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# Challenges for Courts/Lawyers from International Requirements Involving Money Laundering and Corruption

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The logo of the Asian Development Bank (ADB), consisting of the letters "ADB" in white serif font on a blue square background.

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# OVERVIEW

- **Money laundering is as old as crime**
  - **Hide criminal source**
  - **Means have changed over time**
  - **Underground banks**
  - **Any instruments that transfer value**
  - **Sophisticated electronic commerce provides new opportunities**

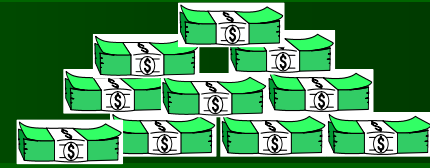
# How Big is the Problem?

- The biggest industry on the planet
  - Bigger than arms
  - Bigger than oil
- 3-5% of Global GDP
- Potential to destabilise governments
- Undermine financial markets
- Links to corruption and destruction of tax base

# Finance System Focus

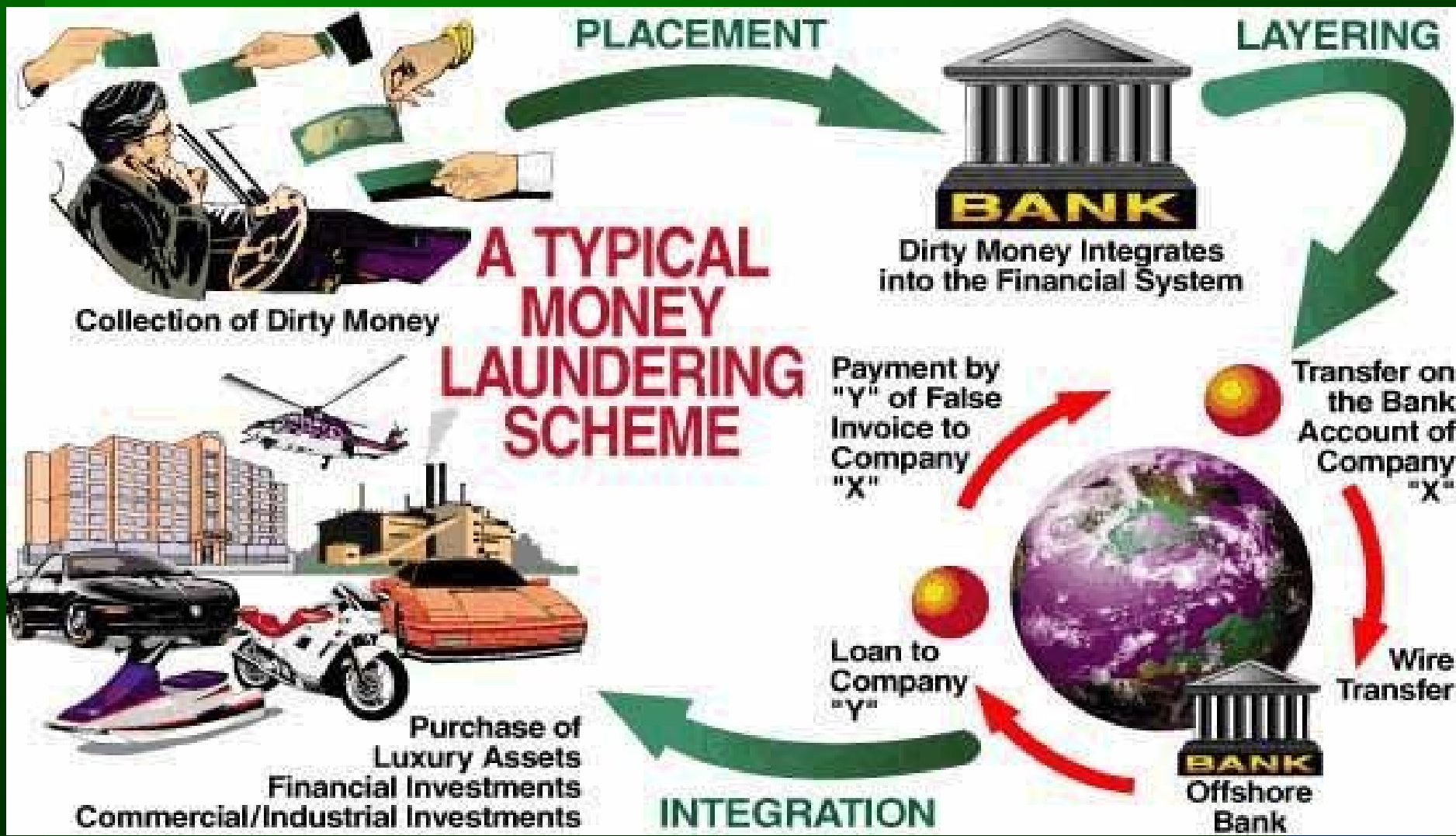
- The Paradigm Shift
  - ❖ Its about financial systems
  - ❖ Stability, integrity, governance
  - ❖ threats to emerging nations and economies
- Financial Action Task Force (FATF) established
  - ❖ Regional body for South Asia– Asia Pacific Group (APG)

# What is Money Laundering?



- Processing proceeds of crime to disguise their criminal origins
- An offence to
  - ❑ Acquire or use proceeds of crime
  - ❑ Deal with proceeds with aim of hiding origin
  - ❑ Hide the link of derived assets to proceeds
  - ❑ Help others to do any of the above
- Why? To prevent detection and benefit from crime
- How? Any way you can!
- Traditional Analysis – 3 stages
  - ❑ Placement/Layering/integration

# Three Stages of Money Laundering



# The Link to Taxation

- Criminals don't pay tax
- Link between money laundering and tax
- Much of the funds removed from an economy is tax free
- Is Tax fraud a predicate offence in your jurisdiction?
- Undermines credibility of AML agencies
- Seriously affects revenue collection
- Could be a powerful tool
- Still not fully recognized

# Key Responses to Money Laundering

- ❑ Effective response needs 4 elements
- ❑ (1) Create money laundering offence and related requirements
  - Transaction reports (CTRs and STRs)
  - Customer ID and Know Your Customer
- ❑ (2) Financial Intelligence Unit (FIU) which can collect and exchange financial intelligence

# International Response to (1)+(2)

- Financial services providers to have compliance programs
- Due diligence rules enhanced
  - Particularly private institutions
- Brokers, insurance agents, investment banks, precious metals and stones, lawyers and other professionals and real estate
  - Bank-like AML programs

# Key Responses to Money Laundering

- ❑ (3) Capacity to seek and receive mutual legal assistance and extradition of offenders
  - Bilateral and multilateral treaties
  - Supporting legislation
  
- ❑ (4) Capacity to recover proceeds of crime
  - Locate, freeze and confiscate
  - Civil or criminal onus
  - Shifting burdens of proof
  - Protection of third parties

# General Observations about Proceeds Laws

- **Should be simple but comprehensive**
  - Black letter v fuzzy law
- **Significant policy choices to be made**
  - Conviction based?
  - Standards of proof
  - Who seeks confiscation?
- **Proceeds laws are part of an integrated package**
  - Money laundering
  - Mutual legal assistance
  - Some models link it all together (UN)

# Key Elements of Proceeds Laws

- Information gathering
- Freezing and restraining
- Confiscation regime
- International aspects
- Administration of assets
- Major policy issues

# Finding the Proceeds of Crime

## Practical Issues

- Getting started – you need a lead
  - Intelligence from some source
- Bank secrecy laws
  - Distinguish confidentiality from secrecy
- Secrecy jurisdictions well known to money launderers
  - Such countries are used as conduits
- A particular problem in Asia
  - A number of countries have strong bank secrecy
- Few opportunities for mutual legal assistance+extradition
  - Few treaties and even fewer countries with MLA Acts to regulate the process
  - MLA is slow and difficult

# Information Gathering

- **Examination Orders**
  - Judicial or administrative
  - Protection of witnesses
  - Use of evidence (immunities)
- **Production Orders**
  - Suspects and associates
  - Third parties e.g. financial institution
- **Monitoring Orders**
  - Tracing of transactions and assets

# Freezing Orders

- Court issues orders to “freeze” a criminal’s or a third party’s property eg. his relatives or agents, and prevent them from dealing with or disposing of the property.
- It freezes the property so that it can be made available to satisfy a confiscation or forfeiture order.
- A common problem with these orders is that they can only be applied for at or near the time a person is charged with a criminal offence.

# Confiscation

- The enforcement of orders is the most important part of the process. Without efficient and effective confiscation of proceeds of crime, AML laws are ineffective.
- Obstacles to the confiscation of proceeds of crime and criminal property, include:
  - Inability to quickly freeze a criminal's property before he becomes aware of the investigation or is charged with an offence
  - Freezing orders that do not cover property of 3<sup>rd</sup> parties who hold property for the criminal

# International Aspects

- Recognizing and enforcing foreign Orders
  - Reciprocity as a precondition?
- Part of Proceeds Law or covered by Mutual Legal Assistance Act?
  - Treat the same as other requests for assistance?
  - Separate regime (compare enforcing an order and conducting investigation)

# International Aspects

- **Registration and Enforcement**
  - Transmit via diplomatic channel?
  - Role of central authority
    - ☐ Make applications, give undertakings
- **Separate regime or deemed to be domestic orders**
  - Can they challenged or accept on their face
- **Special conditions**
  - Shortened time frames and capacity for appeals and judicial review

# FATF Rules on Terrorist Financing

- **9 Special Recommendations**
  - Ratify 1999 UN Convention on Terrorist Financing
  - Criminalize terrorist financing
  - Freeze and confiscate assets
  - Report suspicious transactions
  - Enhanced international cooperation
  - Target alternative remittance systems
  - Link identity to remittance
  - Rules to cover non-profit organizations
  - Cash Couriers

# Money Laundering v Terrorist Financing

- Not the same thing
  - Both try to disguise source and end point
  - No predicate offence
  - Funds may be legitimate
  - 'Intended' use may never occur
  - What is the offence?
- Mirror image
  - Reverses the ML scenario
  - Requires different focus in financial institution
  - Investigators need to reverse thinking
- Similar techniques – different purpose
- New challenges for lawmakers
  - How do we deal with funds in transit?
  - Wait till terrorist event?

# Consequences of the Paradigm Shift

- **Global Reaction – The ‘unthinkable’ became acceptable**
  - **Controls on movement of people and cargo**
  - **New law enforcement powers**
  - **Power to freeze financial transactions on suspicion**
  - **New controls on securities markets foreshadowed**
  - **Business convenience gives way to security imperative**

# **ADB/OECD ANTI-CORRUPTION INITIATIVE for ASIA/Pacific**

- **Strategy Documents**
- **Action Plans**
- **Steering Group**
- **Advisory Group**
- **Biannual Conference**

# Anti-Corruption Action Plan

## PILLARS

- Pillar 1 - Develop effective + transparent systems for public service
- Pillar 2 – Strengthen anti-bribery actions + promote integrity in business operations
- Pillar 3 – Active public involvement

– See Plan at <http://www1.oecd.org/daf/ASIAcom/ActionPlan.htm>

# ADB-OECD Anti-Corruption Initiative

- **Steering Group**
  - Action Plan endorsed in 25 countries
- **Advisory Group**
  - Donors, International NGOs and business organizations
- **Secretariat in ADB**
  - provides technical advice
  - selects/implements priority reform areas and supporting projects
  - liaise with the international donor community
  - call upon the Advisory Group for additional assistance.

# Anti-Corruption Perception Index 2004 for 148 Countries

5. Singapore
9. Australia
16. Hong Kong, China
24. Japan
39. Malaysia
47. South Korea
64. Thailand
71. China
85. Mongolia
90. India, Nepal
102. PNG, Philippines, Vietnam
122. Kazakhstan, Kyrgyzstan
129. Pakistan
133. Indonesia
145. Bangladesh

# Medium Term Strategy

- **Country Ownership**
- **Regional Cooperation**
  - Sub-regional roundtables
  - Regional Policy Dialogue
  - Outreach
- **Civil Society and International Donors**
- **Enlarge Regional Participation**

# An Example of a Project in Malaysia

<b>Project</b>	<b>Survey perceptions of Malaysian public towards Corruption</b>
<b>Action Plan Pillar 3</b>	<b>Public Discussion of Corruption</b>
<b>Expected Results</b>	<b>Increase effectiveness of the Anti-Corruption Agency</b>

# Will Governments Practice What They Preach?

- General domestic will
- Move at their own pace
- International community is prepared to help
- It is a common strategy
- Economies of the region still weak

# More Information

- Initiative website
  - ADB/OECD Anti-Corruption Initiative for Asia-Pacific.
  - See <http://www1.oecd.org/daf/ASIAcom/>
- The regional, web-based reference centre + anti-corruption knowledge tools.
  - See <http://www1.oecd.org/daf/ASIAcom/countries>
- ADB's Anti-corruption Policy and activities.
  - See <http://adb.org/Anticorruption/default.asp>

**THANK YOU**

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