermediaries and trust and company service providers and widened the definition of high value dealers to capture those who accept cash payments of €15,000 or more (this is wider than the scope of the equivalent definition in the Second Directive, which included only dealers in goods such as precious stones).

EU Fourth Directive on Money Laundering (2015)[37]

58. It is submitted that the Fourth Directive aims to improve the current regulatory European framework, also taking account of the new FATF recommendations published early in, 2012. The Fourth Directive and an accompanying new Wire Transfer Regulation were published in February 2013, adopted in 2015, and were to be transposed into national law by 26 June 2017. In particular, the proposals for the Fourth AML Directive involve: **[SGI Compilation – Volume I – pg. 453 to 497]**

a. extending the scope of the regulated sector under the Third AML Directive;
b. enhancing the 'risk-based approach' concept of the Third AML Directive by requiring the carrying out of written risk assessments;
c. restricting the use of 'simplified due diligence' by regulated firms;
d. requiring 'enhanced due diligence' to be applied to domestic politically exposed persons [PEPs] (those holding prominent public functions domestically) and persons ·who work' for international organisations;
e. requiring all corporates and other legal entities established in the EU to hold adequate, accurate information on their beneficial ownership;
f. requiring greater harmonisation of administrative sanctions by prescribing certain minimum sanctions that Member States should ensure are available to deal with breaches of the local implementing legislation;
g. enhancing information sharing arrangements between local financial intelligence units around the EU;
h. providing powers to the European Supervisory Authorities to issue guidance on supervisory and customer due diligence matters, as well as publishing regulatory technical standards addressing specific fact scenarios.

59. It is submitted that the EU has not been alone in articulating and updating a strategy of prevention which affords extensive recognition to the special role of the private sector / banking sector in the overall anti-money laundering strategy. For example, the 'Model Regulations Concerning Laundering Offences Connected to Illicit Drug Trafficking and other

[37] Directive 2015/8491.

Serious Offices', first developed by the Inter-American Drug Abuse Control Commission (CICAD) of the Organization of American States (OAS) in 1992 placed considerable emphasis on this dimension.

Regulatory aspects in detail

60. It is submitted that the nature and extent of the money laundering problem are such that apart from *post-facto criminal* measures, the world community has found it appropriate to impose internationally coordinated measures to prevent, regulate and monitor the use of the financial system and other vulnerable parts of the private sector to further ulterior motives. The prevailing philosophy in this regard was well captured in these words: "*The fight against money laundering cannot be the sole responsibility of government and law enforcement agencies…. If these activities are to be suppressed and hopefully, in the long term, substantially eliminated it will require the collective will and commitment of the public and private sector working together*."[38]

61. It is respectfully submitted that, the first major initiative to give substantive expression to this approach was the December 1988 **Statement on Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering** issued by the Basel Committee. Its basic purpose is to encourage the banking sector, through a general statement of ethical principles, to adopt a common position in order to ensure that banks are not used to hide or launder funds acquired through criminal activities. The central principles which it enunciates have been summarised as follows:- [**SGI Compilation – Volume I – pg. 498 to 502**]

- ***Know Your Customer:*** *Banks should make reasonable efforts to determine the customer's true identity, and have effective procedures for verifying bona fides of a new customers (whether on the asset or liability side of the balance sheet).*
- ***Compliance with laws:*** *Bank management should ensure that business is conducted in conformity with high ethical standards, that laws and regulations are adhered to and that a service is not provided where there is good reason to suppose that transactions are associated with laundering activities.*
- ***Cooperation with law enforcement agencies:*** *Within any constraints imposed by rules relating to customer confidentiality, banks should cooperate fully with national law enforcement agencies including, where there are reasonable grounds for suspecting money laundering, taking appropriate measures which are consistent with the law.*
- ***Policies, procedures and training:*** *All banks should formally adopt policies consistent with the principles set out in the Statement and should ensure that all members of their staff concerned, wherever located, are informed of the bank's policy. Attention should be given to staff training in matters covered by the Statement. To promote adherence to these principles banks should implement specific procedures for customer identification and for retaining internal records of transactions. Arrangements for internal audit may need to be extended in order to establish an effective means of testing for general compliance with the Statement.*

[38] Sherman 'International Efforts to Combat Money Laundering: The Role of the Financial Action Task Force' in MacQueen (ed) Money Laundering (Edinburgh: Edinburgh University Press, 1993).

62. It is respectfully submitted that, in an effort to maximise the impact of these principles, the Basel Committee took the step of commending the statement to supervisory authorities in other countries. Furthermore, the philosophy of prevention is also central to the 40 Recommendations of the FATF (which were substantially revised in 2003 and again in 2012). As the Head of the Financial Affairs Division of the OECD remarked:[39]

> *'The common thread underlying these recommendations is the view that financial institutions are the key element in the detection of illicit transactions given their unique function in a country's payments system and in the collection and transfer of financial assets. This is reflected in the heavy emphasis put on the identification of customs and beneficial owners, the availability of adequate record keeping systems, the necessary diligence of financial institutions in respect of unusual transactions, and the development of in-house anti-money laundering programmes.'*

63. In a more specialised sense, the **Basel Committee on Banking Supervision**, published a paper, **Customer due diligence for banks** [**SGI Compilation – Volume I – pg. 503 to 527**], designed to provide '*guidance as to minimum standards for worldwide implementation by all banks*'. Furthermore, in February 2003, the Basel Committee published an attachment to Customer due diligence for banks, entitled General Guide to Account Opening and Customer Identification, which was developed by its Working Group on Cross-Border Banking. While the articulation and promotion of minimum international stands is, by definition, the preserve of governments and other public authorities, on occasion the private sector has been proactive in seeking to adapt them to the particular circumstances of a business sector or, more rarely, to promote a higher voluntary benchmark.

64. It is respectfully submitted that a particularly noteworthy example of the latter is the text '**Global Anti-Money Laundering Guidelines for Private Banking**' (better known as the ***Wolfsberg Principles***) [**SGI Compilation – Volume II – pg. 528 to 535**]. These guidelines were drawn up in October 2000 by a group of major international private banks, and were formulated with the practical needs of that segment of the banking sector in mind. In terms of innovation, most attention has been attracted by the guidelines on client acceptance and the enumeration, in that context, of situations requiring additional diligence or attention. These range from the problems posed by those connected with high-risk countries to public officials and associated politically exposed persons. The Wolfsberg Group has been active since 2000 in publishing further guidelines for the private banking industry in the field of AML. In particular, in June 2006 the Wolfsberg Group published two papers: **Guidance on a Risk Based Approach for Managing Money Laundering Risks** and **AML Guidance for Mutual Funds and Other Pooled Investment Vehicles**. The Wolfsberg Group also works with other industry bodies to develop guidelines, and approve standards developed elsewhere in the financial industry to combat money laundering. The Wolfsberg Group, in conjunction with other industry bodies such as the Bankers Association for Finance and Trade, and the Clearing House Association, was instrumental in developing and approving the new SWIFT

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[39] R. Pecchioli "The Financial Action Task Force', paper presented to the Council of Europe Money Laundering Conference, Strasbourg, 28-30 September 1992.

message format for cover payments discussed in above, which were introduced in November 2009.

International Cooperation: The Role of Financial Intelligence Units (FIU)

65. From the outset, it has been recognised that enhanced international cooperation is a key component of efforts to combat money laundering considering the nature of the mischief itself. To this end, the 1988 UN Convention and the 1990 Convention placed considerable emphasis on the provision of mutual legal assistance and cooperation in the tracing, seizure and confiscation of criminal proceeds. The provisions on mutual legal assistance have been expanded upon in the 2005 Convention. Similarly, the importance of agency-to-agency international collaboration has been underlined in these and subsequent instruments.

66. It is submitted that, however, the emergence of the strategy of prevention and the consequent involvement of private-sector actors has presented both new challenges and new opportunities in the sphere of cooperation. The creation of the **Egmont Group** is the most significant response to date to this new phenomenon. It is named after the Egmont-Arenberg Palace in Brussels where, in June 1995, the first meeting took place following a joint Belgian-US initiative. Since that time, this grouping has met on a regular basis and has, in the words of the European Commission, '*become a genuine international forum and, though having no official status, has become an essential element in the international fight against money laundering*'.[40] **[SGI Compilation – Volume II – pg. 658 to 705].** In June 2002 the decision was taken to create the 'Egmont Committee'. This acts as a steering group and represents the body externally. In February 2002 the Egmont Group was granted formal observer status by the FATF. India, is a part of the Egmont Group and has its own FIU. The Official Commencement (operational) Date is March 16, 2005 and the Official Date of Entry to the Egmont Group is May 29, 2007.

67. It is submitted that its origins are to be found in the challenges posed for national authorities in securing the effective implementation of agreed anti-money laundering measures. Of particular importance in this regard has been the creation of often extensive, new and potentially valuable sources of financial information available to national authorities arising out of the elaboration of those aspects of the strategy which embrace the private sector. For example, both the Recommendations of the FATF and the Third Directive call for the mandatory reporting of suspicious transactions to the relevant national authorities.

68. It is submitted that, these disclosure-receiving bodies, commonly known as FIUs tend to be of any one of four types. In the police model – as used, for instance, in the UK (SOCA) and Slovakia (OFIS) – such suspicious transaction reports are made directly to law enforcement for investigation. In the judicial model, as used in Iceland and Portugal, among others, disclosures are addressed to the office of the public prosecutor. In a few instances, reports are transmitted to a joint police-judicial unit. This mixed system has been favoured, for example, in Norway and Denmark. Finally, there is the intermediary or administrative model, variants of which have been created in a wide variety of jurisdictions including Slovenia (OMLP), the US (FINCEN) and Australia (AUSTRAC). These act as a buffer between

[40] European Commission second report to the European Parliament and the Council of the implementation of the Money Laundering Directive, COM (1998) 401 final, Brussels, 01.07.1998, p. 14.

the private sector and the police and prosecutorial authorities. The said distinct approaches establish that various countries have modulated their strategy as per their local needs and preferences.

69. It is submitted that the Egmont Group at its meeting in Rome in November 1996, adopted a definition of a *Financial Intelligence Unit*. The definition was amended in 2004 and now reads as follows:

> *'A central, national agency responsible for receiving (and, as permitted, requesting), analysing and disseminating to the competent authorities, disclosures of financial information;*
> *i. Concerning suspected proceeds of crime and potential financing of terrorism, or*
> ii. *Required by national legislation or regulation in order to combat money laundering and terrorism financing.'*

70. It is respectfully submitted that, the Egmont Group formally adopted a 'Statement of Purpose' in June 1997, which was last revised in 2005. It is submitted that priority was afforded to the enhancement of international information exchange and other measures to improve cooperation between participating jurisdictions. One highly practical manifestation of its approach to the latter is the creation of the Egmont Secure Website. This permits members '*to access information on FIUs, money laundering trends, financial analysis tools, and technological developments. The website is not accessible to the public; therefore, members are able to share this information in a protected environment*'.[41] [**SGI Compilation – Volume II – pg. 536 to 565**]

71. It is respectfully submitted that, the potential for enhanced international cooperation through the creation of national FIUs on the basis of the Egmont Group definition is now widely recognised, and supportive initiatives have been taken in an increasing number of institutional contexts, including the UN and the EU, to advance this process. For these reasons, among others, the prospects for the gradual emergence of the Egmont Group as an effective, and increasingly global, forum are encouraging. It is submitted that, in recent years, the work of the Egmont Group has borne fruit and there has been significant progress in achieving a greater level of agreement with regard to the nature of the role of FIUs, and the procedures for exchange of information between different FIUs. The revised FATF Recommendations provide that each country should have a financial intelligence unit (FIU) which should serve as a national centre for receiving, analysing and disseminating suspicious transaction reports, and should have access on a timely basis to the financial, administrative and law enforcement information that it requires to properly undertake its functions. This definition is similar to that of the Egmont Group. The Third Directive makes a similar provision with respect to FIUs, providing that the FIU of each Member State must be established as a 'central national unit', and must be provided with adequate resources.

72. It is respectfully submitted that additionally, the FATF Recommendations provide that countries should rapidly, constructively and effectively provide the widest possible range of mutual legal assistance in relation to money laundering and terrorist financing investigations,

[41] US General Accounting Office 'Money Laundering: FINCEN's Law Enforcement Support, Regulatory and International Roles' GAO/T-GGD-98-83 (1998) Appendix III, p. 19.

prosecutions, and related proceedings, and take expeditious action in response to requests by foreign countries to identify, freeze, seize and confiscate criminal property.

UNDERSTANDING THE MISCHIEF

Introduction

73. The term ‘money laundering’ arose in the United States in the 1920s. It was apparently used by American police officers with reference to the ownership and use of launderettes by *mafia groups*. These groups showed an active interest in acquiring these launderettes, many of which were already owned by criminal groups, as they gave them a means of giving a legitimate appearance to money derived from criminal activities. These illicit proceeds were declared to be profits gained through launderettes and were thus ‘laundered’[42]. The term ‘money laundering’ was apparently first used with a legal meaning in an American judgment of 1982 concerning the confiscation of laundered Columbian drug proceeds[43]. [**SGI Compilation – Volume V – pg. 2457 to 2472**]

74. The ultimate goal of any money laundering operation is twofold: to conceal the predicate offences from which these proceeds are derived and to ensure that the criminals can ‘enjoy’ their proceeds, by consuming or investing them in the legal economy.[44] It is to be noted that some forms of crime, especially financial crimes such as insider trading, for example, almost automatically and immediately imply money laundering operations as the offenders will obviously try to conceal the benefits they have reaped from their criminal activities.

75. In order to fulfil these ultimate goals, a number of intermediate goals have to be attained. Money laundering operations generally boil down to *‘a . . . complex process often using the latest technology, of sanitising money in such a manner that its true nature, source or use is concealed, thereby creating an apparent justification for controlling or possessing the laundered money*’.[45] This is sometimes called money laundering in the first degree, as opposed to the actual integration of criminal proceeds into the legitimate economy, sometimes referred to as ‘recycling’. The recycling element is not required when the proceeds are reinvested in (organised) crime activities.

76. Apart from its economic effects,[46] the sheer amount of profits made by money laundering also accounts for the pressing need to launder these profits. Without sophisticated money laundering operations, which give these gains an apparently legitimate origin, the amount of proceeds would in itself be an indication of their illegal origin. As was stated by the former American Attorney-General Edwin A. Meese in 1985 in the House of Representatives: ‘*Money laundering is the life blood of the drug syndicate and traditional organised crime*’.[47] [**SGI**

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[42] D.A. Chaikin, ‘Money Laundering as a Supra-national Crime: An Investigatory Perspective’, in Principles and Procedures For A Transnational Criminal Law, A. Eser and O. Lagodny (Freiburg: Max-Planck Institut, 1992), pp. 415–16.
[43] US v. $4,255,625.39, Federal Supplement, vol.551, South District of Florida (1982), 314, cited by Secretary-General of the UN, Note Strengthening Existing International Cooperation, p. 5.
[44] Secretary-General of the UN, Note Strengthening Existing International Cooperation, p. 7.
[45] Secretary-General of the UN, Note Strengthening Existing International Cooperation, p. 4.
[46] See in general V. Tanzi, Money laundering and the international financial system, IMF Working Paper No 96/55, 14p. and P. J. Quirk, Macroeconomic implications of money laundering, IMF Working Paper No 96/66, 33p.
[47] Cited by P. Bernasconi, ‘Geldwäscherei und organisierte Kriminalität’, in Finanzunterwelt. Gegen Wirtschaftskriminalität und organisiertes Verbrechen (Zürich: Verlag Orell-Füssli, 1988), p. 26.

Compilation – Volume V – pg. 2494 to 2512 (Tanzi)]; [SGI Compilation – Volume V – pg. 2513 to 2554 (Quirk)]

Reasons for combating money laundering

77. It is submitted that the primary reason for fighting money laundering is to enable law enforcement authorities to confiscate the proceeds of predicate criminal activities. The criminalisation of money laundering aims to undermine crime and especially organised crime by taking away the incentive for these criminal activities relatable to offences.

78. The second rationale for the fight against money laundering is that while the high- level criminals mostly stay aloof from criminal activities, they do come into contact with the proceeds of these activities, thereby creating a 'paper trail' of records which track the movement of money. This paper trail may constitute evidence of their implication in these criminal activities.[48]

79. The third rationale for devising strategies against money laundering, undoubtedly comes from the recognition of the prejudicial influence the flows of 'dirty money' may have on the financial sector, and more generally, on the economy as a whole. It can be argued that the influence of money laundering may even result in the establishment of control by criminal elements over institutions from the legitimate economy. It is submitted that money laundering creates a certain risk of inherent instability for the world economy and even a potential for organised crime groups to destabilize a national economy because of its corruptive influence on financial markets and the reduction of the public's confidence in the international financial system.

80. The fourth rationale is concerning the effective allocation of resources and capital. During money laundering, labour and capital used in illegal, socially disruptive activities instead of legal activities, and therefore, capital is less optimally invested. Further, money launderers invest the proceeds in jurisdictions poorer economic policies[49] thereby moving capital to less efficient destinations. Taken together, the money laundering impacts the growth rate of the world economies[50].

81. It is respectfully submitted that grave negative impact occurs from significant flows of 'dirty money' on the banks and other financial institutions. Further it has become apparent that a wide variety of business enterprises can be used for money laundering purposes. As one former President of the FATF has stated *'experience shows that money launderers will utilise almost any form of corporate and trust activity to launder their profits…. anti-money laundering measures have to be directed, in addition to the banking system, to currency exchange houses, insurance companies, building societies and other lending institutions as well as betting agencies'.*[51]

[48] Nadelmann, 'Unlaundering Dirty Money', 34
[49] Tanzi, Money Laundering and the International Financial System, pp. 6–7
[50] See, in general, Tanzi, Money Laundering and the International Financial System, specifically p. 4. See also Quirk, Macroeconomic Implications of Money Laundering, pp. 27
[51] T Sherman 'International Efforts to Combat Money Laundering: The Role of the Financial Action Force' in H MacQueen (Enforcement Directorate) Money Laundering (Edinburgh: Edinburgh University Press, 1993).

"Laundering" – The approach and evolution

82. It is respectfully submitted that, while many different forms of criminal activity contribute to such estimates, there is some level of consensus as to the principal sources of illegal proceeds. The FATF has identified collar crimes (tax, fraud, corporate crimes, embezzlement and intellectual property crimes) and drug related crimes as the major sources of criminal proceeds. Other significant sources identified by the FATF include smuggling of goods, evasion of excise duties, corruption and bribery (and the embezzlement of public funds). The FATF also unsurprisingly reports an increase in the use of the internet to perpetuate the predicate crimes.[52] **[SGI Compilation – Volume II – pg. 566 to 641]**

83. It is respectfully submitted that the global financial crisis of 2007 has strengthened the argument for effective international cooperation in tackling financial crime in order to ensure stability in the global financial system. Mr. *Paul Vlaanderen*, the former President of the FATF, has said, '*the current global crisis has many causes, but one of these is the persistent lack of transparency in some section and jurisdictions*.'

84. It is submitted that as the classic criminal law concepts of complicity in the nature of Section 120B of the IPC, were often found inadequate globally to fight money laundering. The classic tools of the criminal law were perceived to have failed in the fight, legislators across the world considered the confiscation of the proceeds of crime and the incrimination of money laundering as new, more effective tools for tackling the problem. By taking away the proceeds from crime and by making it more difficult to launder its proceeds, law enforcement authorities not only take away the incentive for participating in *criminal activity relating to an offence*, but, more importantly, seek to disrupt the functioning of the activity itself.

The extent of the money laundering phenomenon

85. It is submitted that the risks to which legitimate businesses and the legal economy as a whole are exposed because of money laundering is often illustrated by reference to data relating to the economic volume of the flows of 'dirty money' that are being laundered. The International Monetary Fund ("**IMF**") and the Financial Action Task Force ("**FATF**") have estimated that the scale of money laundering transactions is between 2 and 5% of global GDP.[53] It is further submitted that, the United Nations has recently put the figure at USD 2.1 trillion or 3.6% of global GDP.[54] In its authoritative report, the United Nations noted as follows: **[SGI Compilation – Volume II – pg. 794 to 797] ; [SGI Compilation – Volume II – pg. 823 to 962 (UNODC Report)]**

> *"The most widely quoted figure for the extent of money laundered has been the IMF 'consensus range' of 2% to 5% of global GDP, made public by the IMF in 1998. A meta-analysis of the results from various studies suggests that all criminal proceeds are likely to amount to some 3.6% of global GDP (2.3%-5.5%), equivalent to about US$2.1 trillion (2009)."*

[52] FATF Report on Global Money Laundering & Terrorist Financing Risk Assessment (July 2010).
[53] Michel Camdessus, Managing Director of the IMF, 'Money Laundering: the Importance of International Countermeasures', an address to the Plenary Meeting of the Financial Action Task Force on Money Laundering in Paris, 10 February 1998.
[54] United Nations Office on Drugs and Crime, 'Estimating Illicit financial flows resulting from drug trafficking and other transnational organised crime', October 2011.

86. It is submitted that empirical evidence and experience internationally suggests that the overall majority of money laundering operations have an international dimension. This internationalisation has in part been brought about by the larger phenomenon of the increasing internationalisation of the legitimate economy itself. It is submitted that one could even look upon the internationalisation of crime as a mere illegal spin-off of the globalisation of the legal economy[55]. The criminal activities and groups undoubtedly take advantage of the facilities of the global economy and newly developing technologies and avenues thereof, by colluding with other persons, and by laundering their criminal proceeds on an international scale.

87. The internationalisation of money laundering means that purely national measures would be inadequate as the proceeds of crime which have been deposited within one jurisdiction where the rules on the prevention of money laundering are less strict can penetrate into the financial system of other countries as well. It has been aptly said that '*These jurisdictions are part of the world payments system without any restriction. So long as this is the case, cash exports will tend to go to these countries for integration into the financial system there and return by means of wire transfers. This means that detection of the outflow of cash becomes especially important when internal avenues have been blocked*'.[56]

88. Therefore, on a legislative level, ***international harmonisation*** of anti-money laundering legislation is an ***absolute prerequisite*** for success in the fight against money laundering. This holds not only for criminal legislation, but also in the context of *preventive legislation*, where the argument for effectiveness is reinforced by an economic argument, namely the desirability of imposing the same type of anti- money laundering measures on financial institutions in different countries with a view to an international levelling of the playing field[57]. On an operational level, the globalisation of money laundering makes it necessary to establish effective international co-operation mechanisms which allow national authorities to co-operate in the prevention and prosecution of money laundering and in international 'proceeds-hunting'[58].

Evolution of approach

89. It is submitted that the approach of tackling the mischief of money laundering has also evolved from merely a *post facto* criminalisation of proceeds of crime to a preventive approach often characterised by "*anti money-laundering measures*" terminology of the FATF. The twin approach is a deterrent based and preventive approach, wherein the criminalisation of money laundering is the logical corollary of the confiscation of proceeds from crime. The preventive approach, with its stress on the reporting obligations, follows the paper trail from the other end: from the laundering of money to the predicate offence. This entails subjecting financial

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[55] Nadelmann, Cops Across Borders, pp. 104–5. See also P. Wilkitzki, 'Development of an Effective International Crime and Justice Programme – A European View', in Principles and Procedures For A Transnational Criminal Law, ed. A. Eser and O. Lagodny (Freiburg: Max- Planck Institut, 1992), p. 270

[56] FATF-I, p. 8. See also Second Commission Report to the European Parliament and the Council on the Implementation of the Money Laundering Directive, p. 4.

[57] United Nations Economic and Social Council, Commission on Crime Prevention and Criminal Justice, Review of Priority Themes, Control of Proceeds of Crime-Report of the Secretary- General, Vienna, 13–23 April 1993, E/CN.15/1993, p. 18

[58] See M. C. Bassiouni and D. S. Gualtieri, 'International and National Responses to the Globalisation of Money Laundering', in Responding to Money Laundering. International Perspectives, ed. E. Savona (Amsterdam: Harwood Academic Publishers, 1997), pp. 109 et seq.

institutions to a number of financial law duties, a greater transparency of financial transactions is envisaged, which should make it possible to detect 'dirty money flows'. It is submitted that as stated above, reporting duties are intended to provide the competent authorities with information on suspicious or unusual transactions (or information which allows them to filter such transactions), thus allowing those authorities to reconstitute the paper trail towards the predicate offence and its perpetrators.

90. It is submitted that although the introduction of the confiscation of the proceeds of crime and the criminalisation of money laundering was started in the context of drug trafficking, it has undergone a profound evolution in this respect: from instruments designed to fight organised crime, they have now become general law enforcement and regulation tools that can be used in almost any case. It is submitted that they have in a sense inaugurated a new criminal justice policy, which is oriented towards the financial profits from crime. This new policy strives to curb crime by taking away the profits of crime, rather than merely punishing the individuals who have allegedly committed the crimes.[59] The expansion of the range of predicate offences in part results from the nature of *money* itself being freely moveable in an advanced world. It has been advised globally, that regardless of the criminal policy that law enforcement authorities choose to adopt with respect to money laundering, legislation should tackle with all kinds of money laundering and permit confiscation of the proceeds of any kind of crime[60].

CONCLUSIONS

91. It is clear that therefore, the measures against money-laundering have clearly left embryo of drug or terrorism related offences and moved beyond the same. Further, the efforts against money laundering have consistently advocated to include the *widest range of predicate offences* in the domestic laws.

92. The definition and understanding of what constitutes money-laundering, has evolved and is now no more restricted to necessarily include the elements of projection and untainted property. The international mandate provides any activity which is connected with proceeds of crime ought to be criminalised.

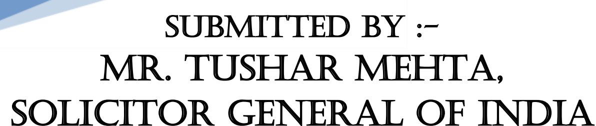
93. The international community has further realised that mere *post facto* criminalisation of money laundering is not enough and has therefore suggested a whole host of preventive measures which include regulatory measures in the nature of KYC and monitoring of suspicious transactions and reporting obligations apart from civil measures in the nature of attached of proceeds of crime.

94. Furthermore, in recent years, there have been substantial developments in relation to preventative measures, and in particular, the agreement of certain key principles, such as the adoption of the risk-based approach to customer due diligence, is enshrined at EU level in the Third Directive and has been reinforced in the FATF's most recent revised Recommendations.

[59] GUY STESSENS, *Money Laundering – A new International Law Enforcement Model*, Cambridge Studies in International and Comparative Law Cambridge University Press.
[60] GUY STESSENS, *Money Laundering – A new International Law Enforcement Model*, Cambridge Studies in International and Comparative Law.

95. It is clear from the discussions that, in the course of the last quarter-century, major progress has been achieved at the international level in formulating the essential elements of a complex and multi-faced strategy with the potential to undermine the economic power which flows from the laundering the vast proceeds derived from serious criminality. In this regard, the degree to which a consensus has emerged among governments in an area which impacts so directly on domestic criminal justice systems and economic policy is unprecedented.

96. It is submitted that India, and its version of the Prevention of Money Laundering Act, 2002, is merely a cog in this international vehicle. It is submitted that India, as a signatory to the treaties and an important participant in the international process and the fight against money-laundering, is bound legally and morally, to adopt the global best practices and respond to the changing needs of the times. It is submitted that it is in this context that the constitutionality of the provisions of the PMLA, ought to be adjudicated. It is submitted that the same would be in stark contrast to any general provision of criminal law and rather would have to be adjudicated also from the stand point of the country obligations and responsibilities *internationally*.



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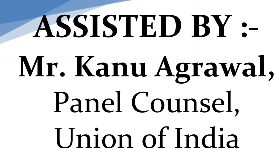

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