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INTRODUCTORY NOTE

It is with pride that the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI) offers to the international community Resource Material Series No. 65.

This volume contains the work produced in the 125th International Training Course that was conducted from 8 September to 30 October 2003 and the Sixth International Training Course on Corruption Control in Criminal Justice that was conducted from 4 to 28 November 2003. The main theme of the 125th Course was, "Effective Countermeasures against Illicit Drug Trafficking and Money Laundering".

Drug trafficking is a major global problem that facilitates drug abuse and helps to fund the growth of organized criminal groups. The proceeds of this crime often find their way into the legitimate business sphere impairing the integrity of legitimate financial systems. There is also evidence that terrorists use such proceeds to fund their activities; there is therefore, a pressing need to take steps to combat this threat.

One of the most effective measures that can be taken against drug trafficking is to target the proceeds of this crime and thereby deprive the criminals of the purpose of their operations. By implementing effective strategies to prevent them cleaning this dirty money we can stop them gaining the benefits of their activities and in turn stop the growth in drug trafficking and other criminal activities carried out by these criminal groups. The UN Convention against Illicit Traffic in Narcotic Drugs and Psychotic Substances, UN Convention against Transnational Organized Crime and the FATF "Forty Recommendations" are at the forefront of the fight against drug trafficking. Regional initiatives, such as the Asia/Pacific Group on Money Laundering, help implement these international standards within a specific region.

This Course gave the participants an opportunity to share information on the current situation of illicit drug trafficking and money laundering and the challenges faced by each country. Equipped with this information the participants were able to explore more effective measures and strategies to meet their own countries needs and those of the international community as a whole.

Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life, and allows organized crime, terrorism and other threats to human security to flourish. This evil phenomenon is found in all countries, big and small, rich and poor; however, it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice, and discouraging foreign aid and investment. Corruption is a key element in economic under-performance, and a major obstacle to poverty alleviation and development.

Since the problems of corruption are so great and perennial, UNAFEI has held a course on corruption control for the last six years. This year, however, was significant in that the General Assembly of the United Nations adopted the Convention against Corruption which introduces many measures to aid the fight against corruption. This Course gave the participants a timely opportunity to focus their discussions on how to implement the provisions of this Convention, so that their countries could become parties to this instrument.

In this issue, in regard to the 125th Course, papers contributed by visiting experts, selected individual presentation papers from among the participants, and the Reports of the Course are published. I regret that not all the papers submitted by the Course participants could be published. In regard to the Sixth Corruption Course the papers contributed by the visiting experts and the Report of the General Discussion are published. I must request the understanding of the selected authors for not having sufficient time to refer the manuscripts back to them before publication.

I would like to pay tribute to the contributions of the Government of Japan, particularly the Ministry of Justice and the Japan International Cooperation Agency, and the Asia Crime Prevention Foundation for providing indispensable and unwavering support to UNAFEI's international training programmes.

Finally I would like to express my heartfelt gratitude to all who so unselfishly assisted in the publication of this series; in particular, the editor of Resource Material Series No. 65, Mr Simon Cornell, who so tirelessly dedicated himself to this Series.

March 2005

Kunihiko Sakai
Director of UNAFEI

PART ONE

Work Product of the 125th International Training Course

"EFFECTIVE COUNTERMEASURES AGAINST ILLICIT DRUG TRAFFICKING AND MONEY LAUNDERING"

UNAFEI

VISITING EXPERTS' PAPERS

INVESTIGATION OF MONEY LAUNDERING AND CORRUPTION

Tony KWOK Man-wai *

I. SHORT HISTORY OF THE ICAC HONG KONG

Let me explain briefly about the Hong Kong ICAC which has a particularly interesting history and story to tell. It was established in 1974 at the time when corruption was widespread, and Hong Kong, as a British Colony, was probably one of the most corrupt cities in the world. Corruption was a way of life and there was at that time a particularly close "business" association between law enforcement agencies and organized crime syndicates. Nearly all types of organized crimes, vice, gambling and drugs, were protected. As a taxi-driver, you could even buy a monthly label to stick on your taxi's windscreen and it would give you immunity from any traffic prosecution. Such was the scale of open corruption in Hong Kong. When the ICAC was set up at that time, very few people in Hong Kong believed that it would be successful. They called it "Mission Impossible". Within three years, the ICAC smashed all the corruption syndicates in the Government and prosecuted 247 government officers, including 143 police officers, amongst whom some were labelled "Million Dollar Detective Sergeants"!

The United Nations research on corruption described Hong Kong as a success model in fighting corruption. So, what is our secret of success? To me, there are five factors:

First. There is top political will to eradicate corruption, which enables the ICAC to become a truly independent agency, directly responsible to the very top, i.e. the Chief Executive of Hong Kong. This ensures that the ICAC is free from any interference in conducting their investigation, and can get on with its task without fear or prejudice.

Second. The strong political support was translated into financial support. The ICAC is probably one of the most expensive anti-corruption agencies in the world. Their annual budget amounted to US $90M, about US $15 per capita. You may wish to multiply this figure with your own country's population and work out the anti-corruption budget that needs to be given to the equivalent of the ICAC! However, looking at the budget from another angle - it represents only 0.3% of Hong Kong Government budget or 0.05% of Hong Kong's Gross Domestic Product (GDP). I think you will agree that such a small "premium" is a most worthwhile investment for a clean society.

Third. The ICAC enjoys wide investigative power. Not only are they empowered to investigate corruption offences, both in the Government and private sectors, they can investigate all crimes which are connected with corruption.

Fourth. The ICAC strives to be highly professional in their investigation. The ICAC was one of the first agencies in the world to videotape interviews of all of its suspects; they have a dedicated surveillance team with over 120 specially trained agents who took surveillance as their life-long

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career. The ICAC has a number of other specialized units such as witness protection, computer forensics and financial investigation.

Finally. The ICAC adopts a comprehensive "three-pronged" strategy in fighting corruption, i.e. through deterrence, prevention and education. All three are important but in my view, deterrence is the most important. That is the reason why in the ICAC's total establishment of over 1,300 staff members, over 900 of them work in the Operations Department, responsible for investigating corruption. Nearly all of the major corruption cases I have dealt with were committed by people with high authority and wealth. For them, they have certainly been educated about the evil of corruption and they may also be subject to a certain degree of corruption prevention control. But what inspired them to commit corruption? The answer is simply greed, for they would weigh the fortune they could get from corruption with the chance of them being discovered. So how can we deter them from being corrupt? The only way is to make them realize that there is a high risk of them being caught, which is the Mission of the ICAC Operations Department—to make corruption a *high risk crime*. To do that, you need a professional investigative force.

II. CORRUPTION AND MONEY LAUNDERING

Corruption rarely exists alone. It is often a tool to facilitate organized crimes. Over the years, The ICAC has investigated a wide range of organized crimes facilitated by corruption. Police officers have been arrested and convicted for corruptly assisting vice and gambling operators; Customs officers have been arrested for colluding with drug traffickers and smugglers of various kinds; Immigration Officers for assisting illegal immigrants; hotel and retail staff for perpetuating credit card fraud. In regard to money laundering, The ICAC has come across incidences where bank staff, finance market operators, accountants, lawyers, casino managers corruptly assist the organized crime syndicates to launder proceeds from crime. In these cases, the ICAC needs to investigate not only corruption, but also some very sophisticated organized crime syndicates and professionals

A. What is Money Laundering?

Criminals of every kind - from drug traffickers, smugglers, illicit arms dealers to corrupt officials - must launder the money flowing from their crimes to conceal such proceeds from being the target of investigation and seizures. They make their ill-gotten wealth look clean by moving it around, and legitimizing it in the world's financial systems. Attacking criminals where it hurts - in their pockets - by preventing them from profiting from their crimes is an effective deterrent. Combating money laundering is therefore of paramount importance in suppressing serious and organized crimes.

B. Money Laundering in Hong Kong

Like other international financial centres, Hong Kong is not immune from the risk of being used by criminals to launder their illicit proceeds. Our open economy makes detection of transfer of illicit funds even more difficult. Notwithstanding this, Hong Kong has been vigilant in safeguarding the stability and integrity of our financial sector against such risks. Proactive actions have also been taken against money laundering, both domestically and on the international front.

In Hong Kong, a person commits a money laundering offence if he deals with any property, knowing or having reasonable grounds to believe that it represents any person's proceeds of drug trafficking or an indictable offence.

C. Stages of Money Laundering

There are three stages of money laundering:

1. Placement - disposing of the funds, e.g. using cash carriers or false identities to open bank accounts for deposits; use of offshore accounts so that the original owners cannot be traced.

2. Layering - distancing the funds from the source, e.g. further transfers of funds amongst layers of bogus accounts or use of shell companies to create a bogus business transaction.

3. Integration - merging the funds and placing them into the economy, e.g. integrate with legitimate business through creative accounting such as false invoices, over or undervalue of goods, or in the pretext of a loan payback.

D. Hong Kong's Anti-Money Laundering framework

Over the years, Hong Kong has built up a robust and comprehensive anti-money laundering framework as described below. The framework has continuously been strengthened by a number of measures and initiatives on the legislative, enforcement and regulatory fronts.

1. Legislation - The Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance are the two main pieces of legislation to combat money laundering.

2. Law enforcement - Police, Customs and the ICAC.

3. Financial regulators - Hong Kong Monetary Authority, Insurance Authority, Securities and Futures Commission.

4. International co-operation - Hong Kong being a member of the Financial Action Task Force on Money Laundering (FATF).

5. Criminal Justice System - the courts.

E. Hong Kong Anti-money Laundering Legislation

Money laundering in Hong Kong is enforced through two pieces of legislation:

1. Drug Trafficking (Recovery of Proceeds) Ordinance, Chapter 405;

2. Organized and Serious Crimes Ordinance, Chapter 455

Which cover the following offences/measures:

- Dealing with the proceeds of crime - a person commits an offence if he deals with any property, knowing or having reasonable grounds to believe that the property directly or indirectly represents any person's proceeds of drug trafficking or an indictable offence. Maximum penalty - 14 years and a fine of HK $5 million.

- Reporting suspicious transactions - where a person knows or suspects any property represents or is connected with proceeds of a drug trafficking offence or an indictable offence, he shall as soon as it is reasonable for him to do so, disclose that knowledge or suspicion to an authorized officer. Maximum penalty - Three months imprisonment and a fine of HK $50,000.

- Control of banks, money changers and remittance agents - requiring them to register their business with the police, identify customers for transaction over HK $20,000 and keep transaction records for six years.

- Enforcement power :
  (i) Search warrant
  (ii) Production Order
  (iii) Restraint Order- permits the making of a restraint order if a person has been arrested for an organized crime
  (iv) Confiscation Order

After the events of 11th September, 2001, the United Nations (Anti-terrorism Measures) Ordinance was enacted in July 2002 to implement, among others, the more pressing elements of the FATF's Eight Special Recommendations on Terrorist Financing and the mandatory elements of the United Nations Security Council Resolution 1373 relating to measures for the prevention of terrorist acts.

F. Law Enforcement

Anti-money laundering and countering terrorist financing legislation are principally enforced by the Police and Customs. The two agencies jointly operate the Joint Financial Intelligence Unit which collects suspicious transaction reports, analyses and disseminates intelligence for follow up investigations for the purpose of prosecution of money laundering and terrorist financing offences. So far, over HK $380 million (US $48.7M) have been confiscated since the enactment of the two anti-money laundering laws. As at 30 April, 2003, a total of HK $1,172 million of proceeds of crime was under restraint orders. In addition, HK $101 million has been ordered to be confiscated and was pending recovery from the defendants. To enhance international co-operation, Hong Kong has shared with foreign jurisdictions, on four occasions, confiscated assets related to drug trafficking, involving the total amount of HK $57 million.

G. International Cooperation

Hong Kong plays an active role in international cooperation in anti-money laundering in the following areas:

- Signatories to multilateral treaties such as the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Convention), 2000 UN Convention against Transnational Organized Crimes (the Palermo Convention), etc.

- Provides mutual legal assistance to other jurisdictions under the Mutual Legal Assistance in Criminal Matters Ordinance and to surrender fugitive offenders under the Fugitive Offenders Ordinance in respect of money laundering and terrorist financing offences. At present, Hong Kong has signed 14 agreements under the Mutual Legal Assistance in Criminal Matters Ordinance and 13 agreements under the Fugitive Offenders Ordinance.

- Liaison network with the World Bank, International Monetary Fund (IMF), Asia Pacific Economic Cooperation (APEC), Interpol and World Customs Organization (WCO).

- As a member of the Financial Action Task Force on Money Laundering (FATF), an inter-governmental body established in 1989 which sets standards, and develops and promotes policies to combat money laundering and terrorist financing. It also monitors international implementation of standards through self-assessment, mutual evaluations and identification of non-cooperative

countries. It comprises 31 countries and governments, the European Commission and the Gulf Cooperation Council. Hong Kong is an active member of FATF and in recognition of Hong Kong's efforts against money laundering, it was selected as the President of the FATF for the period from 1 July 2001 to 30 June 2002. The Commissioner for Narcotics, as the coordinator of Hong Kong's anti-money laundering efforts, represents Hong Kong in this role.

H. Major Initiatives Launched during Hong Kong's Presidency of FATF

Under the presidency of Hong Kong, the FATF made considerable progress in the fight against money laundering and terrorist financing, the latter role was taken up after the events of September 11, 2001. Some of the major accomplishments included a comprehensive review of the FATF Forty Recommendations against money laundering, formulation of the Eight Special Recommendations on Terrorist Financing, and a worldwide global programme of engagement, and enhanced collaboration with the IMF and the World Bank.

I. Asia Pacific Group on Money Laundering

Hong Kong is also a founding member of the Asia Pacific Group on Money Laundering (APG). The Group was set up in 1997 with the aim to facilitate adoption, implementation and enforcement of internationally accepted anti-money laundering standards by jurisdictions in the region. As an active member contributing to the Group's work, Hong Kong is a co-chair of the APG Working Group on Alternative Remittance and Underground Banking Systems.

III. DIFFICULTIES IN INVESTIGATING CORRUPTION AND MONEY LAUNDERING

Both corruption and money laundering are difficult crimes to investigate, due to the fact that they are by nature secretive crimes and often involve only satisfied parties. The offenders are often highly educated, professional and high-powered who know how to cover up any trail of their crime and who are often in a position to make others keep the code of silence to abort any investigation. These days, the offenders often take advantage of the high technology in communication, the ease and freedom of the transfer of funds, the banking practice that supports secrecy, the availability of nominee accounts and in exploiting the loopholes created by cross jurisdictional problems, making investigation even more difficult.

A. Prerequisites for an Effective Investigation

There are several prerequisites to an effective investigation:

1. Independence - corruption investigation can be politically sensitive and embarrassing to the Government. The investigation can only be effective if it is truly independent and free from undue interference. This depends very much on whether there is a top political will to fight corruption in the country.

2. Adequate investigative power - Because corruption is so difficult to investigate, you need adequate investigative power. The HK ICAC enjoys wide investigative power, such as power to check bank accounts, requiring suspects to declare their assets, requiring witnesses to answer questions under oath, restraining properties suspected to be derived from corruption and holding the suspects' travel documents to prevent them from fleeing the jurisdiction.

3. Adequate resources - investigating corruption and money laundering can be very time-consuming and resource intensive, particularly dealing with cross jurisdictional cases.

4. Confidentiality - it is crucial that all investigation should be conducted covertly and confidentially, before overt action is ready, so as to reduce the opportunities for compromise or interference. On the other hand, many targets under investigation may prove to be innocent and it is only fair to preserve their reputation until there is clear evidence of their corrupt deeds. Hence in Hong Kong, we have a law prohibiting anyone from disclosing any details of an ICAC investigation until arrests and searches have been made. The media once described this as a "press gag law" but they now come to accept it as a right balance between press freedom and effective law enforcement.

5. International mutual assistance - many cases are now cross jurisdictional and it is important that you can obtain international assistance in the areas such as locating witnesses and suspects; money trails, surveillance, exchange of intelligence, arrest, search and extradition.

6. Professional - all the investigators must be properly trained and professional in their investigation. The HK ICAC strives to be one of the most professional law enforcement agencies in the world. Over the years, the ICAC has developed a comprehensive training programme to enhance the investigators' skill in the following professional areas :
   - General investigation techniques
   - Interview techniques, including under video recording
   - Financial Investigation Techniques
   - Search
   - Surveillance
   - Undercover operations

B. Public Reporting System

Any success in law enforcement always starts with a comprehensive public reporting system and aims at encouraging the public to report and assist in investigating crime. A good reporting system should take into consideration the following criteria:

- Publicity to encourage public reporting
- Provide customer service to complainants
- Measures to deter frivolous or malicious complaints
- Establish policy on anonymous reports
- Enforce strict confidentiality on the reports
- Measures to protect whistle-blowers
- Provide a quick response to the reports
- Establish a fair procedure for handling the reports, with checks and balances against abuse
- Establish a system of accountability to the complainants

C. Methods of Investigation

Investigating corruption can broadly be divided into two categories:

a. Investigating past corruption offences
b. Investigating current corruption offences

D. Investigating Past Offences

The investigation normally commences with a report of corruption and the normal criminal investigation technique should apply. Much will depend on the information provided by the informant and from there, the case should be developed to obtain direct, corroborative and circumstantial evidence. The success of such an investigation relies on the meticulous approach taken by the investigators to ensure that "no stone is left unturned". Areas of investigation could include detailed checking of the related bank accounts and company ledgers and obtaining information from various sources to corroborate any meetings or corrupt transactions etc. When there is a reasonable suspicion to act, the suspects' home and office should be searched for further evidence and all related parties should be properly interviewed.

E. Investigation of Current Corruption Offences

Such investigation will enable greater scope for ingenuity. Apart from the conventional methods mentioned above, a proactive strategy should always be preferred, with a view to catch the offenders red-handed. Surveillance and telephone interception should be mounted on the suspects and suspicious meetings monitored. A cooperative party can be deployed to set up a meeting with a view to trap the suspects. Undercover operations can also be considered to infiltrate into a crime syndicate. The prerequisite to all these proactive investigation methods are professional training, adequate operational support and a comprehensive supervisory system to ensure that they are effective and in compliance with the rules of evidence.

F. Asset Tracing

One most important investigation technique in corruption and money laundering investigation is asset tracing. The key to this is a painstaking accounting approach to examine and follow the money trail in the following areas:

- bank accounts of the alleged offenders and their relatives
- remittance
- companies and nominee companies
- stocks, shares and funds
- properties
- source of expenditures

As soon as there is reasonable suspicion, a period of surveillance on the alleged offender to identify his lifestyle, followed by a thorough search of his home, office, safe deposit box, car and personal belongings should be conducted so as to obtain the necessary clues to identify where his assets have been hidden.

G. Resident Informant

One unique feature of corruption investigations is that the investigators must not be content with obtaining evidence against one single offender. Corruption is always linked and can be syndicated. Every effort should be explored to ascertain if the individual offender is prepared to implicate other accomplices or the mastermind of the corruption. In Hong Kong, there is a judicial directive to allow a reduction of 2/3 of the sentence of those corrupt offenders who are prepared to provide full information to the ICAC and to give evidence against the accomplices in court. The ICAC provides special facilities to enable such "resident informants" to be detained in ICAC premises for the purpose of de-briefing and protection. This "resident informant" system has proved to be very effective in dealing with syndicated or high-level corruption.

H. Investigative Support

Apart from the core investigation units, there should be strong operational support units, and the following are essential for the reasons given:

- Intelligence Section
  As a central point to collect, collate, analyze and disseminate all intelligence and investigation data, and the upkeep of indices for ready cross reference.

- Surveillance Section
  Such a section is a very important source of evidence and intelligence. ICAC has a dedicated surveillance unit of over 120 surveillance agents and they have made a significant contribution to the success of a number of major cases.

- Technical Services Section
  This section provides essential technical support to surveillance and operations.

- Information Technology Section
  It is important that all intelligence and investigation data should be managed and analyzed by computer as an aid to investigation. In this modern age, most personal and company data are stored on computers and investigators must possess the ability to break into these computers seized during searches to examine their stored data. Computer forensics are regarded as vital for all law enforcement agencies worldwide these days.

I. Financial Investigation Section

The corruption investigations these days often involve a sophisticated money trail of proceeds of corruption, which go through a web of offshore companies and accounts, funds etc. It is necessary to employ professionally qualified investigative accountants to assist in such investigation and in presenting such evidence in court.

- Witness Protection Section
  The ICAC has experienced cases where crucial witnesses were compromised, with one even murdered, before giving evidence. There should be a comprehensive system to protect crucial witnesses, including 24 hours armed protection, safe housing, a new identity and overseas relocation. Some of these measures require legislative backing.

IV. CASE STUDIES

A. Senior Public Prosecutor Corruption Case

A very senior pubic prosecutor, at the time holding the position as the Acting Deputy Director of Public Prosecutor, was found to have excessive assets of HK $16 million believed to have been derived from corruption: including bank balances of NZ $2.43 million; three lots of land in New Zealand and an orchard farm. Enquiries revealed how he had laundered his corrupt proceeds through the following countries:

- TAIWAN: he bought gold in H.K., then sold it in Taiwan and kept the money in a Taiwanese Lawyer's account. Transferred the money to N.Z. via a bank account of a HK lawyer.

- LONDON: he drew money from Taiwan via a Taiwanese lawyer. He transferred the money to an account in H.K. before transferring it to other overseas accounts.

- HONG KONG: transferred money to his mother's account in Singapore and his family in N.Z. Bought gold using money transferred back from Singapore and Taiwan.

- VANUATU PACIFIC: kept money in two trust funds, one of which was for his children.

- NEW ZEALAND: money to his family's bank account; invested in orchard business, buying three lots of land in Taurauga.

- AUSTRALIA: kept money from H.K. in his sister in-law's account.

He was subsequently convicted of corruption offences and sentenced to eight years imprisonment, with HK $12 million of his assets forfeited.

B. Illegal Passport & Money Laundering Syndicate

The ICAC smashed an international illegal passport and money laundering syndicate in recent years. The syndicate members included a Customs Senior Inspector, two Immigration Officers, a Principal Immigration officer, who was the head of Immigration of an African Country, a bank manager and a casino operator. This syndicate arranged illegal passports, including diplomatic passports from various foreign countries for sale to people who wanted to emigrate to the US. The syndicate could also assist in laundering illegal money. The ICAC succeeded in infiltrating into the syndicate through an ICAC officer acting undercover. At the critical stage, the ICAC also enlisted the assistance of a Russian speaking undercover officer from a US law enforcement agency to pose as a member of a Russian organized crime group. All the key figures were apprehended and subsequently convicted. This is a classic example of international cooperation, and the mutual assistance that should be developed in undercover operations.

C. Counterfeit Credit Cards (CCC) - HK Joint Operation with Tokyo/Seoul

Counterfeit credit card (CCC) fraud continues to be a lucrative source of revenue for organized crime groups. In 1992, Hong Kong was responsible for 32% of the world's credit card fraud. Now Hong Kong is only responsible for 2% of the fraud. This type of fraud is often facilitated by corrupt retail staff who steal the genuine credit card information from customers and pass them to the syndicate for making counterfeit cards. In 2000, the ICAC assisted the Tokyo Metropolitan Police Department in eradicating a crime syndicate from Hong Kong which uttered CCCs in Japan. Tokyo Police, in appreciation of the ICAC efforts, presented us with a Certificate of Appreciation. In March 2001, information was received that four members of a CCC syndicate were organizing a trip to Seoul, South Korea, where they intended to utter CCCs manufactured with data they captured in Hong Kong and elsewhere. A team of ICAC officers travelled to Korea to assist the Seoul Metropolitan Police in the identification of the suspects. The criminals were arrested in Seoul. In Hong Kong, simultaneous actions were taken, resulting in the seizure of credit card data and computer software used in the manufacture of CCCs. The leader of the syndicate was charged with CCC offences in Hong Kong and sentenced to a term of imprisonment. These two cases were typical international syndicates with operations stretching through a number of jurisdictions. In recognition of the ICAC's success in CCCs investigation, an ICAC Chief Investigator was awarded "Law Enforcement Officer of the Year" by the International Association of Financial Crime Investigators in America. This is another example of successful international cooperation.

D. Cigarette Smuggling Case

The ICAC carried out a protracted investigation which lasted for three years from 1993 to 1996 into a cigarette smuggling syndicate. Its members included ex-customs officers, a senior manager of an international tobacco company, a number of established cigarette traders and senior triad members of Wo On Lok Triad Society. The investigation revealed bribe payments of over US $4.2M (HK $33M) paid by the syndicate to the senior manager of a tobacco factory to ensure an unlimited supply of cigarettes to facilitate smuggling into China. During the course of the investigation, a key member of the syndicate, who had earlier agreed to assist ICAC in the investigation, was found brutally murdered and dumped in the harbour in Singapore. His murder was suspected to be carried out by five members of the Wo On Lok Society. In the end, three members of the syndicate were convicted of bribery, murder or perverting the course of justice charges. Three persons are still wanted on warrant. This is one of the most serious organized crime cases investigated by the ICAC.

E. Hong Kong Jockey Club Race Fixing Case

Horse racing is a very popular game in Hong Kong and the total amount of bets placed by punters at each race meeting is in the tune of tens of million of dollars, one of the highest in the world. Hong Kong Jockey Club is keen to maintain the integrity of racing. In a joint investigation with the Jockey Club, the ICAC succeeded in unearthing a case of race fixing involving a number of jockeys who were bribed by an off-course betting syndicate with a triad background. The total amount of bribes paid to riders for not letting their mounts run to the best of their ability exceeded US $180,000 (HK $1.4 million) in a single race. This amount of money is only a drop in the ocean compared to the revenue the syndicate gets in illegal bookmaking. Seven persons were prosecuted and three jockeys and two civilians were subsequently found guilty of bribery and gambling offences, and sentenced to substantial terms of imprisonment. Unfortunately, the ICAC was not able to get to the head of the syndicate simply because there was a missing link with no one prepared to provide the necessary evidence against the head. This is the difficulty of investigating organized crime groups.

F. Soccer Match Fixing Case

Betting on soccer match results used to be illegal in Hong Kong, although it is now legalised. The ICAC investigated a case involving an illegal international soccer bookmaking syndicate. The syndicate was involved in illegal soccer betting on international matches and also 'fixed' the outcome of local football matches. This was achieved by bribing key players in the team. A corrupt police sergeant was bribed to assist the illegal operation in Hong Kong. This was a particularly difficult case to investigate. To begin with, no aggrieved individuals came forward to complain. Secondly, the syndicate's operation is transnational. Bets accepted in Hong Kong were then placed with a major bookmaker in Malaysia through a middleman in Singapore, and all financial transactions were conducted through an 'underground' banking system. To add to the complexity of the case, all bets were recorded on a sophisticated computer programme which was capable of total erasure through a push of a button on the keyboard. The ICAC carried out a strike operation on the first day of the World Cup Final in 1998 and managed to break into the premises so swiftly that the operator was so shocked that he was unable to push the crucial button on time. Nonetheless, it still took a long process of computer forensics to retrieve the evidence from the computer and have it admissible as evidence in court. This investigation resulted in the arrest and conviction of eight individuals in Hong Kong. Five footballers were sentenced to terms of imprisonment ranging between 12 and 22 months, the police sergeant was jailed for four years, and the head of the syndicate and his 'lieutenant' were each sentenced to two years' imprisonment. The need to upgrade ourselves in information technology is obvious if we want to tackle sophisticated organized crime.

V. CONCLUSION AND OBSERVATIONS

It is obvious that corruption and organized crimes are getting more and more difficult to investigate. The offenders have taken full advantage of high technology and cross jurisdiction loopholes. The conventional investigation methods and the current legal system may not be adequate to win the battle against the corrupt. We should adopt a more proactive approach in investigation such as the wider use of undercover operations and the use of telephone interception.

I would like to give my personal observation on the following areas:

A. A Strong Partnership Approach

15.The ICAC sees great value in a strong partnership approach with other local law enforcement agencies, including the Police, Customs, and Immigration Department in Hong Kong. In the old days, when the ICAC arrested a government official, this might not be welcome by his head of department, who blamed the ICAC for bringing scandal to his department. "Don't wash your dirty linen in public" is outdated and can only encourage corruption. If the dark days of corruption teach us anything, it is that turning a blind eye to corruption simply will not do. The problem will only grow bigger. I am pleased to note that heads of departments, particularly the law enforcement agencies, today have changed that attitude and are taking a proactive strategy in order to tackle corruption. Indeed, many of the ICAC's most successful cases originated from their proactive approach or as a result of joint investigations. To effectively deal with a sophisticated organized crime group and its money laundering activities, it is highly recommended that a multi-disciplinary task force approach be adopted, drawing together investigators from the police, ICAC, Customs, Tax, legal counsel, forensic accountants, asset management experts and major case management technological support. Such a multi-disciplinary approach enables adequate power and expertise to be available to deal with the equally professionally supported organized crime groups.

B. Adequacy of the Criminal Justice System

Corruption is a secret crime and there is a need to break the secrecy if we want to find out the truth. The present system in Hong Kong which basically follows the old UK one, allows the suspect to exercise their right of silence when questioned under caution. If they have a lawyer, the first thing the lawyer will advise them is to maintain his right of silence. When the case comes to court, the offender will have ample time to concoct a story, which does not allow the prosecution sufficient time to verify its truthfulness. In the end, it defeats the objective of the criminal justice system in enabling full facts to be presented to the court so as to arrive at a fair verdict. Under the new UK caution system, the suspects are now warned that any delayed response to questions may prejudice their defence in subsequent legal proceedings. The new caution reads like this, "*You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence.*" I believe this new caution strikes a better balance between the human rights of suspects and the public interest to investigate crime. Alternatively, we should also consider adopting the Continental system where the suspect can be interviewed by examining magistrate where he cannot exercise any right of silence.

C. Telephone Interception

It is no longer a secret to the criminal world that most law enforcement agencies have access to telephone interception in their investigation. There appears to be two broad ways in dealing with telephone interception in different countries. In the United States, Canada and Australia, telephone interception requires judicial approval and its products can be used as evidence in court. In the UK and Hong Kong, telephone interception is approved by the Government but cannot be used as evidence in any courts. Experience over the world proved that telephone interception is an extremely useful tool in

investigating high level organized crime and corruption and its production in court often forms the crucial evidence against the mastermind offenders. To deprive the use of telephone interception evidence in court is in my view simply to hamper the effective investigation and prosecution of major corrupt offenders.

Consideration should also be given to introducing new legislation to protect whistle-blowers, witness protection, and allowing a greater degree of entrapment to facilitate successful undercover operations, and the international mutual assistance in corruption investigation and money laundering.

D. International Mutual Investigative Assistance in Criminal Matters

We all appreciate that organized crimes this day have no boundary and international cooperation is vital. However, at present, we rely heavily on mutual legal assistance which have restrictions on areas of cooperation and at the same time require strict judicial procedure which is often a time consuming and complicated process. We need to act faster than criminals and there should be a more efficient mechanism amongst law enforcement agencies to call for and obtain assistance at short notice. The United Nation is now in the process of drafting a U.N. Convention on Fighting Corruption. I hope that it will enable closer international cooperation amongst anti-corruption agencies. I believe the time has come for an international association of anti-corruption agencies to be formed under the U.N.'s auspices to enhance international liaison.

DEVELOPMENTS IN MUTUAL LEGAL ASSISTANCE AND EXTRADITION AT THE INTERNATIONAL LEVEL

Hans G. Nilsson *

I. INTRODUCTION

Over the past 20 years, if not more, crime has evolved exponentially in the Member States of the United Nations and at the regional level. The nature of crime has also changed: from being confined only to one country or region, crime has become international in its planning, perpetration and detection. The level of seriousness of the crime has also increased and a number of committed offences can today be qualified as truly international in their very nature (drugs trafficking, terrorism, trafficking in human beings, illicit arms trafficking, and crime on the Internet etc.).

This development has required that the "international legislator" [1] take all necessary measures to enable international judicial cooperation to progress and become more efficient. Although many countries have the possibility, under their Constitutions, to cooperate against crime on the basis of reciprocity, experience has shown that a sound legal basis in a Convention is conducive to efficient cooperation against crime. This is particularly true in the field of extradition but also to a large degree in mutual legal assistance.

This development has lead to a number of initiatives to be taken in the past 15-20 years within the United Nations or in regional organisations such as the Council of Europe, the OAS or, more recently, in the European Union.

I propose in this paper to examine some of the developments that have taken place during this period, both in the field of extradition and in mutual legal assistance. In order to limit the paper, I will restrict it to an examination of the most important developments and trends at the UN level, namely as regards the two "flagships" of international cooperation that have been agreed at international level: the 1988 UN Convention against trafficking in narcotic drugs and psychotropic substances, concluded on 19 December 1988 and the 2000 UN Convention against transnational organised crime. As regards the third flagship, which has experienced so far the fate of the flying Dutchman, namely the draft UN Convention against corruption, at the time of writing not yet concluded but where it may reasonably be presumed that it will be concluded in December of this year, there is in principle no need to examine this draft, as it largely, into the most minute detail, contains the same provisions as the Palermo Convention.

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[1] By this term, I am not only referring to the work of international or supranational organisations but also to the work carried out at a bilateral level between two or more States.

I will further examine some recent developments within the European Union, which may not be so well known to an international audience as these developments concern only the 15 Member States of the EU, soon to become 25 as from 1 May 2004. But before explaining the set up of the EU in criminal matters, I should first mention some matters concerning the Council of Europe - the oldest organisation that has been dealing with cooperation in criminal matters in Europe since 1957[2].

II. COUNCIL OF EUROPE

At regional level in Europe, many important developments have taken place within the Council of Europe, the Strasbourg based organisation with its now 45 Member States. Since 1957 it has developed international instruments in the field of international cooperation in criminal matters, including the 1957 European Convention on Extradition, the 1959 European Convention on Mutual Legal Assistance in Criminal Matters and the 1990 Convention[3] on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime[4].

The Council of Europe had until 1989 21 Member States, i.e. Western Europe. With the fall of the Berlin Wall, its membership has gradually evolved until its most recent Member State- Croatia.

Since the membership includes both large States (with very different levels of development of Human Rights and the Rule of Law) such as Germany, France, Russia and Ukraine, and small States (also with different levels of development in certain aspects) such as Luxembourg, Malta, Liechtenstein and Andorra, the criminal law cooperation within this framework tends to become intergovernmental, and sometimes also "a la carte" with a number of possibilities of grounds for refusal and reservations in the conventions that have been drafted under its auspices.

A further complication, from this point of view, has been the recent tendency to allow States such as the United States, to assist in the deliberations of the expert Committees drafting new instruments. At least to my mind, although it must be welcomed in general that international cooperation in particular in the field of cyber crime has a vocation to fight crime at a universal level, this has sometimes not facilitated the difficult search for solutions that may be found between like minded-countries having similar legal traditions or close ties in international cooperation. A particularly striking example has been the previously mentioned 1990 Laundering Convention where large concessions were made to one non-European country that participated in its drafting but which today, 13 years after its conclusion, has not yet ratified this Convention. One may wonder whether it would not have been wiser to seek "European" solutions to these problems and seek separate solutions instead with some non-European countries.

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[2] The Organisation was founded in 1949.

[3] This Convention is not European since it is in principle also open to States that are not European as from its beginning - the USA, Canada and Australia participated in its drafting, although only Australia has signed the Convention that has now 38 ratifications.

[4] The Council of Europe has in total elaborated more than 20 international conventions in criminal matters and in total nearly 200 Conventions. Its most important achievement is the European Convention on Human Rights, setting up the unique system of protection of human rights in Europe by the European Court of Human Rights.

In this context, the recently concluded Convention on cyber crime must be mentioned as a particularly interesting example of a development that may have a real impact on international cooperation in the fight against crime in the particular area of computer crime and investigations into cyberspace.

From the Council of Europe experience, one must however also conclude that extradition and mutual legal assistance remain the main tools in international cooperation; transfer of criminal proceedings and the recognition and enforcement of criminal sanctions[5] remain to a large extent theoretical possibilities without any follow up in practice, even among countries that have close relations in criminal cooperation such as the Benelux countries or the Scandinavian countries. However, cooperation for purposes of allowing the transfer of sentenced persons[6] with a view to permitting them to reinsert in their own societies has been more successful, although it has proven problematic with some countries, in particular outside Europe that have been permitted to join this Convention.

III. EUROPEAN UNION

The developments within the European Union are much less well known than those within the Council of Europe by the international community. There are several reasons for this, but in particular it should be mentioned that these developments are relatively recent (the Treaty of Maastricht entered into force on 1 November 1993), they are unique to the world (a system of semi-supranational competencies have been gradually put in place; the instruments drafted are binding on the Member States) and they concern only the Member States of the EU which form part of an ever closer and integrated Union that de facto has its own legal personality[7].

In view of these developments, it may be justified to describe in more detail to an international audience these developments within the EU, since they have an impact on the most developed part of Europe (the candidate States to the European Union have an obligation to implement the entirety of the Union acquis), thus the 25 States and since they also have a potential to have an impact on other States in Europe that have aspirations to become Member States of the European Union.

With the entry into force of the Treaty of Maastricht, the Union declared that judicial cooperation in criminal matters was an area of "common interest" for the Member States. This means already that the machinery of the EU could be used for purposes of developing criminal law within the framework of the Institutions of the EU. The European Commission participated in the drafting of the new instruments, and had even a right of initiative when it came to those relating to fraud (it took the initiative to what was to become the 1995 Convention of the fight against fraud for purposes of protecting the financial interests of the European Communities. The European Parliament was heard by the Council of Ministers that took all the final decisions. The European Court of Justice had a limited role to interpret the instruments drafted under the regime of the Treaty of Maastricht. Under this Treaty regime were however drafted a number of

[5] See the European Convention of 15 May 1972 on the Transfer of Proceedings in Criminal Matters and the European Convention of 28 May 1970 on the International Validity of Criminal Judgments.

[6] See the Convention of 23 March 1983 on the Transfer of Sentenced Persons.

[7] Viz. the recently signed, and binding on the Member States when concluded, treaties with the United States on extradition and on mutual legal assistance where the contracting parties are the United States of America and the European Union (and not its Member States).

Conventions (14) and so-called Joint Actions (instruments in principle binding on the governments but which could have a somewhat weak legal status depending on the Member State concerned) on a number of important topics: definition of the offence of participation in a criminal organisation, private corruption, confiscation of the proceeds from crime, etc. In addition, the Council adopted so-called Common Positions, instruments that define a position that the Member States are required to defend during negotiations within international fora, such as the United Nations or the OECD.

Of particular importance were the two Conventions that were concluded on extradition in 1995 and 1996 - see below. In the field of mutual legal assistance, an evaluation was undertaken on how mutual legal assistance works in practice[8] in the Member States, the European Judicial Network was set up and a Joint Action was adopted on good practice in mutual legal assistance.

It turned out however that the legal instruments at the disposal of the EU did not match the objectives of the political leaders of the Union. During the revision of the Treaty of Maastricht, the so-called "third pillar"[9] became one of the areas where change was most radical. The Joint Actions were abolished and replaced by Framework Decisions and Decisions, which are both binding on the Member States and are also liable to be interpreted by the European Court of Justice under certain conditions. Framework Decisions are used to harmonise substantive and procedural criminal law and Decisions for any other purpose. The European Commission has been given a full right of initiative in the same vein as the Member States and was also the body that took the formal initiative, after a decision by the Heads of State and Government, to the European Arrest Warrant that abolishes extradition among the Member States- see below.

One of the reasons for these radical changes was that for the first time in matters of judicial and police cooperation the Union had set itself an objective: the creation of a high level of safety within an Area of freedom, security and justice. It should be remembered that in principle, among the Member States, there are no more internal borders so that people may travel freely from one country to another. Law enforcement and criminal law cooperation had however remained within the realm of sovereignty and the borders remained for this kind of cooperation. It could however now be said that the first steps towards the creation of a single Area in certain matters have been taken since the entry into force of the revised Treaty of Amsterdam on 1 May 1999.

Another reason for the radical changes was the widespread dissatisfaction with the unwieldy system of slow negotiation and uncertain implementation of international conventions - an instrument that is used for intergovernmental cooperation and not adapted to the closer ties that the Union is seeking to achieve. Experience of the Union is that conventions take too long before they are implemented (the 1995 and 1996 Conventions on extradition mentioned below have not yet been ratified by all Member States; only by 13 of them) and the role of Union Institutions, in particular that of the Court of Justice, has not been developed enough.

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[8] The reports are published on the Council's website at http://www.eu.ue.int.

[9] Judicial cooperation in criminal and police matters; the second pillar is the Common Foreign and Security Policy of the Union and the first pillar is the supranational part of the Union (i.e. the European Community) where the European Commission has the sole right of initiative (e.g. environment policy, transport, telecommunications, etc).

As regards Framework Decisions and Decisions therefore, the Council can prescribe a specific period of implementation and does also do that in practice - usually 18 months is taken as a normal period for implementation and adaptation in legislation. The Member State that does not implement a Decision or a Framework Decision within the prescribed period will be in breach of the Treaty (and of the Framework/Decision which is binding). In practice, it could be said that the Union has abandoned the instruments of conventions and will now only resort to these types of instruments which are more powerful[11].

After these brief explanations which are necessary to understand the institutional set up and the nature of the cooperation, I will now turn to the main topic of the paper.

IV. EXTRADITION/SURRENDER

A. At the level of the United Nations

When the 1988 UN drugs Convention was concluded, it was considered that this was an achievement at international level which made extradition progress considerably. And this assessment must be considered to be true, although one could also be somewhat more critical to some of the provisions of the 1988 Convention. In particular, the 1988 Convention, like a number of its predecessors, does not contain real obligations to extradite - it is not a mini extradition convention which could be read as an extradition treaty like, for instance, the 1957 Council of Europe Convention or the 1996 EU extradition Convention. Only Article 6:2 creates certain indirect extradition obligations for the Parties in that a number of the offences included in the Convention are deemed to be included in the extradition treaties applicable between the Parties. Perhaps the real difference is that the level of cooperation internationally was so low, and was only limited to certain crimes (hijacking, kidnapping of internationally protected persons, taking of hostages, protection of nuclear material, torture and suppression of offences against maritime navigation, etc.) that any progress on a more common crime such as drugs trafficking could be considered to be real progress.

If one looks then at the Palermo Convention, which was concluded some twelve years after the 1988 Convention, when the international community had further understood the threat of serious crime, when trafficking in human beings was rife and when illicit arms smuggling had become a phenomenon to combat at the international level, one may note that surprisingly little progress has been made in the field of extradition - progress in this case meaning that the provisions on international cooperation should have been strengthened. In certain respects however, there in undeniably some progress, for instance in that the protections of the individuals have been reinforced. A comparison will be carried out hereinafter.

The main achievement of the 1988 Convention is of course that it exists and that it has been widely ratified by the international community of States. It was the first worldwide multilateral convention in which all existing instruments of international legal cooperation were recognised. Through Article 6 of the Convention is established the legal basis for extradition in all kinds of serious drugs offences as well as for money laundering where the predicate offence is drugs trafficking. A worldwide standard has thus been established in this important field of law enforcement cooperation. As previously noted, drugs offences are deemed to be included as extraditable offences in already existing treaties and the

[10] It should be noted that the new draft for a European Constitution, submitted to the European Council meeting in Thessaloniki on 20 June 2003, suggests that these instruments should be replaced by European laws and European Framework laws. These instruments will be equivalent to the current Directives and Regulations and will have direct effect.

Convention may, in certain circumstances, be considered as a free standing legal basis for extradition even where there is no treaty relation.

Article 6:2 is particularly relevant to countries which still have a list of offences in their treaties whereas it has no relevance to those countries operating a threshold approach. This article is retaken in the Palermo Convention, Article 16:3. It is the same text that one finds there. However, the Palermo Convention deals also with accessory extradition, which the 1988 Convention does not cover.

Extradition is not covered by the offences mentioned in Article 3:2 of the 1988 Convention, i.e. the Convention does not create extradition relations for the intentional illegal possession, purchase or cultivation of narcotic drugs for personal consumption, but it does cover all drugs trafficking offences and ancillary offences such as preparatory or supportive acts, laundering of or dealing in the proceeds of drugs offences and acts of instigation. The Palermo Convention goes further as to the scope of the offences as it covers all the offences under the Convention and offences involving an organised criminal group and the person who is the subject of the extradition request is located in the territory of the requested State, provided that there is double criminality.

Although the 1988 Convention harmonises to a certain extent the concept of drugs trafficking, it should be noted that extradition is still subject to the concept of double criminality under article 6:5, which provides that extradition remains subject to the conditions provided for by domestic law and applicable extradition treaties. No doubt, such law will necessarily provide for the upholding of double criminality principles which have been a cornerstone of extradition law for decades. The Palermo Convention repeats in Article 16:7 these requirements and represents to some extent a step back in that it makes a specific reference not only to the grounds of refusal mentioned in Article 6:5 of the 1988 Convention but also includes a specific reference to the minimum penalty requirement for extradition. Interestingly, in the not yet concluded Corruption Convention, the Africa Group has insisted on abolishing double criminality for mutual legal assistance[11], thus making the final attempt to end the negotiations in August of 2003, but without success. New negotiations will have to be carried out at the end of September 2003 but it is expected that the draft Convention will still be able to be finished by the end of this year and signed in Mexico.

Article 6:5 specifies that extradition remains subject to the conditions provided by the law of the requested Party or by applicable extradition treaties, including the grounds on which extradition may be refused. This paragraph should not be understood as allowing Parties to the Convention to invoke grounds for refusal which may be provided for under domestic law, but which have not been included in the applicable extradition treaties. In these cases, the Treaty will have to be applied fully, in accordance with its text, notwithstanding provisions of the domestic law of the country concerned.

Article 6:6 contains a provision which could be considered to be jus cogens in extradition law, under Article 53 of the Vienna Convention; namely that extradition may be refused where there are substantial grounds for believing that compliance with the request would facilitate the prosecution or punishment of any person on account of his race, religion, nationality or political opinions, or would cause prejudice for any of those reasons to any of the persons affected by the request.

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[11] Proposed Article 53 (9): "Without prejudice to the fundamental principles of their domestic law, States Parties shall [to the greatest extent possible] render mutual legal assistance in respect of offences covered by this convention, notwithstanding the absence of dual criminality."

The Palermo Convention has taken a different approach than the 1988 Convention which contains a specific ground for refusal. Since it has to be recognised that the refusal would in any case have to be made on the basis of jus cogens, the approach of the Palermo Convention in Article 16:14, which in my opinion is more legally correct, is to state that nothing in the Convention shall be interpreted as imposing an obligation to extradite if the requested Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.

It is here first of interest to note that there are new references in the Palermo Convention to a person's sex and ethnic origin, a clear sign that society has developed since the 1980s, sometimes unfortunately not in the right direction[12]. Moreover, the Palermo Convention now contains a specific reference also to the right of a person against whom proceedings are being carried out to be guaranteed fair treatment at all stages of the proceedings (see Article 16:13). It may thus be noted that significant progress has been made in the Palermo Convention as regards the protection of individual liberties - something which was not in principle so high up on the agenda in the 1980s.

There are also certain efforts made in the 1988 Convention to introduce exceptions to traditional treaty law obligations exceptions in extradition. For instance, Article 3:10 of the Convention provides that offences established in accordance with the Convention shall not be considered as fiscal offences, political offences or regarded as politically motivated, without prejudice to constitutional limitations and fundamental domestic law of the Parties. This article may be particularly relevant to laundering offences under Article 3 of the Convention.

One may wonder however, whether this could be considered to be a real achievement, as such exceptions are usually contained in Constitutions or are considered to be part of fundamental domestic legal principles. In any case, the mere fact of putting the issue on the table in an international convention is already an achievement at the international level.

One may also note that during the negotiations of the 1988 Convention, attempts were made to address the problem of extradition of nationals. As is well known, common law countries extradite their own nationals whereas civil law countries do not normally (except under certain circumstances, such as when the enforcement of a possible sentence may be made in the extraditing country). However, the attempt to address the issue of extradition of nationals was not successful. Extradition of nationals is a matter of constitutional law in a number of countries and, as is well known, to change the constitution is a tall order in several States. There is however a provision (article 6:10) that deals with the extradition of nationals for purposes of enforcement of sentences. A similar provision is found in the Palermo Convention, Article 16:12. The Palermo Convention however goes further in that it provides for a more stringent legal regime than the 1988 Convention in relation to nationals whose cases have been submitted to a competent national authority (see Article 16:10). Moreover, the Palermo Convention also contains new provisions relating to those countries that may surrender persons only on condition that the person will be returned to the surrendering State (Article 16:11).

One of the more innovative provisions of the 1988 Convention is article 6:7 which provides for a certain standard in relation to speeding up of extradition procedures or simplifying evidentiary requirements. The paragraph in itself, however, is not very constraining upon the Parties. It merely

[12] Viz. ethnic cleansing in former Yugoslavia.

requires to "endeavour" to speed up and simplify. However, since this is a most unusual clause even in bilateral extradition treaties, it may be seen as a recognition that extradition procedures are too long and unwieldy, and that evidentiary requirements, in particular prima facie and probable cause requirements are to be simplified. Rather disappointedly, the Palermo Convention subjects the requirement of speed also to the domestic law of the Party, which of course waters down the provision to nullity (see Article 16:8). It is unfortunate that the States do not consider the importance of reasonable speed in extradition as an objective worthy to pursue. Negotiators of international instruments should consider that "justice delayed is justice denied". It is for such reasons in particular that the European Union adopted its Arrest Warrant (see below).

Paragraph 8 concerning provisional arrest is relevant to those States that can extradite only on the basis of a Treaty, and which may be willing to regard the 1988 Convention as the necessary legal basis for that purpose. The paragraph gives such a legal basis, but makes a reference to domestic law which no doubt will have to contain further specific rules as to the length of detention, etc. The Palermo Convention contains similar language.

Paragraphs 9 and 10 of the 1988 Convention deal with the concept of aut dedere aut iudicare, either extradite or try the person. Without going into the rather complicated scheme which must also be read in conjunction with Article 4 on jurisdiction, one may note that these paragraphs, which were the result of lengthy negotiations, are a compromise between those that prioritise that fugitives shall not be able to escape justice by fleeing abroad, and those that place the emphasis rather on the prevention of possible conflicts of jurisdiction. In principle, the result of the negotiations were that, when extradition is refused to another Party to the Convention because the offence was committed within its own jurisdiction or by one of its nationals, the "Refusing Party" has an obligation to exercise jurisdiction (i.e. to submit the case to its competent authorities for the purpose of prosecution) over the (Article 3:1) offence.

The Palermo Convention contains new provisions also relating to fiscal matters and on a consultation mechanism (Article 16:15 and 16).

Finally, Article 6 of the 1988 Convention contains an exhortation that the Parties shall seek to conclude bilateral and multilateral agreements to carry out or to enhance the effectiveness of extradition and on transfer of sentenced persons. These paragraphs are very weak and it is doubtful in my mind whether the mere fact of writing such language into a convention will contribute to the further drafting of such agreements. They are however a recognition that the 1988 Convention is not a free standing convention creating extradition obligations on its own. These articles are in principle retaken in the Palermo Convention.

As a general evaluation, thus, it may be said that international extradition law has not moved much further in the past 12 - 15 years except in the areas of protection of the individual. That must however be seen to be an achievement. There remain still problems concerning double criminality, the political offence exception and extradition of nationals. Moreover, it seems difficult to achieve something on the issue of speed - extradition proceedings are slow, unwieldy and do not meet the needs of a modern criminal justice system, which has become more and more globalised and where crime is truly international by nature and where criminals can easily travel and escape justice in any country.

B. At the Level of the European Union

It is no doubt to my mind that the issue of mutual recognition in criminal matters may have an enormous significance for the development of future policy-making of the EU in the field of criminal law and it may well represent a real change in policies in criminal matters. As the EU has become a very

important player internationally also in criminal matters, it is possible that these new instruments and events may have side effects in other parts of the world.

The former United Kingdom Home Secretary and current Minister of Foreign Affairs, Mr. Jack Straw, launched the idea of mutual recognition among his colleagues at a lunch during the UK Presidency of the European Union in 1998. Many wondered really what the Minister was aiming at. Was it only a question of ratification of the 1970 Convention of the Council of Europe or the 1991 Convention drafted within European political cooperation or was it something else? The European Council[13] later confirmed, when they met at Cardiff in June 1998, that further work needed to be carried out on mutual recognition. It further decided at its subsequent meeting in Tampere[14] in 1999 that mutual recognition should become the "cornerstone" of future judicial cooperation in the European Union.

C. The Concept of Mutual Recognition

In order to understand what is happening in the European Union in the development of new means of cooperation in criminal matters, it may be of some interest to examine what is meant by mutual recognition.

In fact, the concept is not new in the Union. It has been in particular used in the context of setting up the Single Market within the Union and also in the field of civil law. It is often referred to as an alternative of harmonisation, but the matter is somewhat more complicated than that. Using the concept in criminal law is however in principle new.

It is true that until today, the concept of mutual recognition has not been well defined. Some consider it a "revolution" whereas others consider that it is only another form of judicial cooperation, something similar to standard mutual legal assistance, perhaps a little bit more efficient. The question is who is right?

If one looks at the "Revised Convention for the Navigation on the Rhine of 17 October 1868 one may read [15]:

"The decisions of the courts for navigation on the Rhine in each State on the board of the Rhine will be enforced in all the other States by observing the forms provided for in the law of the executing State."

This text is applicable to financial penalties among the members of the Rhine Commission and was drafted 135 years ago. It bears, however, a striking resemblance with Article 4 of a UK initiative on mutual recognition as regards financial penalties which is currently being discussed in the Council. Did we then not reach any further in 135 years?

It has been argued that the difference between "classical cooperation" and mutual recognition is that in mutual recognition, State A takes the decision and this decision is recognised and enforced in State B. Traditional judicial cooperation is about State A requesting assistance from State B and the decision is

[13] This is the Heads of State and Government of the EU.

[14] A town in Finland.

[15] Quoted from : Council of Europe, Aspects de la valeur internationale des jugements repressifs, Strasbourg 1968.

being taken in State B. Although clarifying from the point of view of bringing some order into the system, I do not consider, however, that the situation is as clearly cut as that. An arrest warrant in State A for purposes of extradition is already under the 1957 Extradition Convention enforceable abroad and an insertion, under Article 95 of the Schengen Convention, of information relating to an arrest warrant will have immediate effects/consequences for any person found on the Schengen territory and will lead to his immediate arrest. Moreover, Article 13 of the 1990 Council of Europe Money Laundering Convention [16], in the same manner as the 1988 Drugs Convention, provides for a dual system of recognition: either "direct" enforcement of the decision or a submission to competent authorities for them to take decisions.

It cannot be said to be only a question of terminology, although the chosen terminology is important as it has both a psychological and a symbolic value. Terminology may also have an impact on practice as, if one in building a system of mutual recognition is creating autonomous concepts [17], Member States will have to examine whether these concepts fit in with their legal system or if they have to create new legal concepts. But mutual recognition is not only about admitting that we will accept a foreign decision as if it were our own, it is also about admitting that it might not fit in with our own legal system. This is also what the European Court of Justice has noted in a landmark case "Gozutok" (case 187/01), where the principle was applied to a case of ne bis in idem.

In two proposals on freezing of assets and on financial penalties that the Council has been examining during 2002 and 2003, this is shown by the use of the terms "issuing State" and "executing State". I believe that the use of those terms is important as they clearly demonstrate that we are no longer in a scheme of cooperation between States but in a system of mutual recognition.

In fact, the concepts are different: in traditional judicial cooperation it is State sovereignty that is the key element. One sovereign Member State cooperates with another sovereign Member State, fully in respect of its national law. In mutual recognition the starting point is completely different. It is first and foremost a question of accepting a foreign decision as if it were made by a national judicial authority. The key issue is: do we have trust and confidence in that decision?

The difference between traditional cooperation and mutual recognition should also have legal consequences. In principle it should no longer be possible to refuse a foreign enforcement order, it must be executed. There are, in a full blown scheme of mutual recognition, no longer any rights of refusal, at the very most rights of non-execution.

If one draws out the consequences of a genuine system of mutual recognition, it should not be possible to refuse to enforce a decision even if statutory limitations under the national law could apply, even if the highest penalty for an offence does not exist under the national law, etc. This raises very delicate issues and it will have to be examined in the future whether one can accept all the consequences of a pure mutual recognition system, not the least in the light of protection of fundamental rights.

Mutual recognition is not about turning a blind eye to a foreign judicial authority but it is about placing full faith and trust in the foreign legal system and in their judges. Therefore, real mutual

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[16] European Treaty Series No 141.

[17] It should be remembered that in the European Union, the Court of Justice might be called to pronounce itself on these concepts.

recognition is only possible among States that are very close to each other and have similar legal systems or have a high level of trust in each other.

One of the problems in exercising a control of the decision in a foreign State, including a control in the light of the provisions of the European Convention on Human Rights, is that the foreign State is in almost all cases never apprised of the entire procedure carried out in the issuing State. The case law of the European Court of Human Rights is clear on this point; the Court examines the entire procedure and sees whether it, taken as a whole, is considered to be fair. Of course serious mistakes may not be made by the judge but the question is whether it is a judge in another country that should control that question or a judge in the country where the main question is examined? For my part I believe that in principle there should not be any possibility for the judge of another country to control such mistakes unless they are clearly brought to his attention and in such cases they will probably in any case be considered null and void under general rules, for instance of constitutional emergency, that could always be applied. Therefore, in principle, full faith and trust needs to be placed in the foreign judicial authority of another Member State.

The question of harmonisation and mutual recognition has been debated intensively within the European Union since the Tampere European Council. It seems clear from the debate that harmonisation actually favours mutual recognition and that the two go hand in hand. Harmonisation is not an alternative to mutual recognition and, in the same manner, mutual recognition is not an alternative to harmonisation. However, the very concept of mutual recognition means also that there might be differences between Member States' legislation, but that should not in itself be an obstacle to mutual recognition.

In my opinion, double criminality is against the concept of mutual recognition - it should therefore not apply. This is also born out to a large extent by the Framework Decision on the European Arrest Warrant.

D. The European Arrest Warrant

The concept of a European Arrest Warrant (EAW) is a concept which, along the lines of mutual recognition described above, will abolish extradition between the Member states of the European Union and instead institute a system of surrender. The EAW must be recognised by the judicial authorities of every Member State of the EU. Intervention of the Ministries of Justice is abolished and the EAW is circulated directly between judicial authorities, sometimes via a computerized system which has existed inside the EU since 1990, the so called Schengen Information System. The EAW serves as a request for location, arrest, detention and surrender of the fugitive.

Viewed from the perspective of cooperation in criminal justice matters there can be no doubt that the Framework Decision on the European Arrest warrant does not amount to an automatic extradition or surrender on demand. On the other hand the changes to which it gives effect are, in their nature and potential effect, unprecedented for a multilateral instrument in this area of concern. It is, in fact, the first instrument seeking to implement the principle of mutual recognition in international criminal law.

To many the European Arrest Warrant is closely associated with the formulation, by the Extraordinary European Council of 21 September 2001, of an action plan to combat terrorism. While it is true that it constitutes a key ingredient of that plan and that the terrorist attacks on the U.S. of 11 September produced the necessary political momentum for its timely conclusion, it is necessary to recall that the origins of the initiative predate those tragic events.

The perceived need to improve the efficiency and effectiveness of extradition among the Member States of the EU dates back over twenty years and for prolonged periods it had a position of prominence

on the agenda of the Judicial Cooperation Working Group operating in the framework of European political cooperation. The concept of the creation of a "European Judicial Area" can even be traced back to the mid 1970 when, the then French President, Valerie Giscard d'Estaing coined the expression.

Inter-governmental interest in extradition was, however, revitalised by the entry into force of the Treaty on the European Union on 1 November 1993. Indeed, at its first meeting later the same month, the Council of Interior and Justice Ministers stressed the importance of judicial cooperation and adopted a statement requesting that possible improvements in both extradition requirements and procedures be examined. This set in train a process which was to result in, among other achievements, the conclusion of the EU Extradition Conventions of March 1995 and September 1996. Both embodied significant modernising features and thus constitute an appropriate point of reference in any assessment of the changes brought about by the arrest warrant.

The 1995 Convention institutes a system of simplified extradition between the Member States of the EU. The consent of the person and the surrendering State is needed and the conditions for obtaining such consent are specified in the Convention. So far, thirteen of the fifteen Member States have ratified this Convention.

The 1996 Convention on extradition between the Member States of the EU seeks to deal with some of the problematic issues in international extradition law. It lowers the threshold for extradition to six months in the requested member State, it attacks the problems of double criminality in relation to conspiracy and association to commit offences, it abolishes the political offences exception between the Member States (however with some exceptions), it deals with fiscal offences and with extradition of nationals, without however reaching radical solutions and it contains provisions with respect to lapse of time and amnesty.

It is however true to note that these two Conventions are classical intergovernmental instruments which do not correspond to the level of ambition which started to take shape within governments of the European Union and which has led to the creation of the concepts of an Area of Freedom, Security and Justice in the Amsterdam Treaty and abolishing the internal borders of the Union. This was one of the main reasons why the concept of an EAW was created.

While there has thus been a long established recognition of the need for the modernisation of the law and practice of extradition within the EU, the nature and focus of that debate was to be transformed in a radical fashion by the Tampere European Council of October 1999. When the Council reaffirmed the importance of developing the Union as an area of freedom, security and justice it sought at the same time to ensure that the subject remained at the "very top of the political agenda" and to provide "policy orientations and priorities" to guide subsequent developments.

Of these the most innovative and demanding, from a criminal justice perspective, relates to mutual recognition of judicial decisions. In the words of the conclusions (the so-called Tampere Milestones):

> *33. Enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate cooperation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities.*

The Tampere conclusions also called for specific action to be taken in the sphere of extradition:

> *35. With respect to criminal matters, the European Council urges Member States to speedily ratify the 1995 and 1996 EU Conventions on extradition. It considers that the formal extradition procedure should be abolished among the Member States as far as persons are concerned who are fleeing from justice after having been finally sentenced, and replaced by a simple transfer of such persons, in compliance with Article 6 TEU. Consideration should also be given to fast track extradition procedures, without prejudice to the principle of fair trial. The European Council invites the Commission to make proposals on this matter in the light of the Schengen Implementing Agreement.*

Finally the Council called for a Programme of measures to be adopted by the end of 2000 to implement the principle of mutual recognition. This has since been accomplished. Two initiatives relate to the extradition sphere (measures 8 and 15); as with Tampere they distinguish between pre and post conviction cases. In the final event, however, the European Arrest Warrant, like classical extradition law, was formulated so as to embrace both elements.

Interestingly in the original Programme of measures neither was afforded the highest priority (2 and 3 respectively). In another programme of the Union, the so-called Millenium Strategy against organized crime, the creation of a system of surrender was considered to be a long term objective (to be realised within ten years). That the European Arrest Warrant was to become the first mutual recognition measure upon which provisional agreement was to be reached was the result of the change of emphasis and perception brought about by the events of 11 September.

As has been pointed out in the above mentioned Programme of measures 2000:

> "*Implementation of the principle of mutual recognition of decisions in criminal matters presupposes that Member States have trust in each others' criminal justice systems. That trust is grounded, in particular, on their shared commitment to the principles of freedom, democracy and respect for Human Rights, Fundamental Freedoms and the Rule of Law*".

The recitals to the Framework Decision on the EAW explicitly re-affirm that high level of confidence. From that base it goes on to articulate a scheme designed to "remove the complexity and potential for delay inherent in the present procedures of extradition". That classical system of inter-state cooperation is abolished: replaced "by a system of surrender between judicial authorities".

Indeed, it is the decision to remove the executive from its previously central role in the process of surrender which constitutes perhaps the most innovative feature of the new regime. As the UK Home Office has noted:

> *The warrant can only be executed by a judicial authority in the executing state, and there is virtually no involvement for the executive in the decision-making process. The Central Authority ... may have a small role to play in transmitting documents, requests for additional information and facilitating translations and may be involved in some limited elements of the decision making process.*

The "judicialisation" of the process of surrender is to be warmly welcomed. Over the years - and particularly in high profile cases - the propensity for politicians to intervene to prevent extradition, where it was otherwise legally possible, has often been a source of friction and concern.

While the new process is to be overwhelmingly judicial in character it is not to be automatic. It may be based on the notion of mutual trust but it also acknowledges that there remain limits to the consequences which flow from such trust. Consequently the Framework Decision contains both mandatory and discretionary grounds for non-execution (see especially Articles 3-5) as well as a range of other limits and guarantees as regards the nature and scope of the process.

That said there is no doubt that impressive strides have been taken towards the removal of some of the traditional barriers to cooperation, traditionally found in extradition instruments. By way of illustration let us take what were perhaps the three most controversial and difficult issues in the lengthy EU engagement with extradition, namely:

1) non-extradition of nationals;
2) the political offence exception ; and
3) the requirement of double criminality.

1. Non-Extradition of Nationals

As has been noted above, many States, particularly those from the civil law tradition, have been precluded by constitutional or statutory provisions from extraditing their own nationals. For this reason it has become commonplace for extradition arrangements to include nationality as an optional ground for refusal. This is, for instance, the stance taken in Article 6 of the 1957 European Convention, drafted under the auspices of the Council of Europe, though it is associated with a requirement to submit the case for domestic prosecution when this ground is invoked (As many practitioners know, this possibility is often hardly worth the paper on which it is written.).

As noted above, the 1996 EU Convention recorded only modest movement in this area. Article 7 established the basic principle that extradition must not be refused on this basis (a principle subsequently acted upon by Germany that made a change to its Constitution and allowed extradition of nationals with the EU). However, the same article contained an opt-out or derogation provision which, in effect, permits Member States to maintain this barrier on an indefinite basis.

By way of contrast the Framework Decision on the European Arrest Warrant does not include nationality (in its pure form) as either a mandatory or discretionary ground for non-execution (save in respect of Austria where a special, though limited, transitional provision applies until 31 December 2008 - Art. 26). That said, the EAW stops short of negating nationality as a relevant factor. This is well illustrated by the inclusion, in Article 5(3), of the option of making execution conditional on a guarantee that, upon conviction, the individual is returned to his or her state of nationality to serve the sentence there (This is commonly called the "Dutch solution" as it has been advocated by the Netherlands in international fora for a number of years since the Netherlands found this solution in extradition cases with the USA where the death penalty could ensue.). This approach is complemented by an option, in respect of convicted persons, to execute the sentence in the state of nationality rather than return the offender to the state of conviction (Art. 4(6)). A similar philosophy is also evident in the treatment of the transit of nationals (Art. 20(1)).

From this it may be fairly concluded that the Framework Decision has made significant strides in eliminating a major barrier to extradition while remaining sensitive to some of the underlying issues of principle.

2. The Political Offence Exception

The EAW performs even more radical surgery on the so-called political offence exception to extradition. Over many years the Member States of the Council of Europe have played a key role in promoting the incremental abolition of this controversial barrier to extradition: a process commenced in the 1957 Convention, and carried forward by Protocol I in 1975 (Crimes against Humanity and War Crimes), and, more significantly, by the 1977 European Convention on the Suppression of Terrorism. In so doing the Council of Europe has also pioneered a substitute form of protection for the individuals concerned; namely, the so-called fair trial or asylum clause (1977: Art. 5). The major defect in this approach was the continued ability and willingness of countries (including the Member States of the EU) to undermine the effectiveness of these developments by having (frequent and extensive) recourse to limiting reservations and declarations.

The 1996 EU Convention recorded some progress in this sphere by establishing both a new general principle or goal and a new minimum standard. Article 5(1) set as the general principle that no offence may be regarded as political inter-se. Departures from this may, however, be effected by State declaration. However, Article 5 also sets a limit to this process in the form of a common minimum standard; that no EU Member can regard the offences covered by the European Convention on the Suppression of Terrorism as political. By way of compensation the fair trial or asylum provision would, however, continue to apply.

The EAW has taken this process an important stage further: namely, the abolition of the political offence exception as such. This major achievement is not, however, specifically proclaimed in the text. Rather it flows from the fact that political offences are not enumerated as mandatory or optional grounds for non-execution. The sole remaining element of the treatment of this subject is confined to the recitals and takes the form of a modernised version of the fair trial or asylum provision.

In this sphere also it may properly be concluded that the EAW will give effect to substantial change - at least (given the limited number of cases) symbolically.

3. Double Criminality

The feature of the EAW scheme which has attracted perhaps the greatest public attention to date is the exceptions which it creates to the traditional requirement of double criminality; i.e., the rule which, in essence, provides that there shall be no surrender for acts which are not categorised as criminal by the law of the State of refuge. As previously noted, this traditional barrier to extradition, it should be noted, was left largely intact by the 1996 EU Convention (though relaxed by Article 3 for conspiracy and association to commit terrorist, organised crime and drugs trafficking offences).

These limited exceptions to the double criminality rule are significantly widened by Article 2(2) of the framework decision. In respect of a very broad list of thirty two generic types of offences, it abolishes the possibility of examination of double criminality. If a foreign judge certifies that he is investigating a particular offence which is punishable by imprisonment in his country of at least three years and if that offence is on the list of thirty two offences, the judge in the executing state shall not examine the facts of the case and control double criminality. It is very important to note that for the purposes of the EAW it is the act as defined by the law of the issuing State which governs the matter. Therefore, in principle, an executing judge is not allowed, under the Framework Decision, to examine whether double criminality exists. If the foreign judge has certified in the EAW that the offences which he is investigating are on the list, the case is closed.

Moreover, the list of offences contained in Article 2(2) is not restricted to terrorist offences. Indeed its very broad coverage has been heavily influenced by the Europol Convention Annex. Crimes such as racketeering, money laundering, computer-related crime, fraud and swindling are on the list, so there is ample room for manoeuvre for the judges who want to use the EAW. The list can be added to by the Council, acting unanimously, following consultation with the European Parliament. For crimes which are not on the list or which have a penalty level of less than three years in the issuing State, double criminality will continue to apply.

While this approach constitutes a radical departure from pre-existing European and international precedents it is of importance to stress that the requirement of double criminality has not been abolished completely, although it may be assumed that most cases of what was previous extradition among the Member States will now be covered by the list.

Also relevant in this context is the fact that the Framework Decision leaves intact the traditional rule of extradition law in relation to extraterritorial offences; namely that there is no obligation to surrender when the arrest warrant envisages offences which "have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside the territory of the executing Member State" (Art. 4(7)). As a consequence the difficulties encountered by Spain on this basis in the Pinochet affair could arise again in the future. Importantly this permissive restriction applies to all offences including those listed in Article 2(2).

Whilst there has again clearly been significant progress in reducing the impact of a traditional obstacle to extradition, the treatment of double criminality and related matters also serves to underline that the system provided for in the Framework Decision falls some way short of extradition on demand. In my opinion, the Council has reached a fair balance between efficiency and protection of individual rights.

Among the other notable features contained in the Framework Decision and designed to modernise and expedite the process of surrender one might mention the following:

(i) A significant relaxation of the requirement of speciality - albeit along the lines trailed in the 1995 and 1996 EU Conventions.
(ii) It makes provision for Eurojust to play a limited though constructive role by:- the provision of advice (upon request) in cases of multiple requests for surrender (Art. 16(2));- requiring states to inform Eurojust of the reasons for failure to observe the stringent time limits for surrender (Art. 17(7)).
(iii) In principle the system should consign the frequent and lengthy delays (often counted in years) associated with extradition to the dustbin of history. Under the Arrest Warrant the process should take place very rapidly: in principle not more than 60 days which however in exceptional cases may be extended to 90 days (Art. 17). Where surrender is made upon consent, the process will take 10 days.

The EAW is, without doubt, the most important development to emerge from a quarter of a century of EU engagement with the issue of enhanced cooperation between Member States in the administration of criminal justice. If one thinks of the law and practice of extradition as involving or reflecting some sort of balance between its cooperative and protective purposes there has, through this measure, been a decisive shift towards cooperation and even towards recognition of each others systems.

This is not to say, however, that protections for the individual have no role to play in this new system; far from it. By way of illustration, the provisions on such matters as double jeopardy, right to a lawyer, amnesty, and in absentia convictions all have a protective purpose.

At the root of some concern over the EAW expressed by human rights organisations is the view that the mere fact of participation by all Member States in the ECHR, with the associated right of individual petition, is not a sufficient guarantee for the appropriate treatment of the individual whose surrender has been sought. Furthermore, it is argued that the relatively few ECHR inspired references in the text of the framework decision do not adequately address this issue. In my opinion, such concerns are not founded.

There is one substantive provision in the operative part of the text which makes a reference to the protection of human rights - namely Article 1(3). This provision states that the decision shall not have the effect of amending the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 TEU (which refers to the ECHR and the constitutional traditions of the Member States). The question here is whether there was a need to state the obvious - of course the Member States of the EU are bound by the European Convention of Human Rights and their constitutions.

The Preamble also contains three further relevant recitals; namely:

(i) Paragraph 10 - On suspension of the arrest warrant in the case of a severe breach of the principles set out in Article 6(1) TEU (which includes Human Rights and Fundamental Freedoms);
(ii) Paragraph 12 - Which, inter alia, embodies the fair trial or asylum provision to compensate - in effect - for the abolition of the political offence exceptions; and
(iii) Paragraph 12a. Due process, freedom of the press, etc.

It is argued by some that this is insufficient; that the text must be supplemented by the inclusion of substantive grounds for refusal where the individual faces a violation of Article 6 or Article 5 rights upon return.

The Home Secretary in the UK has noted:

> *It is conceivable that there may be a wholly exceptional case in which the UK courts may judge that there is a risk of treatment, on return ... that is incompatible with the ECHR. Under those circumstances, the District Judge could refuse to execute a request for a European Arrest Warrant.*

The basis for this view is clearly Article 1(3). It should, however, be noted that the Strasbourg case law indicates that the circumstances triggering such protection are set at a relatively high level (See, e.g. Soering Case).

It would, as the work of the International Law Association has demonstrated, have been possible to formulate an explicit general human rights clause to reflect this restricted reality (though with a high threshold; e.g. "a real risk of a serious violation"). However this is seemingly implicit in Article 1(3) - that this could actually happen in the context of the development of the EU today is however rather improbable, to say the least. Those seeking broader protections than this might be best thought of as looking for measures to compensate for the removal of those principles of extradition which were of direct benefit to the individual. This says something fairly fundamental about the reality of the existing levels of mutual trust on which mutual recognition is based.

E. Mutual Legal Assistance

1. At the Level of the United Nations

Mutual legal assistance has, in the same manner as extradition, for decades been characterized by concepts of sovereignty and protection of the essential interests and the ordre public of the requested State. It has in fact become a tool for diplomats and not for law enforcement, scarcely meeting the needs of a modern society which is open to attack from terrorists and organized criminals engaged in trafficking in all sorts of goods or of human beings.

However, the trend was broken to some extent when the 1988 Convention for the first time in a world wide instrument incorporated provisions on international cooperation, taking into account in particular experiences of a number of countries belonging to the common law tradition, in the conclusion of bilateral treaties on the subject.

In Europe, the mutual legal assistance until 1990 was founded on the 1959 Council of Europe Convention on mutual legal assistance in criminal matters and, for some countries, on the 1962 Benelux Convention. Within the Nordic countries, a regional cooperation had been developed which was largely based on uniform laws and on trust (and common language) between those countries.

But at the worldwide level, it was clear that the ever increasing drugs trafficking phenomenon had to be met - the drafting of the 1988 Convention provided a golden opportunity. Moreover, the Convention allowed for provisions on transfer of criminal proceedings, transfer of enforcement of sentences, transfer of sentenced persons and the transfer of the enforcement of confiscation orders, to be incorporated. However, in relation to such latter cooperation, the drafters deliberately refrained from elaborating detailed provisions as it was considered that such cooperation for the time being would be more appropriate for regional or bilateral conventions.

It would not be possible to examine in detail all the provisions of the 1988 Convention and the significant progress that was made at the time. Such an examination would make this paper too long and unwieldy. I will therefore concentrate the following analysis on some of the more significant improvements between the 1988 Convention and the Palermo Convention.

Before doing so, it should however be noted that the two Conventions (in Article 7(1)-(6) for the 1988 Convention and in Article 18(1)-(6) for the Palermo Convention) are freestanding and not only contingent upon the existence of a Treaty between the Parties. They therefore give a solid legal basis to afford the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings relating to offences covered by the Conventions (the 1988 Convention only covers the core offences). In the following paragraphs (8-19 for the 1988 Convention and 9-29 for the Palermo Convention), the two Conventions are not freestanding but apply to requests if the Parties are not bound by a Treaty or, if they are bound by a Treaty, that Treaty will apply unless the Parties agree to apply the UN Conventions. The Palermo Convention however "strongly encourages" its own application if it facilitates cooperation.

Only from the number of paragraphs in the articles, it may be concluded that the provisions of the Palermo Convention represent significant progress and a higher level of precision than the 1988 Convention. Among the new (or more specified) measures mentioned as examples of mutual legal assistance under the Palermo Convention are freezing, providing information, evidentiary items and expert evaluations, as well as the provision of government records. The facilitation of the voluntary appearance of persons in the requested State has also been added specifically, although Article 7(4) of the 1988 Convention contains some weak treaty language that also would cover this situation.

Provisions of so-called spontaneous information have also been added in the Palermo Convention, probably on the basis of experiences gained in the context of Article 10 of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, which, to my knowledge, was the first multilateral instrument on cooperation in criminal matters that contained such a provision. Paragraph (18(4)) of the Palermo Convention is however considerably weakened as it is made contingent upon not being without prejudice to domestic law, something that may mean that in practice the paragraph may not be so efficient. It is also interesting to note that the Palermo Convention in the following paragraph to a great degree of detail specifies the conditions under which the spontaneous transmission will take place and in particular contains language as regards information that is exculpatory to an accused person. This again illustrates how the modern multilateral treaties have become more protective of individual rights of persons than the previous generation.

Interestingly, the Palermo Convention goes into some detail, in its paragraph 13, also on the crucial role of the Central Authorities to ensure that requests are speedy and properly executed or transmitted to an executing authority responsible for the execution of the request (which in such a case is "encouraged" to execute speedily - an obvious reference to the independence of the judicial authorities). The Palermo Convention also contains, in paragraph 24, a specific obligation for the States to execute the request for mutual legal assistance "as soon as possible" and that it shall take "as full account as possible" of any deadlines suggested by the requesting State for which reasons are given. The information requirements have also been specified to a high level of detail in that paragraph. These provisions are probably inspired by similar provisions in the previously mentioned Joint Action of 1998 of the Council of the EU on best practices in MLA and of corresponding provisions in the EU 2000 Convention on mutual legal assistance.

The Convention also deals with the difficult problem of federal States which may have several central authorities. It also considerably alleviates the formalism concerning written requests transmitted via diplomatic channels and allows for any means capable of producing a written record under conditions allowing the establishment of authenticity. This may mean that at least faxes may be used or, with a generous interpretation, even E-mails. It will also allow a development in the future that would be technology neutral. No doubt, this could allow States to expedite the execution in particular of freezing orders where often speed is of crucial importance.

The Palermo Convention reflects also technological progress in that it allows ("wherever possible and consistent with fundamental principles of domestic law") for the hearing of witnesses by videoconference (see paragraph 18). This possibility was first included in the Convention of 29 May 2000 of the European Union on mutual legal assistance between the Member States and has in that convention been considerably regulated in detail. The Palermo Convention has not gone into detail but provides merely for the legal framework for the decision to be made. It may be assumed that this paragraph may need some further specific agreements between the Parties, as in practice several problems have not been addressed, such as the responsibility for perjury and other delicate questions.

2. <u>At the Level of the European Union</u>

In a paper which I submitted to the Group training course for senior officials at UNAFEI in February 2000, I described in detail the work of the European Union as regards mutual legal assistance. It is therefore not necessary that I again go into detail on that work. It is sufficient here to note that the Convention, which I described in that paper, has now been adopted on 29 May 2000 and is so far ratified by three Member States.

In addition, an innovative Protocol to the Convention was adopted in 2001. This Protocol sets up a system whereby the Member States would be able to provide mutual legal assistance in the search for bank accounts of suspects and, when found, to block money on such accounts. This Protocol represents a great step in the fight against organised crime and constitutes a breakthrough in enhancing efficient law enforcement.

As previously mentioned, the Council, in implementing its programme concerning mutual recognition, has begun to draft a number of instruments embodying this principle. Many of these instruments have been recently adopted or are in the final stages of negotiation and will be adopted shortly.

Among these measures are Framework Decisions on:
Freezing of assets. This Framework Decision[18] will enable assets to be frozen within 24 hours in the entire Union.
Financial penalties. This Framework decision will enable financial penalties to be executed in the entire EU on the basis of a very simplified system with few grounds for non-execution.
Confiscation. This Framework Decision will enable confiscation orders to be executed within the Union on the basis of a very simplified system. It is still under discussion but can be expected to be adopted within six to ten months.

In addition, the Council is expecting a new proposal from the European Commission to set up a system of mutual recognition for obtaining evidence abroad.

V. SOME NOTES ON MONEY LAUNDERING AND FINANCING OF TERRORISM

The offence of money laundering was first, in an international context, mentioned in an old Council of Europe Recommendation from 1980, but the Council of Europe was ahead of its time. When then the issue was brought up in the context of the negotiations on the 1988 Convention, things had moved ahead and the international community was prepared to deal with the issue - there was a generally shared feeling among legislators and policy makers that there was a need to "hit criminals where it hurt most - in the wallet".

The definition of money laundering was taken up not only in the 1988 Convention but also in the 40 Recommendations of the FATF and in the 1990 Convention. This contributed to a general consensus that something had to be done, although there was (and still is) doubt in some countries about making money laundering a criminal offence across the line, and not only for proceeds from drugs trafficking.

The activities of the FATF, MONEYVAL or other international groupings have however had a great impact and there is a growing international consensus on the topic.

[18] OJ L 196/45, 2.8.2003.

In the European Union, a number of initiatives have been taken in the form of binding legislation. Among these the following can be mentioned:

- The Council Directive of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering[19]. This Directive obliges the Member States to prohibit money laundering and lays down detailed rules on serious transaction reports and on "know your customer" requirements. This Directive was supplemented in 2001[20] when the obligations of the Directive were extended to certain non-financial activities and professions, including lawyers and accountants. It also broadened the prohibition of the predicate offences.
- The Joint Action on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime[21]. This Joint Action deals with a number of issues such as reservations to the previously mentioned Council of Europe Convention, training and other issues.
- A Framework Decision on the same topic[22] which approximates criminal law and addresses the issue of predicate offences and sanctions (at least four years imprisonment). Value confiscation is introduced throughout the EU.
- A Decision on cooperation between Financial Intelligence Units[23]. The FIUs shall cooperate to assemble, analyse and investigate relevant information within the EU. It lays down rules on exchange of information and on analysis thereof.

The special European Council, held in Tampere on 15 and 16 of October 1999, was devoted to the maintenance and the development of an area of freedom, security and justice in the European Union. Among the conclusions of the Tampere European Council was a call for improved cooperation against cross border crime through the use of joint investigation teams to combat, inter alia, terrorism and for special action against money laundering.As regards financing of terrorism, the following may be noted.

In the wake of the terrorist attacks in the USA on 11 September 2001, the Justice and Home Affairs Council met on 20 September and adopted a series of measures to combat terrorism, including in the areas of judicial and police cooperation and the financing of terrorism.

At the extraordinary European Council on 21 September 2001 it was decided that the fight against terrorism would be a priority objective of the European Union. The Council approved a plan of action dealing with enhanced police and judicial cooperation, developing international legal instruments against terrorism, preventing terrorist funding, strengthening air security and greater consistency between all the Union's policies. An informal meeting of the ECOFIN Council took place on 21 September 2001. It issued a statement on actions to combat the financing of terrorism.

The statement outlined a number of initiatives in this regard. These were:

- Rapid adoption of the second money laundering Directive (see above) and a Framework Decision on the execution in the EU of orders freezing assets or evidence.[24]
- Paying particular attention to activities linked to terrorism in the draft Directive on insider trading.
- Reinforcing exchange of information between Financial Intelligence Units (FIUs). See above.
- Ensuring extension of the Financial Action Task Force (FATF) mandate to include terrorist financing and supporting the FATF's Non-Cooperative Countries and Territories (NCCT) exercise and review of its 40 Recommendations.
- Adopting a proactive and coordinated approach to such matters in international fora.
- Asking EU future members to be in line with EU standards.
- Ratification and implementation of relevant UN Resolutions and Conventions.

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19 OJ L 166/77, 28.6.91.

20 L 344/76, 28.12.01.

21 OJ L 333/1, 9.12.98.

22 OJ L 182/1, 5.7.01.

23 OJ L 271/4, 24.10.00.

24 OJ L 196/45, 2.8.2003.

On 19 October 2001 the European Council declared that it is determined to combat terrorism in every form throughout the world. It also indicated that it would continue its efforts to strengthen the coalition of the international community to combat terrorism in every shape and form. It called for particular attention to be given to approval of the European arrest warrant, the common definition of terrorist offences and the freezing of assets, increased cooperation between the operational services responsible for combating terrorism (Europol, Eurojust, the intelligence services, police forces and judicial authorities) and effective measures to combat the funding of terrorism by formal adoption of the second Money Laundering Directive and speedy ratification of the UN Convention for the Suppression of Terrorist Financing.

Therefore, since October 2001 a number of actions have been taken by the EU aimed at countering terrorism as well as preventing the acquisition, retention and use of funds or assets by such organisations. Taken together with the earlier actions these constitute powerful measures in the Union's arsenal to fight terrorism. Outside of what has already been mentioned above, some of the further legislative actions will be mentioned here.

- Council Decision of 6 December 2001 extending Europol's mandate to deal with serious forms of international crime listed in the Annex to the Europol Convention[25] The effect of this Council Decision was to enable Europol to deal with the serious forms of international crime listed in the Annex to the Europol Convention, such as murder, grievous bodily injury, kidnapping, hostage-taking, organised robbery and illicit arms trafficking. Europol's mandate now includes support for law enforcement against serious international organised crime, including terrorism.

- Council Common Position[26] of 27 December 2001 on combating terrorism[27]. The Common Position sets out a number of actions to be taken to combat terrorism. The principal measures contained in the Common Position are: criminalising the financing of terrorism within the EU, freezing of financial assets or economic resources of persons or entities involved in terrorism, prohibiting the giving of financial or other assistance to such persons or entities, requiring measures to be taken to suppress any form of support for those involved in terrorist acts, taking steps to prevent terrorist acts and denying safe haven to those involved in such acts. It also calls for Member States to afford one another (and third countries) assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, better border controls to prevent the movement of terrorists, information exchange and cooperation to prevent and suppress terrorist acts. Furthermore the Common Position contains a list of international conventions and protocols against terrorism to which member states should become parties.

- Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism[28]. The Common Position establishes the primary list of persons, groups and entities involved in terrorist acts. It sets out the criteria to be used to decide who should be considered as terrorists for inclusion on the list and the actions which constitute terrorist acts. The names on the list are to be reviewed at least once every six months. Under the Common Position the European Community is

[25] OJ C 362/01, 18.12.01.

[26] This is a binding instrument under the Common Foreign and Security Policy.

[27] OJ L 344/90 of 28 December 2001.

[28] OJ L 344/93 of 28.12.0.1.

empowered to order the freezing of the funds and other financial assets or economic resources of, and the prohibition on the provision of financial services to, the listed persons, groups and entities. Member States are required to afford each other assistance in preventing and combating terrorist acts. In accordance with Article 6, the Common Position is to be kept under constant review. The annex to the Common Position has been up-dated several times.

- Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism[29]. The Regulation provides for the freezing of the funds, financial assets and economic resources of certain persons, groups and entities involved in terrorism, for a prohibition on the making available of funds, financial and economic resources to such persons, groups and entities and a prohibition on the provision of financial services to them. It authorises the Council to establish and maintain a list of persons, groups and entities involved in terrorism. Provision is also made for the granting of authority for the use of funds frozen in accordance with the Regulation to meet essential human needs and for certain other payments (e.g. taxes, utility bills etc.).

- Council Decision of 27 December 2001 establishing the list provided for in Article 2(3) of Council Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism[30]. This decision contains a list or persons, groups and entities against whom specific restrictive measures are to be applied in accordance with Council Regulation No 2580/2001. An updated list of persons, groups and entities to which the measures in the Regulation apply has been published several times.

- Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime[31]. This Decision establishes Eurojust, to be composed of seconded prosecutors, judges or police officers from each Member State. The objectives of Eurojust are to stimulate and improve the coordination, between the competent authorities of the Member States, of investigations and prosecutions, to improve cooperation between the competent authorities of the Member States and to support the competent authorities of the Member States in order to render their investigations and prosecutions more effective. The Decision also provides that Eurojust shall establish and maintain close cooperation with Europol and OLAF (an EU body protecting the financial interests of the Community). It also permits Eurojust to conclude cooperation agreements with third States and international organisations and bodies. It may also establish contacts and exchange experiences of a non-operational nature with other bodies, in particular international organisations and conclude cooperation agreements with third States. Eurojust has its seat in The Hague and has already dealt with more than 500 cases of serious international crime.

- Council Framework Decision of 13 June 2002 on joint investigation teams[32]. The Framework Decision is intended to make the combating of international crime as effective as possible. It considered it appropriate that a specific legally binding instrument on joint investigation teams should be adopted to apply to joint investigations into drugs/human trafficking and terrorism and that they should be set up, as a matter of priority, to combat offences committed by terrorists. The Framework Decision provides that two or more Member States may establish joint investigation teams for a specific purpose and for a limited period to carry out criminal investigations in one or more of the States establishing the team.

[29] OJ L 344/70 of 28.12.01.

[30] OJ L 344/1 of 28.12.01.

[31] OJ L 063/1 of 6.3.2002.

[32] OJ L 162/1 of 20.6.02.

- Council Framework Decision of 13 June 2002 on combating terrorism[33]. The Framework Decision requires Member States to adopt a common definition of terrorist offence as set out in Article 1. It also obliges Member States to criminalise certain actions related to terrorist groups or terrorism, such as directing or participating in the activities of a terrorist group as well as inciting, aiding or abetting and attempting to commit a terrorist offence.

VI. CONCLUSION

As may be seen, the legislative activity of the Council of the EU is impressive. A number of legislative proposals are under way and many acts have been adopted. The political objective of creating an Area of Freedom, Security and Justice should be realised gradually. At the same time, the Union needs to dialogue with its partners because crime does not stop at its frontiers. One interesting example of this dialogue is the recently signed Treaties on extradition and on mutual legal assistance between the EU and the United States of America, where the EU for the first time in this context acts as an entity with a legal personality.[34] The Union is also currently negotiating treaties in this area with Norway and Iceland and will, no doubt, in the future negotiate treaties with its partners.

[33] OJ L 164/3 of 22 June 2002.

[34] OJ L 181/27, 19.7.2003.

SPECIAL INVESTIGATION TECHNIQUES AND DEVELOPMENTS IN MUTUAL LEGAL ASSISTANCE - THE CROSSROADS BETWEEN POLICE COOPERATION AND JUDICIAL COOPERATION

Hans G. Nilsson *

I. INTRODUCTION

The international community has during many decades looked at police cooperation and judicial cooperation in criminal matters as two separates disciplines. Traditionally, police cooperation has been carried out within the framework of Interpol on a purely bilateral basis. The police have been used to cooperate informally and exchange information, sometimes with a dubious legal basis for doing so. On the other side, judicial cooperation has been an extremely formalised exercise, more looking like international diplomacy than efficient law enforcement.

However, the globalisation, the internationalisation of crime and its development into very serious forms including its spread over the world in many different forms has forced judicial cooperation to meet more and more with police cooperation. It has been realised over the past two decades that police cooperation in itself is not an end and that it must come closer to the finality of the investigation and prosecution of an offender and the stopping of serious criminality such as trafficking in human beings, drugs trafficking and terrorism. On the other hand judicial cooperation has, very slowly, become slightly less formal and more direct, in particular within Europe. It has been understood that modern day investigations cannot be carried out like they were when there was no Internet, no SWIFT transfers or no e-mails.

Therefore, the police cooperation, as it traditionally has been seen, has joined mutual legal assistance and, on the other hand, mutual legal assistance has come much closer to traditional police cooperation. In fact, the border between the two has become blurred and it is no longer possible to distinguish specifically between these forms of cooperation. This development can also be seen in the international legal instruments that have been adopted within the past two decades. It should also be realised that what may be considered to be police cooperation in one country could be predominantly a judicial cooperation measure in another country. Police services may have powers in some countries which are only devolved to judicial authorities in other countries and vice versa. The difference between common law and civil law traditions in this respect is great and has certainly contributed to the relatively disparate picture that one gets when examining international cooperation.

There has also been a shift, in particular in Europe, from traditional judicial cooperation through central authorities or through diplomatic channels, to more direct cooperation between judicial authorities or by transmission through the International Criminal Police Organisation. The recognition or use of Interpol is already laid down in the 1959 Council of Europe Convention on mutual legal assistance in criminal matters and has also been recognised in Article 7, paragraph 8 of the 1988 Convention of the UN.

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It is significant that the UN 1988 Convention deals very little with new forms of cooperation such as special investigative teams. However, Article 9, concerning other forms of cooperation and training than the classical mutual and legal assistance, deals with the enhancement of the effectiveness of law enforcement action to suppress the commission of offences established in accordance with the Convention. It may be considered to be a precursor to what would follow in other Conventions. This Article suggests that on the basis of bilateral or multilateral agreements or arrangements the parties shall cooperate with one and another in conducting inquiries with respect to drugs offences having an international character, concerning the identity, whereabouts and activities of persons suspected of being involved in drug offences, the movement of proceeds of property involved in the commission of these offences and the movement of narcotic drugs. The Convention suggests in Article 9.1.c., in appropriate cases and if not contrary to domestic law, that Joint Teams should be established taking into account the need to protect the security of persons and of operations. Therefore, for the first time the possibility of the creation of so called Joint Investigation Teams has been established in this Convention. However it may be that not many Joint Teams have been established under the provisions of the Convention as it is probably too basic to be able to be implemented properly unless there is complete mutual faith and trust between the Parties.

The developments under international law continued, however, after the 1998 Convention and a number of instruments in Europe began to contemplate the taking of specific measures which may be considered to be special investigative measures. Before examining some of these measures, it may however be useful to consider some terminological and methodological issues.

II. WHAT ARE SPECIAL INVESTIGATION TECHNIQUES?

There is to my knowledge no internationally agreed definition of what constitutes special investigation techniques. It would be possible to make two kinds of definition, one functional definition simply enumerating some techniques which are known in police or judicial cooperation, or to make a generic definition. In literature, one has distinguished between the use of subterfuge and the overt or secret nature of police or judicial action. In addition, it has also been considered the interaction between investigating and prosecuting authorities and the witnesses, suspects and the third parties.

The use of subterfuge involves a certain degree of deception: there is a procedure which seems to lead an individual to perform certain acts or reveal certain information by generating a divergence between what is supposed to be the case and what is expressed in a conventional manner or otherwise. Infiltration and pseudo-purchases are examples.

The overt or secret nature is present where an attempt is made to conceal what is being done. The tailing of a person, telephone tapping and filming of persons are by nature secret. The aim of the secrecy is not to alter the behaviour of the presumed offender but to deprive him of his information.

Secrecy is distinguished from deception: the latter involves falsifying information; the former is intended to deprive the suspect of information. The degree of secrecy may vary: the accused may be informed post facto of the results of telephone tapping, tailing and filming while the identity of an infiltrated officer will usually be kept secret up to and including the trial stage.

As for the interaction with the individuals concerned, this is brought into play by the interrogation of a suspect, the questioning of a witness or confrontations.

Through a combination of these three variables, one can classify criminal investigation procedures under eight headings:

1. Overt investigations with interaction and without deception
   (Example: examination by a judge, interrogation, confrontation)

2. Overt investigations without interaction and without deception
   (Example: visit to a home, scientific police investigations, expert reports)

3. Secret investigations with interaction and without deception
   (Example: use of informants)

4. Secret investigations without interaction and without deception
   (Example: tailing information tapping or monitoring of telecommunications)

5. Overt investigations with interaction and deception
   (Example: false promises and dissimulation and falsehood in the course of interrogation)

6. Overt investigations without interaction or deception
   (Example: subjecting a vehicle to a compulsory road security check in order to search it surreptitiously)

7. Secret investigations with interaction and deception
   (Example: undercover operations)

8. Secret investigations without interaction and deception
   (Example: use of enticements and traps to enable the commission of an offence)

If one chooses a more generic definition of special investigation techniques they may considered being "techniques for gathering information systematically in such a way as not to allow the target person to know of them, applied by law enforcement officials for the purpose of detecting and investigating crimes and suspects".

When the Council of the European Union worked on identifying special investigative techniques it identified a number of categories. The following are some examples:

1. Interception, recording and transcription of telecommunications
2. Interception and recording of other forms of communications
3. Interception, recording and tracing of communications in the area of computer crime
4. Tracing of telecommunications
5. Observation
6. Observation and surveillance by video camera
7. Infiltration
8. Infiltration by an undercover agent of the requested state
9. Infiltration by an undercover agent of the requesting state in the territory of the requested state
10. Infiltration by an informer of the requested state
11. Handling of informers
12. Cross-border observation
13. Cross-border hot pursuit
14. Cross-border tracking

15. Controlled delivery
16. Pseudo purchases

A number of other techniques could also be mentioned such as in general undercover operations including covert investigations, front store operations (for instance undercover companies), controlled deliveries, electronic surveillance of all forms, searches (including on premises or objects)," agent provocateurs", etc... Also the increasing use of so-called Joint Investigative Techniques may be mentioned in this context as a special investigative technique.

There is of course a fine line to be drawn between so-called special investigation methods and police investigation techniques. Police investigation techniques may be applied to back up special investigation methods. They are applied within the same legal framework and according to the same principles, particularly proportionality and necessity. Special police investigation techniques may be used where special investigation methods have been authorised. For instance observation may necessitate the use of particular technologies (such as bugging) but the use of such technologies alone is not per se special investigation methods.

One could also distinguish between whether the special investigation methods used are utilised in proactive or reactive investigations. The question here is whether the special investigation methods could be used in the preparatory phase of criminal investigations, perhaps even before a specific crime has been identified.

The use of a special investigation method in proactive criminal investigations is of course sensitive from the point of view of protecting individual liberties but it appears that in many Member States of the European Union this is a possibility under certain conditions, such as that there should be a legal framework for the method and that there is adequate control, in particular judicial control. In addition, there must be a reasonable suspicion that an offence will be committed and that the investigation method is used exceptionally. In particular the safeguarding of public order needs to be taken into account. There is ample case law from the European Court of Human Rights in relation to when a reasonable suspicion arises. There must be an existence of facts or information which will satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as reasonable will however depend on all the circumstances, as noted in a judgement on 30 August 1990.

During the early 1990's, a number of international developments in Europe could be recorded which had a bearing on special investigative techniques. Such developments were linked with the gradual abolition of the border controls of the Member States (the so-called internal borders of the Union) and the subsequent necessity for the adoption of so-called flanking measures, i e measures that were necessary to maintain law and order in a Union which no longer had borders. It may be questioned whether these so-called flanking measures actually were motivated by the abolition of the frontiers or instead whether crime in itself must not be fought?

Be it as it may, in the so-called Schengen Convention of June 1990, implementing the Schengen Agreement of 14 June 1985, on the gradual abolition of checks at common borders, a number of special investigation techniques were included. These measures were applicable only to five Member States in the beginning but were increased to include, in principle, all Member States of the EU, Norway and Iceland.

In article 39 of the Convention, the contracting Parties undertook to ensure that their police authorities shall, in compliance with national legislation, and within the scope of their powers, assist each other for

the purpose of preventing and detecting criminal offences, so far its national law does not stipulate that the request has to be made by the judicial authorities and provided that the request of the implementation thereof does not involve the application of coercive methods by the requested Contracting Party.

In accordance with Article 40, police officers in one of the Contracting Parties who, within the framework of a criminal investigation, are keeping under observation in their country, a person who is presumed to have taken part in a criminal offence to which extradition may apply, shall under certain conditions be authorised to continue this observation in the territory of another Contracting Party. Even without prior authorisation the police officers may also be authorised to continue beyond the border under certain specified conditions in Article 40 paragraph 2.

There are a number of general conditions that have to be satisfied in order to allow this cross-border surveillance. For instance, the officers carrying out the surveillance must comply with the law of the Contracting Party in whose territory they are operating and obey the instructions of competent local authorities. They must also carry documents certifying that authorisation has been granted and that they are acting in an official capacity. They are allowed to carry service weapons during the surveillance but would not be able to use these weapons except in cases of legitimate self-defence.

Article 41 of the Schengen Convention deals with hot pursuit. This hot pursuit is authorised to continue in the territory of another Contracting Party without prior authorisation where, given the particular urgency of the situation, it is not possible to notify the competent authorities of the Contracting Party prior to the entry into its territory. The hot pursuit could be continued in a specified number of kilometres inside the territory of the other Party.

It should be noted that since these far going international provisions, in effect transfer in certain respects some parts of their sovereignty to the other Contracting Parties, it was felt necessary to solve the issue of responsibility for acts committed by a police officer when operating inside another Contracting Party's country and also to solve the issue of responsibility for damages caused by police officers during the course of their mission. All these measures were also combined with other measures such as the setting up of Joint Police Stations close to the borders and having common training and exchange of officers.

It should also be noted that under Article 53 of the Schengen Convention requests for mutual legal assistance may be made directly between judicial authorities and returned by the same channels. This possibility of direct communication should however not prejudice the possibility of requests being sent and returned between Ministries of Justice or through national central offices of Interpol. The Schengen Convention abolished therefore the old requirement of communication by central authorities contained in the 1959 Convention.

Gradually one may observe in the European Union that Article 53 has now been, to a large extent, implemented and that most judicial cooperation between the Member States of the European Union is now taking place bilaterally.

At the same time as the negotiations on the Schengen Convention and the 1988 Convention of the UN, negotiations were carried out within the framework of the Council of Europe. These negotiations started 1986 with the setting up of a special committee that would elaborate a convention on Laundering, search, seizure and confiscation of the proceeds from crime. The Convention, which was to be included as European Treaty series number 141, was signed on 8 November 1990 and entered into force in 1993. It has now nearly 40 ratifications and may be considered to be at least an equivalent success as that of the 1957 and 1959 Conventions of the Council of the Europe [2].

The Council of Europe Laundering Convention contains some language that may be fitted into the section on special investigation techniques. It contains a general obligation for a Party in Article 3 to adopt such legislative and other measures as may be necessary to enable it to identify and trace property which is liable to confiscation and to prevent any dealing in, transfer or disposal of such property. In its Article 4 special recognition is given to the so-called "special investigative powers and techniques". A Party is under this Article obliged to adopt such legislative and other measures as may be necessary to empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized in order to carry out confiscation and investigative and provisional measures. A weaker provision is found in Article 4, paragraph 2, which provides that each party shall consider adopting such legislative and other measures as may be necessary to enable it to use special investigative techniques facilitating the identification and tracing of proceeds and the gathering of evidence related thereto. Such techniques may include monitoring orders, observations, interception of telecommunications, access to computer assistance and orders to produce specific documents.

Under the Convention the Parties are obliged to assist each other in the identification and tracing of instrumentalities, proceeds and property liable to confiscation. As already has been mentioned, there is a possibility for Parties to forward information spontaneously; this was the first time to my knowledge that provisions concerning spontaneous information were contained in an international instrument. The background to this provision was that the drafters of the Convention looked at some conventions on exchange of information in tax matters and drew the parallel to conventions on judicial cooperation in criminal matters.

The development of mutual legal assistance in the European Union did not stop with the setting up of the European Judicial Network, the adoption of the Joint Action concerning best practices in mutual legal assistance and the development of Eurojust, i.e. the new European Union prosecuting agency having its seat in The Hague. On 29th May 2000, the Council adopted a new convention on mutual assistance in criminal matters between the Member States of the European Union and decided to include a number of special investigative measures into the Convention. Among these measures is the spontaneous exchange of information, hearing by video conference, hearing of witnesses and experts by telephone conference, controlled delivery, joint investigation teams, and covert investigations.

The most important, and most difficult, measure of special investigative techniques that was included in the Convention was the interception of telecommunications. It took the Council nearly two years to negotiate the five articles concerning this highly sensitive topic. Moreover it turned out that the technologies changed all the time so that, for instance, certain types of telecommunications were made available during the negotiations and certain companies involved in satellite communications went into bankruptcy, etc. The complexity of the issue is clear when reading the headings of article 19 and 20: interception of telecommunications on national territory and interception of telecommunications without the technical assistance of another Member State. The first type of interception is in connection with the use of service providers. It will not be possible in the context of this paper to go more deeply into the various measures. It is sufficient to note that although the European Union is by definition an area of freedom, security and justice where the Member States have a high level of trust in each other, still the provisions concerning special investigative techniques show that some mistrust or at least caution has been required in the drawing up of these provisions. No doubt this has to do with the fact that this special

[2] A full description of the work of the Convention is found in Criminal Law Forum 1991, Volume 2 number 3, by the author of this paper, with the title "the Council of Europe laundering convention - a recent example of the developing international law".

investigative technique is so intrusive and necessitates judicial control in conformity with the Member State's constitutions and the European Convention on human rights.

The negotiations in the European Union had a direct impact also on the negotiations of the Palermo Convention. This is clear from article 19 which concerns Joint investigations and article 20 which concerns special investigative techniques. One may however note that the UN context has considerably watered down the provisions in that for the Joint Investigations the States Parties "shall consider concluding" bilateral or multilateral arrangements or arrangements and they shall ensure that sovereignty in the other State Party whose territory such investigation is to take place is fully respected. Therefore a simple legal framework, really an exhortation without any substantive operationality, has been included.

The same may be said for the special investigative techniques included in article 20. There are safeguards relating to the fact that the techniques must be permitted by the basic principles of the domestic legal systems, safeguards relating to the fact that they must be within the possibilities of a State Party and under the conditions prescribed by its domestic law. Controlled delivery is one of the measures and, where it is appropriate, also the use of other special investigative techniques are contemplated. States Parties are encouraged to conclude when necessary appropriate bilateral or multilateral agreements for using the special investigative techniques.

III. CONCLUSION

Crime evolves and the international conventions with them. However with the present pace and reticence among the international community, it is not sure that we will manage to fight 21st Century criminals with the tools that are adapted to the society of today. Ratification of conventions is slow, political will is lacking in some quarters of the planet and resources are unfortunately scarce in many States. At the same time the criminals use more and more sophisticated techniques, modern means of telecommunications, e-mails and the Internet, and have vast resources due to their criminal acts.

The truth of the matter is that law enforcement will always be behind modern day criminals. However, law enforcement has at its disposal special investigative techniques, which may be very efficient. These techniques need however, to be used with caution: a balance has to be found between the respect for individual rights and the need to safeguard the collective interests. Investigative means require a legal basis and its effects must be foreseeable. Investigations must be necessary and the results impossible to achieve by other means interfering less with individual rights and freedoms.

There must also be a certain margin of appreciation in deciding what measures to take, both in general and in particular cases those that should be left to the national authorities. In doing so there must be fair balance between the individuals' fundamental rights and the democratic societies' legitimate rights to protect it against criminal activities. This balance is not always easy to find.

CHALLENGES FACING U.S. ANTI-MONEY LAUNDERING EFFORTS IN TRANSNATIONAL CRIME

Linda M. Samuel *

I. INTRODUCTION

Astute drug traffickers and other criminals are increasingly committing their crimes in one country and hiding and sheltering their vast wealth elsewhere. The various ways criminals move funds across international boundaries is limited only by their imagination. They do it the old fashioned way by hand carrying it in suitcases, across the Mexican border on horseback, in body cavities, and of course through financial institutions, including wire transfers and commercial transactions involving undervalued or overvalued commodities or falsified loan arrangements. Why do criminals do this? They know that there are still many countries on this earth that have weak enforcement and will provide their wealth a safe haven so that they can enjoy the fruits of their crime and use the money to further and continue their illegal activities. The result is that money laundering has become a global problem involving international financial transactions, the smuggling of currency cross borders, and the laundering in one country of the proceeds of crimes committed in another country. Indeed, that virtually every significant money laundering case in the United States is now transnational in nature is the rule, rather than the exception. This crime of money laundering has devastating social consequences and is a threat to the security of all our nations. We are all in agreement that to disrupt and dismantle organized criminal groups, we must attack the economic underpinnings of their crimes by following the money flow and using forfeiture to take away their financial networks. When the money flows are transnational, international cooperation is vital. Where the mechanisms for rendering assistance from one country to another are too slow and frustrate rather than facilitate cooperation then we must change our ways and streamline our legal assistance procedures. If we are not willing to do this, the criminal will always stay one step ahead of the law. Outlined below are three critical areas which are essential components for any country's anti money laundering regime.

II. STRONG DOMESTIC MONEY LAUNDERING LAWS, WHICH HAVE FORFEITURE AS ITS CENTREPIECE

Having an effective legislative framework must be a priority for every country. Each nation must criminalize money laundering and needs an effective system to identify, trace, freeze or seize and ultimately confiscate property involved in serious profit generating offences. It is critically important to have an ability to take away the economic incentive that criminals enjoy from their crimes - which provided the motivation for them to commit the crimes in the first place. As an important starting point, countries should take stock in their own national laws to see where domestic cases have broken down and

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where their system has failed them. It is a pretty good indicator that if a country is unable to do for themselves, they will be unable to do for others. Whether there is a political will to make needed legislative changes is an entirely different matter. In the United States, we have experienced enacting relevant legislation both with and without political will in two recent laws - the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA") and the USA Patriot Act of 2001 ("the Patriot Act"). Prior to the passage of CAFRA, the Department of Justice had been trying unsuccessfully to amend the forfeiture laws for the better part of nine years. Year after year some other issue became the national priority for our Congress, and civil forfeiture reform was put on the back burner. On the other hand, following the terrorist attacks of September 11th, there was nothing more important to Congress than giving U.S. law enforcement the tools they required.

For its part, the United States made significant changes to its money laundering law as a result of the enactment of The Anti-Terrorism Act of 2001 (USA Patriot Act), Public Law 107-56, which became effective on October 26, 2001. The Patriot Act was enacted in record speed - some six weeks following the terrorist attacks. Most importantly, in many instances, these new powers are not limited to terrorism cases. Well before September 11, those in law enforcement - both police and prosecutors - knew for some time that our money laundering and forfeiture laws were inadequate. Even the criminals knew of the weaknesses of U.S. law and could capitalize on them. When our laws were enacted in 1986, they were intended to address primarily a domestic problem. The laws were not designed with international considerations in mind such as when the illicit proceeds were beyond our borders, and conversely what protection we could give to other countries when the illegal money was in the U.S. but the crime that generated those funds was committed abroad and did not violate U.S. penal laws. Indeed, until recently, United States federal law for the most part did not permit the forfeiture of the proceeds of foreign crimes. As another example, our laws require notice on third parties but did not adequately address how we could deliver notice on third parties who lived outside the United States, and the time limits we place on domestic notice are not always reasonable considering the time it may take to locate a foreign interested party, make a legal assistance request, and have that request executed. Furthermore, our laws did not facilitate the introduction of foreign bank records and other foreign evidence in U.S. court proceedings, especially in civil forfeiture cases.

But, as we all know, money laundering has become a global problem with the use of technology to conduct business and transfer funds from one country to another. For instance, in the area of corruption, we have all read in the newspapers such names as Abacha, Bhutto, Fujimori, Lazarenko, Marcos, and Suharto, to name a few heads of state and high ranking government officials and about their family members, cronies, and collaborators who have laundered their illicit enrichments by transferring them to jurisdictions abroad.

By amending the money laundering laws as part of the Patriot Act, the United States has strengthened its ability to assist foreign government by improving our capacity to recognize foreign restraining orders and forfeiture judgments. Importantly, we have further expanded the list of foreign crimes that are predicate offences under the money laundering laws to include: "an offence against a foreign nation involving bribery of a public official, or the misappropriation theft, or embezzlement of public funds by or for the benefit of a public official;" all crimes of violence; smuggling munitions or technology with military applications; and any offence with respect to which the United States would be obligated by any multilateral treaty to extradite or prosecute the offender.

In the Patriot Act, Congress broadened our law enforcement authority in many respects to improve U.S. anti money laundering efforts to combat terrorist financing. Among other things, the law provides broad civil forfeiture authority against domestic and foreign based property involved in terrorism and

terrorist financing offences [1] and making terrorist financing a predicate offence for money laundering. These powers combined with a pre-existing law allowing for direct forfeiture authority for the proceeds predicate offences, including the foreign offences, as well as instrumentalities used in those crimes are extremely potent weapons in a prosecutor's arsenal to combat terrorism.

In addition, pursuant to 18 U.S.C. § 1960, any money remitter, licensed or unlicensed, who operates a business knowing that the funds being transmitted are derived from a criminal offence, or are intended to be used for an unlawful purpose can be prosecuted. The scope of the statute as amended is greater than the scope of existing money laundering laws because there is no $10,000 requirement and because there is no specific intent requirement if the money constitutes criminal proceeds, and no proceeds requirement if the money is intended to used to commit an unlawful act.

Also, Congress enacted a new provision, 31 U.S.C. § 5332, which makes bulk cash smuggling a criminal offence. Because it was already a crime to fail to file a CMIR report (failure to report cross border currency movements involving $10,000), the practical effects of section 5332 are to enhance the ability of the Government to forfeit the unreported currency, and to make it possible to prove that an offence was committed before the defendant actually reached the border crossing where a CMIR report has to be filed.

III. MUTUAL LEGAL ASSISTANCE LAWS

Countries need to be able to cooperate internationally where the crime occurs outside their borders but the proceeds generated are located within their borders. They must have laws and procedures to restrain assets at the request of another jurisdiction and to enforce foreign forfeiture judgments rendered by courts in other jurisdictions so that they do not become safe havens to criminals and their illicit wealth. The following are six areas where experience has shown us that the legal systems of sovereign states frequently do not mesh, thereby impeding effective cooperation. Even where there are good domestic laws in place, the protections that law enforcement can provide does not always extend to the situations where the crime occurs outside a country's borders but the proceeds generated are within its borders and to the situations where the requested state must initiate its own domestic forfeiture or laundering proceedings in order to render legal assistance. The obstacles include:

A. Inadequate Scope of Covered Offences

A significant gap that can be exploited by criminal groups results from their knowing in which jurisdictions it is not a crime to launder the proceeds of foreign offences. To determine whether this issue manifests itself, one must first look to determine what legislative scheme is in place in the affected jurisdiction. The specific issue of whether a country can assist given the offence involved, typically turns

[1] See 18 U.S.C. § 981(a)(1)(G)(iii) which makes subject to forfeiture all assets, foreign or domestic, derived from, involved in, or intended to be used to commit any act of domestic or international terrorism. Under this provision, the burden of proof is on the property owner to prove that the property is not subject to forfeiture. Hearsay evidence is admissible in some circumstances to protect national security. Additionally, terrorist assets are broadly defined to be "All assets, foreign and domestic - (1) Of any individual, entity, or organization engaged in planning or perpetuating any act of domestic or international terrorism against the U.S., U.S. citizens or residents, or their property, and all assets, foreign or domestic, affording any person a source of influence over any such entity or organization; (2) Acquired or maintained by any person with the intent and for the purpose of supporting, planning, conducting, or concealing an act of domestic or international terrorism; (3) Derived from, involved in or used or intended to be used to commit any act of domestic or international terrorism against the U.S., U.S. citizens or residents, or their property.

on whether the particular country in question has adopted a list approach or an all-crimes approach in its anti-money laundering law. The United States went down the path of having a list approach of predicate offences in its money laundering law. Currently, we have more than 200 specified unlawful activities that are predicate crimes for money laundering. To those of you here today from countries that are developing their laws for the first time or seeking to modernize their laws, I would submit that our approach is not the one to follow. In the past, often times persons who committed crimes outside the jurisdiction of the United States could deposit their illicit proceeds in the United States with impunity because many foreign offences were not contained on our list of predicate offences. However, it should not matter where the predicate offence took place so long as the conduct would have been criminal if it had occurred where the property is found. The rationale for criminalizing money laundering should be the same regardless of the underlying offence involved -whether it be drug trafficking, extortion, alien smuggling, or internet fraud - and regardless whether the offence was a violation of United States law or that of another nation.

Currently, the foreign specified unlawful activities or money laundering predicates in the United States include an offence against a foreign nation involving:

1. the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act);

2. murder, kidnapping, robbery, extortion, destruction of property by means of explosives or fire or a crime of violence (as defined in section 16);

3. fraud, or any scheme or attempt to defraud, by or against a foreign bank (as defined in paragraph 7 of section 1(b) of the International Banking Act of 1978);

4. bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official;

5. smuggling or export control violations involving-

    (i) an item controlled on the United States Munitions List established under section 38 of the Arms Export Control Act (22 U.S.C. 2778); or

    (ii) an item controlled under regulations under the Export Administration Act of 1977 (15 C.F.R. Parts 730-774);

6. an offence with respect to which the United States would be obligated by a multilateral treaty, either to extradite the alleged offender or to submit the case for prosecution, if the offender were found within the territory of the United States.

We still do not have complete parity in our domestic and foreign lists, but we expect that the number of cases where we will be able to render international assistance will certainly increase because now it is a crime in the United States to launder proceeds of more foreign offences. Additionally, both the proceeds and the instrumentalities from all these foreign offences are now subject to forfeiture.

B. Inability to Assist in Civil Forfeiture Cases

As many of you know, the United States has both criminal and civil (or in rem) forfeiture. In the latter instance, the United States is able to forfeit the property without convicting a person of a crime. The non-conviction based forfeiture proceedings are quasi criminal in nature, and the government must

prove that the property at issue was either derived from the commission of a criminal offence or was used to commit an offence. Nevertheless, the United States has been denied assistance from jurisdictions that have only criminal based forfeiture systems. The result is that tainted property is not restrained and remains available to the criminal because the jurisdiction where the property is located has no one to prosecute. All too frequently the suspect is a fugitive, unidentified, or living comfortably in a jurisdiction that does not extradite its nationals. In some cases, the target is dead. Yet often times, there is strong - even incontrovertible - evidence that the subject property was involved in crime. Under a civil forfeiture statute, an action can be brought to forfeit property irrespective of the status of the owner. Indeed, U.S. law even permits prosecutors to file a civil forfeiture action against foreign-based property. In many cases, an in rem action is undertaken in conjunction with a criminal investigation. In all cases, the prosecutor must demonstrate that a crime has been committed and that the property at issue was derived from or used in a criminal offence. Perhaps if some requested states had a better understanding of the civil forfeiture process, they might be more willing to render assistance in the freezing of assets, furnishing bank records, serving notice, and enforcing orders in civil forfeiture cases.

Consider the cases of notorious Colombian drug traffickers who distributed cocaine to the United States and laundered their drug proceeds in banks throughout the world. Suppose these drug traffickers are killed during raids with the police, which is not beyond the realm of possibility given the fate of Pablo Escobar, Julio Rodriguez-Gacha, and Jose Santa Cruz Londono. Since these kingpins are no longer available for prosecution in Colombia or for extradition to the United States where they were indicted, civil forfeiture actions are the only mechanism in the United States to confiscate their massive criminal wealth.

In accordance with United States law, 28 U.S.C. § 1355(b)(2), United States district courts are vested with extraterritorial jurisdiction and venue over assets located beyond U.S. borders that are subject to civil forfeiture under United States law. Section 1355(b)(2) is particularly useful in cases where the foreign country in question cannot forfeit the property under its own laws, but may be able to take other steps that advance the United States forfeiture effort (e.g., seize the property, enforce a United States forfeiture judgment, or repatriate the assets). In such cases, once the assets have been civilly forfeited in the United States, we can transmit the final civil forfeiture judgment to the foreign country for enforcement or repatriation of the assets.

However, in some jurisdictions, where they have no one to prosecute and cannot assist the United States in civil forfeiture matters, the unjust result is that drug proceeds will revert to the heirs of the deceased drug trafficker. We are heartened to learn of the increasing number of countries that recognize this gaping hole in the international arena and have extended their legal assistance laws to cover civil forfeiture proceedings as being related to foreign criminal investigations or have themselves adopted civil forfeiture laws.

C. Inability to Restrain Assets

Taking provisional measures is perhaps the most important act a requestedcountry can take on behalf of a requesting country. Countries need to be able to respond swiftly to foreign requests to seize or freeze criminal assets located in their borders and to preserve those assets until they are forfeited. This is a critically important step to prevent their dissipation.

Previously, the United States' capacity to render this kind of assistance was seriously deficient. Now, where the statutory requirements of the Patriot Act are met, U.S. prosecutors can freeze assets at the request of another country. Foreign nations seeking a restraining order in the United States of America must (1) be a party to the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances or maintain a treaty or other formal international agreement that provides for

mutual forfeiture assistance with the United States of America, and (2) allege that the foreign offence committed for which forfeiture is sought constitutes a violation for which property could be forfeited under federal law if the offence were committed in the United States. Where a U.S. prosecutor files a motion for a restraining order with the court based on foreign evidence, the court may rely on information set forth in an affidavit describing the nature of the proceeding or investigation underway in the foreign country, and setting forth a reasonable basis to believe that the property to be restrained will be named in a judgment of forfeiture at the conclusion of such proceeding. Alternatively, to preserve the availability of property subject to a foreign forfeiture or confiscation judgment, a U.S. prosecutor can seek to register and enforce another country's restraining order. In this case, the Attorney General must certify that it is in the interest of justice to give effect to such foreign orders. The duration of the restraining order can vary. Where notice would likely jeopardize the availability of the property for forfeiture, the U.S. court is authorized to enter a temporary restraining order for a period not exceeding ten days (unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period) without prior notice or opportunity for a hearing. Upon entry of the ex parte temporary restraining order, the United States will then provide notice of the restraint to persons and entities affected by the order and so that they may seek a hearing in regard to this matter. After a hearing upon notice to interested parties, the United States can seek a restraining order, subject to renewal in 90 day intervals.

To help deal with the situation where a foreign country is unable to restrain assets for us, the United States has enacted a unilateral measure in the Patriot Act to permit Federal prosecutors to seek court orders directing defendants to repatriate their foreign based criminal wealth to the United States where it can be preserved pending forfeiture. This provision is particularly helpful where the jurisdiction where the property is located is unable to freeze the assets at the request of the United States. Although we expect that few, if any, countries will be able to honour these orders through registration and enforcement, there is nonetheless a benefit under our system in that the law permits the court to hold the defendant in contempt for his or her failure to comply with such order to return assets to the United States that he or she has laundered elsewhere. Additionally, there are enhanced sentencing provisions for the recalcitrant defendant.

This is not the only area in the Patriot Act that confers unilateral powers to immobilize assets. Where countries still invoke bank secrecy to thwart the efforts of law enforcement or otherwise declines to cooperate, we have found it necessary to find ways to circumvent those jurisdictions by providing "self-help" type measures to direct action against U.S. banks serving to conduct business in the United States for foreign banks.

The Patriot Act has created a new civil forfeiture statute, 18 U.S.C. § 981(k), to permit the forfeiture of funds held in U.S. correspondent accounts on behalf of foreign banks. By authorizing prosecutors to substitute funds in correspondent accounts in U.S. financial institutions for the funds in the targeted foreign bank account, they will now be able to seize and forfeit criminal assets that previously may have been beyond our reach. In other words, where the government can show that forfeitable property was deposited into an account at a foreign bank, U.S. prosecutors can now file a civil forfeiture action against the equivalent amount of money that is found in that foreign bank's correspondent account located in the United States. Previously, U.S. dollars derived from crime were deposited in offshore accounts where they were promptly transferred back to the United States in a correspondent account held in the name of the foreign bank. The criminal was able to avoid the forfeiture of his funds because they are held in the name of the foreign bank and not the offender. The government was required to trace the deposited funds into the correspondent account, and the foreign bank was considered to be the "owner" of the funds. Because the foreign bank was, in most cases, an innocent owner, the government could not successfully maintain a civil forfeiture action. The law redefines who is an owner of the funds for purposes of

contesting a forfeiture proceeding and applying the innocent owner defence. The "owner" of the funds is defined as the account holder at the foreign bank - not the foreign bank itself - which means that the foreign bank whose account will be the subject of the forfeiture proceeding will lack standing to object to the U.S. forfeiture action.[2] Moreover, it is no longer necessary to trace the money in the correspondent account to the foreign deposit. Under the Patriot Act, if the bank where the criminal proceeds are located has a correspondent bank account in the United States with available funds, civil forfeiture of an amount equivalent to the tainted funds is now authorized from the correspondent account at a bank in the United States. The Department of Justice does not intend to use this new forfeiture authority in every case as an avenue of first resort, especially where established effective procedures for international cooperation already exist.[3] Indeed, the U.S. Department of Justice recognizes the controversial nature of these extraordinary powers and the possible adverse consequences to our international law enforcement relations with our foreign counterparts and the international banking community. Nevertheless, in the aftermath of the terrorist attacks, the United States believed that drastic and aggressive measures were needed so long as jurisdictions are willing to provide safe havens for criminal proceeds and to impose insurmountable barriers to international cooperation in the investigation and prosecution of money laundering and asset forfeiture cases.

Similarly, prosecutions in the United States have been impeded on numerous occasions because of prosecutors and agents have been unable to obtain foreign bank records, even when those foreign banks maintain a presence in the United States or maintain funds in a correspondent bank account there. Notwithstanding any mutual legal assistance treaty relationship we may have with any particular country, foreign banks that maintain correspondent accounts in the United States must now designate a representative within the United States to receive government subpoenas. Under this provision, Section 319(b) of the PATRIOT Act, which is codified at 31 U.S.C. 5318(k), the Attorney General and the Secretary of the Treasury may issue subpoenas to foreign banks that maintain accounts with correspondent banks in the United States in order to obtain records related to the U.S. correspondent accounts, including records maintained outside of the United States relating to the deposit of funds into the foreign bank, irrespective of foreign secrecy laws and the formal international legal assistance process. If the bank fails to comply with the subpoena, the domestic financial institution must terminate its correspondent relationship with that foreign bank not later than ten business days after receipt of written notice from the Secretary or the Attorney General that the foreign bank has failed either to comply with the subpoena or to initiate proceedings to contest it.[4] The result is that those non cooperating foreign banks that accept criminal proceeds will not be able to enjoy access to the United States financial system.

D. Inability to Enforce Foreign Forfeiture Judgments

Where a crime has been committed in one jurisdiction and the illicit proceeds arein another, it is not always practical or possible to conduct prosecutions in each country.

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[2] The foreign bank will be permitted to contest the forfeiture when it is alleged to have been the wrongdoer or when the foreign depositor had already withdrawn the money from the foreign bank before the money in the correspondent account was restrained or seized.

[3] Section 319(a) addresses this possible issue by allowing the Attorney General, in consultation with the Secretary of the Treasury, to suspend or terminate a forfeiture "if the Attorney General determines that a conflict of law exists between the laws of the jurisdiction in which the foreign bank is located and the laws of the United States with respect to liabilities arising from the restraint, seizure, or arrest of such funds . . . . and that such suspension or termination would be in the interests of justice and would not harm the national interests of the United States".

[4] Failure to terminate the correspondent relationship in accordance with these provisions shall render the U.S. financial institution liable for a civil penalty of up to $10,000 per day until the relationship is terminated.

Therefore, the capability of countries to register and enforce foreign forfeiture judgments is a necessary component of any international forfeiture regime. Without this capacity, courts in the country where the criminal assets are located must then waste precious judicial and prosecutive resources to institute duplicative proceedings against property that has already been forfeited in another jurisdiction.

Although the United States lagged behind many jurisdictions in obtaining thisauthority, we can now finally register and enforce the final civil and criminal forfeiture judgments entered by courts in other countries. Pursuant to 28 U.S.C. § 2467, the United States can give effect to foreign forfeiture judgments rendered in connection with any violation of foreign law that would constitute a violation of an offence for which property could be forfeited under federal law if the offence were committed in the United States. The requesting state seeking enforcement of its forfeiture judgment enforced must be a party to the Vienna Convention or have entered into a treaty or other international agreement with the United States that provides for forfeiture assistance, and the request for enforcement must be certified by the Attorney General or his designee. We will file such final judgment with federal courts and domesticate them, thereby treating the judgment as if it had been rendered by a court in the United States. The court in the United States will be bound by the findings of fact in the foreign court order, and may decline enforcement in only very limited circumstances involving fundamental due process deprivations such as lack of notice, lack of jurisdiction, or fraud in the foreign proceedings. In addition to the judicial economy considerations by avoiding duplication of efforts, the benefit of such a provision is that the defendant or person affected by the order cannot have "two bites at the apple." In other words, he or she will not be permitted two opportunities in two different forums to litigate and contest the forfeitability of the property.

E. Payment of Attorneys' Fees from Criminal Proceeds

In the United States, a criminal defendant has a constitutional right to counsel pursuant to the Sixth Amendment of the Constitution. However, he or she does not have a right to high-priced counsel or even a right to counsel of his or her own choice. Additionally, this constitutional right to counsel applies only in criminal proceedings and does not extend to civil forfeiture cases. Moreover, a defendant does not have the right to use criminal wealth and property subject to forfeiture to pay for attorneys' fees. The rule in the U.S. is that a defendant cannot use forfeitable property to pay for defence counsel.[5] The notion is that money stolen in a fraud case or earned in a drug deal belongs to the Government and the victims, not to the defendant; so he cannot use it to pay his attorney. Even where the defendant claims he needs the funds to hire defence counsel, the rule in the U.S. is that the funds remain under restraint if the

Government satisfies the court that it has probable cause to believe that the funds will be forfeited in the event of a conviction.[6]

Other countries, however, permit a defendant to draw down against restrained criminal funds for living expenses and lawyers' fees.

If a criminal robbed a bank and was captured holding the bags of cash taken from the vault, I think we would all agree that the money would be returned to the bank, and the robber should not be entitled to use the proceeds of his crime to pay for his lawyers to mount his defence. It should be no different for other

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[5] See Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 109 S. Ct. 2646 (1989); United States v. Monsanto, 491 U.S. 600 (1989).

[6] See United States v. Jones, 160 F.3d 641 (10th Cir. 1998) (defendant has initial burden of showing that he has no funds other than the restrained assets to hire private counsel or to pay for living expenses, but if he makes this showing he is entitled to a hearing); United States v. Farmer, 274 F.3d 800 (4th Cir. 2001) (defendant entitled to pre-trial hearing if property is seized for civil forfeiture if he demonstrates that he has no other assets available; following Jones); United States v. Jamieson, 189 F. Supp.2d 703 (N.D. Ohio 2002) (same, following Jones; to satisfy 6th Amendment requirement, defendant must show he has no access to funds from friends or family; Government has right to rebut showing of lack of funds if hearing is granted).

types of crimes. Yet, if that defendant concocts an elaborate scheme to bilk money from investors or foreign governments, and sets up sham corporations with bank accounts into which he deposits his criminal proceeds, in many jurisdictions he can obtain court approval to access those funds, which by this time have been restrained, to pay for a lawyer and for living expenses for his family. This is an unfair result, especially in fraud cases, where the jurisdiction seeking to forfeit those funds is aiming to make restitution to identifiable victims.

From a prosecutor's point of view, it is frustrating to see assets that should otherwise be available for forfeiture and restitution evaporate because another country - the country where the criminal was savvy enough to launder them - has released the funds to pay lawyers and to enable the criminal's family continue to enjoy a lifestyle to which they have no right to be accustomed. Importantly, prosecutors know that so long as lawyers have a deep pocket to tap for fees, these cases will drag on, as there is no incentive for the lawyers to bring their clients to the table to cooperate. In some instances, as a result of poor court oversight, money has been released for "reasonable" living expenses, which have enabled the defendants' family to remain in high priced housing that was purchased with criminal proceeds and enabled their children to attend expensive private schools.

Countries need to re-examine the circumstances in which they will release restrained funds, and if they cannot limit this practice entirely, they must impose tighter controls. At a minimum, courts should insist on a detailed and verifiable bill of costs before releasing any money to ensure that those funds will go towards reasonable and necessary expenditures.

F. Lack of Asset Sharing Arrangements

The United States believes that the inadequacy of asset sharing arrangements is another serious impediment to the success of asset forfeiture on a global level. The sharing of forfeited assets among nations enhances international cooperation by creating an incentive for countries to work together to combat international crime. Criminals certainly do not respect national boundaries when committing crimes and laundering their profits. Ideally, law enforcement authorities throughout the world should strive to dismantle criminal organizations no matter where their assets are located. Too often law enforcement's efforts stop at the border, and police do not take that extra step of either tracing the money in another country or alerting their counterparts to the possible existence of criminal funds. In part, this may be due to notions of sovereignty and international law, and a lack of awareness among law enforcement authorities as to the availability of asset forfeiture in certain countries. However, in some cases, there is a lack of certainty with respect to asset sharing and, the attitude is that once criminal property leaves your borders, it is someone else's problem. After all, why should you do all the work if another government is going to keep the money? While keeping the money out of the hands of the criminals should always be our primary law enforcement objective, the reality is that there is a revenue generating side effect from conducting financial investigations and forfeiture cases, and which jurisdiction ultimately retains the money is a legitimate question.

In most countries, law enforcement agents, prosecutors and investigating magistrates are overworked and have limited resources. In times of shrinking resources and budget concerns, supervisors are not particularly keen to allocate the expenditure of resources on investigations where there is no hope of recovery for their government to recoup investigations and prosecution expenses. These concerns can be addressed through asset sharing, which we view is a matter of fairness. When law enforcement from several jurisdictions have worked together dedicating human resources, time, money an energy, and the result is a successful prosecution and forfeiture, those governments that contribute to the successful effort should share in the fruits of their labour. To take a finders-keepers attitude will not promote international law enforcement cooperation. Indeed, for a country that forfeits property with international cooperation

to retain all the proceeds for itself will reward only those countries that have served as money laundering havens.

Despite having enacted forfeiture laws, most countries have not satisfactorily dealt with the issue of asset sharing. Both the Vienna Convention on narcotics trafficking and the Palermo Convention on transnational organized crime urge signatories to give special consideration to asset sharing, yet the laws of many countries provide that all forfeited proceeds shall be deposited into their national treasuries without the possibility of sharing those assets with other countries that may have devoted substantial investigative and/or prosecution resources to the successful forfeiture result.

The United States has been a proponent of international asset sharing for many years. To date, the United States Department of Justice has transferred more that $175 million to 27 different nations. We currently have three laws (21 U.S.C. § 881(e)(1)(E), 18 U.S.C. § 981(i) and 31 U.S.C. § 9703(h) that provide for international asset sharing. We believe that if asset sharing were adopted as a policy and a practice, there would be an incentive for law enforcement in one country to pursue assets in another, and countries would more willingly participate in international investigations.

IV. GOOD RELATIONSHIP WITH THE FINANCIAL SECTOR

An effective anti-money laundering regime depends upon a strong partnership between law enforcement agencies and financial institutions. Through the filing of CTRs (currency transaction reports), information sharing under the PATRIOT Act, and the filing of SARs or STRs (Suspicious Activity Reports), U.S. financial institutions play a key role in the investigation of financial crimes, including terrorist financing. But, we rely on banks to do more than merely report suspicious transactions and monitor currency deposits.

In conducting a financial investigation, law enforcement authorities must have access to evidence to determine the identity of who opened a bank account, who the true parties to a transaction are, and who the true beneficial owner of the funds in a targeted account is. Our ability to follow the money is key to not only prosecuting criminals, but also to preventing terrorism and disrupting other transnational crime. Thus, it is critically important that banks and other financial institutions to know with whom they are doing business and be able to share that information with law enforcement when necessary.

Many of the obstacles in the financial sector that impeded American law enforcement were addressed with the enactment of the Patriot Act, which importantly was enacted with the support of the banking community. Numerous provisions in the Patriot Act attempt to make financial institutions in the United States be more accountable. These measures include: prohibition on correspondent banks in the United States from doing business with foreign shell banks; requirement for enhanced due diligence for correspondent accounts with offshore banks or banks in non-cooperating jurisdictions; requirement that covered financial institutions to assure that correspondent accounts of foreign banks are not used to indirectly provide banking services to foreign shell banks; requirement that covered financial institutions to keep records of foreign ownership of foreign banks; and the requirement that U.S. financial institutions close the correspondent accounts of foreign banks that fail to produce records formally requested by the Justice or Treasury Departments. The Patriot Act also requires that financial institutions "maintain records of the information used to verify a persons identity, including name, address and other identifying information." The law further requires the Secretary of the Treasury, in consultation with the Attorney General and Secretary of State, to take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions for funds sent to the United States.

In the past year, the government has made clear that banks will be held liable, both under criminal and civil laws, for failure to comply with anti-money laundering requirements. In 2002, a civil penalty in the amount of $100,000 was assessed against Great Eastern Bank of Miami for failing to file Suspicious Activity Reports. In addition, two U.S. banks, Broadway National Bank and Banco Popular of Puerto Rico were prosecuted criminally.

In January 2003, Broadway National Bank of New York, an institution used by a number of money launderers, became the first financial institution to be convicted of criminal violations of the Bank Secrecy Act for the failure to file Suspicious Activity Reports. Broadway Bank pleaded guilty to three charges: failure to maintain an anti-money laundering programme as part of illegal activity involving more than $100,000 in a 12-month period; failure to report suspicious transactions; and structuring, in other words, accepting deposits just below $10,000 that were calculated to evade the CTR reporting requirements. The bank agreed to pay a $4 million fine. Evidence came out indicating that Broadway knew its obligations under the law but it chose not to comply with it. For almost ten years the bank's compliance manual sat in its vault and was never opened. Between 1996 and 1998, Broadway failed to report $123,000,000 in suspicious cash deposits, which were then transferred to over 100 accounts, including international wire transfers to accounts in Colombia and Panama. More than one-third of the cash deposits came from one customer -a major money launderer for Colombian drug traffickers.

Also in January 2003, the United States filed a Criminal Information in the U.S. District Court for the District of Puerto Rico charging Banco Popular with one count of failing to file Suspicious Activity Reports. The bank and the government entered into a deferred prosecution agreement under which Banco Popular waived indictment, agreed to the filing of the Information charging it with a crime, and acknowledged responsibility for failing to file accurate and timely Suspicious Activity Reports when confronted with the knowledge that its accounts were being used for activity consistent with money laundering. For instance, the bank did not undertake the most minimal due diligence in an effort to "know its customer." One customer alone deposited a monthly average of $1,400,000 from a business located near the bank which bank employees noticed had few, if any, customers. When Banco Popular filed CTRs, they were often inaccurate. The few SARs that it did file were late and contained false or inaccurate information. Banco Popular consented to a civil penalty of $20,000,000, and it acknowledged that the United States could institute a civil forfeiture action against accounts containing over $21,000,000 in funds believed to be the proceeds of criminal activity. Based upon Banco Populars actions including its acknowledgment of responsibility, its willingness to settle civil claims against the $21,000,000 held in its accounts and its consent to a $20,000,000 civil penalty, the government agreed to defer prosecution for one year. If Banco Popular is in full compliance with all of its obligations under the agreement, the government agreed then to seek dismissal of the Information.

IV. CONCLUSION

To pursue financial crimes, countries must aggressively enforce their money laundering laws and must have cooperative relationships with their financial institutions. Because of the ease with which criminals can move assets between countries, international cooperation is vital. While it is obviously important to arrest, prosecute, and convict offenders of financial crimes, it is equally important to trace, locate, seize, and forfeit the criminal wealth. Effective asset forfeiture is a critical tool of modern law enforcement. Through asset forfeiture, governments can take both the profit out of crime and disrupt criminal activity by forfeiting the property that makes the crimes possible and where necessary make restitution to victims. With the strong support of other governments, the United States has been able to use its criminal and civil forfeiture procedures to restrain and forfeit criminal property even where

criminals have hidden their illicit assets outside of the United States.

Unfortunately, there are still jurisdictions in this world which fail to cooperate internationally and lack the political will to institute recognized worldwide standards pronounced by the Financial Action Task Force in its 40 Recommendations and eight Special Recommendations related to terrorist financing. Notwithstanding the existence of mutual legal assistance treaties, multilateral agreements, and other formal arrangements to facilitate cooperation, the mechanisms in place in some jurisdictions are patently inadequate. Any weak link in the chain affects the entire financial system. Delays in cooperation are tantamount to non-cooperation. Where countries are not willing to cooperate, the United States has enacted and will use certain unilateral measures in the Patriot Act to deal with these obstacles.

For its part, U.S. law enforcement authorities are now better equipped to institute civil forfeiture actions, provide investigatory assistance, and to restrain assets and enforce certain foreign forfeiture judgments, to assist foreign governments seeking to forfeit assets in the United States that are traceable to foreign crimes. In addition, the Department of Justice firmly supports international asset sharing as a means to further international cooperation in asset forfeiture. Each country must do its part to ensure that there are no safe places for criminals or their criminal wealth.

REPATRIATION OBLIGATIONS UNDER THE UNITED NATIONS CONVENTION AGAINST CORRUPTION

Linda M. Samuel *

I. OVERVIEW OF OBLIGATIONS UNDER THE CONVENTION

Once it is finalized, the United Nations Convention against Corruption will impose important new obligations on nations to adopt measures to prevent, criminalize, and combat corruption. The draft convention has six substantive chapters, including chapters that wouldstrengthen domestic infrastructures to prevent corruption, establish standards for criminalizing offences of corruption, provide for international cooperation, facilitate the recovery of the proceeds of foreign corruption, encourage exchange of technical assistance, and establish a mechanism for monitoring implementation. Chapter V is one of the most important chapters in the treaty dealing with the recovery and disposition of assets that corrupt officials placed outside their home countries. Chapter V, article, 61 will establish a framework for the disposition of assets that have been acquired through corruption and forfeited by one state as a result of a mutual legal assistance request from another state and will obligate states to return such assets to the requesting state in at least some circumstances. [1]

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[1] The current text of Article 61, *Return and Disposition of Assets*, is as follows:

1. Property confiscated by a State Party pursuant to article […] [Freezing, seizure and confiscation] or […] [International cooperation for purposes of confiscation] of this Convention shall be disposed of, including by return to its prior legitimate owners,[82] pursuant to paragraph 3 of this article, by that State Party in accordance with the provisions of this Convention and its domestic law.

2. Each State Party shall adopt such legislative and other measures, in accordance with the fundamental principles of its domestic law, as may be necessary to enable its competent authorities to return confiscated property,[83] when acting on the request made by another State Party, in accordance with this Convention, taking into account the rights of bona fide third parties.[84]

3. In accordance with articles [...] [International cooperation for purposes of confiscation] and [...] [Mutual legal assistance] of this Convention and paragraphs 1 and 2 of this article, the requested State Party shall:

(a) In the case of embezzlement of public funds or of laundering of embezzled public funds as referred to in article […] [Embezzlement, misappropriation or other diversion of property by a public official] and article […]

[Laundering of proceeds of corruption] of this Convention, when confiscation was executed in accordance with article […] [International cooperation for purposes of confiscation] and on the basis of a final judgement in the requesting State

Article 61 reflects a compromise of the competing interests of the victim states, typically developing countries, which wanted recognition of their "right" to the "repatriation" of the proceeds of corruption offences committed by their officials without facing excessive delays and overly technical mutual legal assistance requirements, and the interests of the requested states, typically financial centre countries, which frequently require evidence in conformity with their mutual legal assistance laws to support the recovery and return of the claimed proceeds of corruption.

Party, a requirement that can be waived by the requested State Party, return the confiscated property to the requesting State Party;

(b) In the case of proceeds of any other offence covered by this Convention, when the confiscation was executed in accordance with article [...] [International cooperation for purposes of confiscation] of this Convention and on the basis of a final judgement in the requesting State Party, a requirement that can be waived by the requested State Party, return the confiscated property to the requesting State Party, when the requesting State Party reasonably establishes its prior ownership of such confiscated property to the requested State Party or when the requested State Party recognizes damage to the requesting State Party as a basis for returning the confiscated property;[85]

(c) In all other cases, give priority consideration to returning confiscated property to the requesting State Party, returning such property to its prior legitimate owners or compensating the victims of the crime.

4. Where appropriate, unless States Parties decide otherwise, the requested State Party may deduct reasonable expenses86 incurred in investigations, prosecutions or judicial proceedings leading to the return or disposition of confiscated property pursuant to this article.

5. Where appropriate, States Parties may also give special consideration to concluding agreements or mutually acceptable arrangements, on a case-by-case basis, for the final disposal of confiscated property.

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[82] The travaux préparatoires will indicate that prior legitimate ownership will mean ownership at the time of the offence.

[83] The travaux préparatoires will indicate that return of confiscated property may in some cases mean return of title or value.

[84] The travaux préparatoires will indicate that the domestic law referred to in paragraph 1 and the legislative and other measures referred to in paragraph 2 would mean the national legislation or regulations that enable the implementation of this article by States Parties.

[85] The travaux préparatoires will indicate that subparagraphs (a) and (b) of paragraph 3 of this article apply only to the procedures for the return of assets and not to the procedures for confiscation, which are covered in other articles of the Convention. The requested State Party should consider the waiver of the requirement for final judgement in cases where final judgement cannot be obtained because the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.

The Convention itself recognizes that not all corruption offences result in a looting of the national treasury. Under paragraph 3(a) of Article 61, there is a mandatory return obligation with regard to embezzled public funds. The obligation to repatriate the assets to the victim country is imposed when a country chooses to enforce another country's forfeiture order for embezzled public funds. On the other hand, paragraph 3(b) contains a more qualified repatriation obligation in cases involving other convention offences where either the victim state can reasonably establish its legitimate ownership to the forfeiting state or when the forfeiting state recognizes damage to the victim state as a basis for repatriation. Despite its mandatory tone, paragraph 3(b) is not entirely mandatory in its application. As written, because the forfeiting state must be satisfied that the victim state has reasonably established its ownership of the assets, a requested state would be able to decline repatriation if the victim state were not able to establish to the satisfaction of the requested state that it is the owner. In addition, the convention establishes a basic principle for the disposition of forfeited assets in accordance with the convention and domestic law, requires states to be able to transfer forfeited assets to other countries, permits states providing assistance to deduct reasonable expenses, and includes permissive language allowing for States to conclude agreements on how to dispose of forfeited property.

Importantly, the mandatory return of forfeited assets category would only apply in a narrow set of cases and would be subject to important safeguards. First, the repatriation requirements of paragraph 3 are all to be made in accordance with the mutual legal assistance provisions of Article 53, which authorizes governments to deny legal assistance where it would conflict with its essential interests.[2] Consequently, a requested state would not be obliged to repatriate assets if it would mean transferring the assets to a government hostile to the requested state or even possibly one that the requested state believed was corrupt or otherwise engaged in conduct contrary to their important national or foreign policy objectives. Second, the repatriation requirement in the proposed text is triggered only in those cases where the requested state chooses to forfeit the funds by enforcing a foreign forfeiture judgment. This, of course, will be dependent upon the victim state having obtained a forfeiture judgment in the first instance. Not only are foreign forfeiture judgments rare in such cases due to death, fugitiveness, immunity, or evidentiary obstacles for the victim state, but, even were a judgment rendered, consistent with the mutual legal assistance exceptions, a requested state could choose not to enforce what it perceived to be a questionable foreign forfeiture order. Further, through paragraph 1, the whole article is made subject to the conditions of the convention and domestic law. This reinforces the ability of the requested state to deny repatriation on essential interest grounds or if it would conflict with its domestic law. Additional safeguards include the protection of bona fide third parties in paragraph 2 and the implicit ability to insist upon reaching agreement on how the funds will be disposed of through an agreement authorized in accordance with paragraph 5.

II. REPATRIATION UNDER UNITED STATES LAW

The United States does not anticipate that it will be required to make changes to its law to comply with Article 61 because the obligations are in line with mechanisms already in place in the United States. Moreover, the repatriation of forfeited assets in state embezzlement cases or where the victim state can establish specific pecuniary loss as a result of the offence giving rise to the forfeiture would be consistent with U.S. law and the Department's preference for restoring forfeited assets to owner victims. The means

[2] We are working with the State Department to determine whether there is a legal consequence between the chapter language "in accordance with" and our preferred language of "subject to" prior to the reference to Article 53 on mutual legal assistance.

through which the United States will effect repatriation will be pursuant to the Attorney General's statutory discretion to restore assets to victims and the authority to share forfeited assets with foreign governments. In recent years, the United States has taken significant steps to facilitate the detection and recovery of the proceeds of foreign corruption and to assist in bringing foreign corrupt officials to justice. Legislative changes in the Civil Asset Reform Act of 2000 and the USA Patriot Act increased our ability to restrain and forfeit the proceeds of foreign offences. Other Patriot Act provisions established foreign official corruption as a predicate for money laundering and forfeiture including bribery of public officials and misappropriation of public funds. The law further requires financial institutions to provide enhanced scrutiny of private banking accounts of senior foreign public officials.[3] Similarly, where a victim can establish its pecuniary loss through the presentation of documentary evidence and that loss was the direct result of the offence that gave rise to the forfeiture or a related offence, our regulations require us to make restitution of the funds.

The United States has flexible authority to return assets that it confiscates based upon a request for assistance concerning a corruption offence against another country. Under 18 U.S.C. § 981(i) and 18 U.S.C. § 982(b)(1) (through reference to 21 U.S.C. § 853(i) referencing 21 U.S.C. § 881(e)(1)(E)), the Attorney General has discretionary authority to share forfeited assets to other countries as long as the other country assisted in the proceedings leading to the forfeiture. In order to establish the foreign corruption offence, we will almost invariably have to receive assistance from the victim state. In addition, under 18 U.S.C. § 981(e)(6), the Attorney General has authority to restore property to victims, including foreign governments. Both of these international sharing and restoration authorities should also extend to those cases in which the United States enforces a foreign forfeiture order, pursuant to 28 U.S.C. § 2467, on behalf of a foreign nation "as if it had been entered by a court in the United States."[4] In practice, the Department has sought to make victims whole to the extent possible. International asset sharing is a discretionary authority, and remission and restoration decisions are subject to more compulsory regulations promulgated under 18 U.S.C. § 981.[5]

In application, the repatriation obligations under article 61 are most likely to cause us difficulty in cases in which we have concerns about the integrity of the government seeking repatriation of the funds, where we disagree with the other country on how to use the funds, or where transferring assets would be inconsistent with our efforts to resolve other core obstacles to law enforcement cooperation with that country. In a current foreign official corruption forfeiture case and more frequently in some major narcotics asset sharing cases, we have confronted precisely these issues. In such cases, our general practice has been not to deny repatriation or asset sharing, but to defer the transfer until resolution of the complications. In the context of this convention, the provision allowing for the transfer of assets pursuant to an agreement may provide sufficient flexibility to enable us to defer the repatriation in official corruption cases if similar concerns arise.

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[3] Recent examples of Department efforts to combat foreign corruption include the arrest and indictment of former Ukranian Prime Minister Pavel Lazarenko currently being prosecuted in San Francisco, the successful forfeiture of approximately $20 million associated with former Peruvian intelligence chief Vladimiro Montesinos and his associates, direct case assistance to Nicaragua's investigation and prosecution of former President Aleman and his associates, the restraint of more than $43 million in connection with Mexico's prosecution of a corruption scandal involving its state-owned oil company.

[4] While there is no express disposition language in 28 U.S.C. § 2467, enforcement of an order as if entered by a United States court also implies disposition in accordance with United States law, including asset sharing or restoration, remission procedures.

[5] Asset sharing authority has been delegated to the Deputy Attorney General. Remission decisions have been delegated to the Chief of the Asset Forfeiture and Money Laundering Section.

III. CASE STUDY - VICTOR ALBERTO VENERO GARRIDO

A. Case Background

On September 14, 2000, a video tape aired in Peru showing presidential adviser Vladimiro Montesinos Torres, head of Peru's powerful and secretive National Intelligence Service, purportedly offering a bribe to an opposition Congressman. This publicity about Montesinos, widely regarded as the power broker behind then-President of Peru Alberto Fujimori, led Fujimori to appoint a special prosecutor and prompted numerous other Peruvian investigations into the illicit activities of Montesinos and other associates of the Fujimori government, including Victor Alberto Venero Garrido (Venero).[6] A Swiss investigation initiated in October of 2000 led Swiss authorities to freeze approximately $48 million connected to Montesinos on November 3, 2000, and an additional $22 million on November 29, 2000. These events eventually led to Fujimori's flight to Japan in November of 2000, and the fall of his government. Montesinos, a fugitive since September of 2000, was eventually captured in June of 2001 in Venezuela with the assistance of the FBI and extradited to Peru to face corruption, drug trafficking, illicit enrichment and other charges.

On January 26, 2001, prior to the capture of Montesinos, the United States arrested Venero in Miami on a provisional arrest warrant and request for extradition from Peru. Venero, a Peruvian citizen and close associate of Montesinos, later waived further proceedings and was extradited to Peru to face charges of crimes against the administration of justice, bribery (corruption of a public official), and criminal concealment, among other charges. Montesinos and his associates, including Venero, generated the criminal proceeds forfeited in this case through the abuse of Montensino's official position as advisor to former President Fujimori. Some of the principal fraudulent schemes involved the purchase of military equipment and service contracts as well as the criminal investment of government pension funds. At the time of his arrest, FBI Miami discovered several cashiers' checks and accounts related to Venero. The United States Attorney's Office for the Southern District of Florida, with assistance from the United States Attorney's Office for the Central District of California and the Asset Forfeiture and Money Laundering Section of the Criminal Division (AFMLS), restrained approximately $17.3 million connected to Venero, ultimately forfeiting $15.9 million plus interest accrued. During the course of the investigation, U.S. law enforcement agents identified and forfeited approximately $4.3 million, plus interest accrued, in additional assets. The combined net forfeited amount from these two judgments was $20,277,618.32.[7]

B. Role of Venero

Venero was involved in a huge kickback scheme that bilked both Peru's treasury and Peru's Military and Police Pension Fund. In 1994, Venero and others used pension fund money and their own money to buy a majority interest in a Peruvian banking institution, Financiera del Sur (FinSur), which in June 1999 was bought by Peru's Banco de Comercio.Venero was in charge of seeking investments on behalf of FinSur and identified construction and real estate projects for the bank and pension fund to finance. He

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[6] Venero was the de facto head of the Peruvian military and police pension fund and took a cut of interest payments as kickbacks on the bank deposits he made resulting in the theft of approximately $100 million in pension funds. Montesinos, once the top adviser to Fujimori, and Venero also allegedly set up their own companies to buy apartment complexes, hotels and other buildings to be sold to the pension fund at inflated prices. Venero also sold substandard arms and supplies to the Peruvian armed forces at highly excessive prices. Purchases included defective Soviet-made MiGs as well as arms from Belarus, Ukraine, and Bulgaria. In addition to his money laundering activities, Venero also directed death squads, engaged in influence peddling, and bribed opposition politicians.

[7] As noted previously, the investigation also forfeited an additional $358,753.76. In addition, the FBI and SDFla's involvement in the investigation also contributed to the arrest of Montesinos and the direct return of additional assets to Peru, including at least $14.1 million repatriated by Venero.

also controlled the construction companies which built those projects. Venero established a pattern of inflating the actual cost of the pension fund investment projects by 25 percent and billed FinSur accordingly. Projects recommended by Venero were automatically approved by the board members at the police pension fund, as several of them received kickbacks. In just one project of this type, Venero constructed a mall as a FinSur investment. The $25 million project was fraudulently inflated by $8 million. Similarly, Venero covertly formed and controlled several front companies used to broker loans from FinSur in exchange for kickbacks from borrowers. When some loans defaulted, Venero would purchase the busted projects at extremely low prices for resale at a profit.

In addition, Venero and members of FinSur's board of directors were authorized by the Peruvian government to arrange the purchase of military aircraft for the nation. In just two aircraft deals in 1995 and 1998, the Peruvian government paid an extra $150 million, because of a fraudulent 30 percent mark-up tacked on to the sale price. This illicit money allegedly was funnelled through FinSur and Banco de Comercio. From there, it flowed into numerous accounts under a variety of names in banks in the United States and elsewhere to conceal the origin of the illicit funds.

Venero consistently used a group of banks located in Peru, the Cayman Islands, Panama, the United States, and elsewhere to launder his and others' share of criminal proceeds.South American, Caribbean, and U.S. banks identified as funnels for their criminal proceeds include the following: Banco Banex, Banco Nenevo Mundo, Banco Industrial de Finanzas, Pacific Industrial Bank, Banco Exterior in Panama, Weise Bank, Bank of America International and Tribank in the Cayman Islands, Citibank, Bank of America, Prudential Securities, American Express Financial Services, Northern Trust Bank, Sanwa Bank and California's Hacienda Bank.

Cheryle Mangino Diaz, a California banker who is married to Venero's cousin, formerly was a member of the board of directors of Hacienda Bank. Since 1996, she helped Venero conceal more than $20 million in the United States. For example, Mangino Diaz made several false statements to Hacienda Bank officials regarding the origin of the funds that appeared in her account at the time Fujimori and Montesinos fled Peru in September 2000. Venero also used the name of his son-in-law, Sandro Tafur Arevalo, to stash funds at the Bank of America and to conceal his ownership of a penthouse apartment at 8855 Collins Ave. in Surfside.

Venero and his activities were brought to the attention of the FBI by the filing of a Suspicious Activity Report by Citibank's compliance officer in Long Island City, New York. Venero opened a bank account at Citibank in Miami in 1998, and moved about $15 million through it until he was arrested in January, 2001. Initially, the account opening did not raise any suspicion because Latin Americans often opened dollar-denominated bank accounts in the U.S. to protect their assets from inflation in their home countries. However, Citibank and other financial institutions holding bank and brokerage accounts owned or controlled by Venero, Cheryle Mangino Diaz, and others gradually noticed unusual activity in the accounts and filed SARs with the U.S. Government. According to bank officials, Venero's financial transactions had no apparent business justifications and the origin of the funds was suspicious.

C. International Sharing

The United States Department of Justice has approved transferring $20,277,618.32 in forfeited funds to the Government of Peru (GOP) in recognition of its assistance in the Venero case. The forfeited funds represent the proceeds of a broad range of fraud, corruption and money laundering offences committed in Peru and the United States that were connected to former Peruvian intelligence Chief Vladimiro Montesinos, his associate Victor Alberto Venero-Garrido, and other associates of Montesinos and former Peruvian President Alberto Fujimori. The statutory basis for the transfer under U.S. law is Title 18,

United States Code, section 981(i)(1) authorizes the Attorney General to transfer money laundering proceeds and instrumentalities forfeited under 18 U.S.C. § § 981 and/or 982 to a foreign country that participated directly or indirectly in acts leading to the seizure and forfeiture of the property.[8] Currently, discussions are underway between the United States and Peru regarding how best to effect this transfer.

[8] Section 981(a)(1), which contains three subsections, provides for the civil forfeiture of (A) assets traceable to, or involved in, money laundering violations; (B) proceeds and instrumentalities of foreign drug felonies and other specified unlawful activities; and (C) property constituting, or derived from, proceeds traceable to certain bank fraud violations or any other specified unlawful activity. Section 982 provides for the criminal forfeiture of property involved in or proceeds derived from money laundering offences.

SITUATION ON MONEY LAUNDERING IN THAILAND

Pol. Maj. Gen. Peeraphan Prempooti *

I. THE ANTI-MONEY LAUNDERING ACT B.E. 2542 (1999)

The Anti-Money Laundering Act in Thailand originated as a result of the United Nations Convention against Illicit Drug Traffic in Narcotic Drugs and Psychotropic Substances, 1988, known as the Vienna Convention 1988.

This Convention was drafted as a consequence of the belief that effective law enforcement of drug trafficking would take place if they could prosecute financiers or cut off their funds. There were several meetings among more than 100 UN member countries and the Convention was resolved on 19 December 1988. At that time, there were 71 countries to ratify the Convention. As for Thailand, we did not ratify at that time because we have to have approval from the Cabinet before endorsing any agreements. However, we presented our will by signing the Final Act.

The Office of the Narcotics Control Board (ONCB) which is the Thai coordinating body on drug matters has realized the importance of being a party to the Convention. Therefore, the ONCB set up the Ad Hoc Committee comprising of representatives from concerned government agencies to consider the Convention.

On 16 May 1990, the Ad Hoc Committee passed a resolution that Thailand could be a party to the Convention when there are sufficient domestic laws to comply with the obligations addressed in the Convention. Two years later, there was a working group, chaired by a representative from the Office of the Attorney-General, established to consider whether Thailand had sufficient domestic legal and administrative measures to comply with the Convention. At that time, there was a resolution that Thailand was not ready to be a party of the Convention because there was no domestic law concerning money-laundering control. Consequently, the ONCB and concerned government agencies drafted the Anti-Money Laundering Act. The Bill was sent to the Cabinet and Parliament for consideration. On 19 March 1999, the Parliament, which consists of members from the House of Representatives and the House of Senators, considered approving the Bill. Then, Anti-Money Laundering Act B.E.2542 (1999) was published in the Government Gazette on 21 April 1999 and came into force in the Kingdom on 19 August 1999.

In Anti-Money Laundering Act B.E.2542 (1999), there are 66 sections covering definition terms; general provisions; reporting and identification; the Money Laundering Control Board; the Business Transaction Committee; the Anti-Money Laundering Office; the procedure concerning property; and penalties. The law can be categorized by Chapter as follows:

Chapter 1: General Provisions, comprising sections 5-12
Chapter 2: Reporting and Identification, comprising sections 13-23
Chapter 3: Money Laundering Control Board, comprising sections 24-31

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* Secretary-General, Anti-Money Laundering Office, Thailand.

Chapter 4: Business Transaction Committee, comprising sections 32-39
Chapter 5: Anti-Money Laundering Office (AMLO), comprising sections 40-47
Chapter 6: The Procedure Concerning Properties, comprising sections 48-59
Chapter 7: Penalties, comprising sections 60-66
(The Anti-Money Laundering Act B.E.2542 (1999) is in Appendix A)

A. Section 3

Definition terms used in this Act are prescribed in section 3. Currently, there are eight predicate offences, including a new one - terrorism - that was enacted on 11 August 2003. The eight predicate offences are as below:

(1) Narcotics;
(2) Trafficking in or sex exploitation of children and women in order to gratify the sexual desire of another person;
(3) Cheating and fraud to the public;
(4) Misappropriation or cheating and fraud under other commercial banks and financial legislation;
(5) Malfeasance in office or judicial office;
(6) Extortion and blackmail committed by organized criminal association or unlawful secret society;
(7) Customs evasion;
(8) Terrorism

The financial institutions having the legal obligation to report financial transactions to the AMLO consist of commercial banks; finance companies; securities companies; credit financers; insurance and assurance companies; savings cooperatives; etc (such as money changers, securitization companies and investment consultants. Section 3 also gives the definition of "Transaction" and "Suspicious Transaction". The meanings of these two words are described as the following:

"Transaction" means any activity relating to a juristic act, contract, or any operation with other persons dealing with finance, business or involving properties.

"Suspicious Transaction" means a transaction that is more complicated than the norm by which that transaction is usually conducted, a transaction that lacks economic rationale; a transaction where there is probable cause to believe that it was conducted for the purpose of avoiding the compliance of this Act; or a transaction related to or possibly related to a commission of any predicate offence, whether the commission of such transaction is conducted once or more than once.

B. Sections 5-9

These sections address the criminal offence on money laundering. In recent decades, crimes have become more complicated and sophisticated. Local crimes have stepped up to the level of transnational organized crime with a lot of assets involved. The significant characteristics of a transnational organized crime are as below:

(1) The division of labour: There are specialists, such as lawyers and accountants, involved in their illegal activities so that these persons use their expertise to technically conceal or distort money derived from illegitimate sources;
(2) The commission of many crimes: transnational organized crime tends to violate many offences at the same time. There is a cooperation and coordination network to support their group activities as well;
(3) Maximizing the profit: The objective or final goal of any transnational organized crime is to maximize the profit or benefit to their organization. Most of the money or benefit from these illegal activities will be transformed for the purpose of concealing the illegitimate source of these funds.

The funds will be laundered so it is clean and then will be used to support their illegal activities again and again as a revolving fund. Therefore, there are special measures prescribed in these sections in order

to achieve more effective law enforcement in tackling transnational crimes. For example, (1) Transferring or transforming or disguising of properties related to an offence shall be deemed as having committed the money laundering offence. (2) Whoever commits a money laundering offence, even if the crime was committed outside the Kingdom, shall receive the penalty within the Kingdom, if: (a) either the offender or co-offender is a Thai national or resides in the Kingdom; (b) the offender is an alien and has taken action to commit an offence in the Kingdom or is intended to have the consequence resulting there from in the Kingdom, or the Royal Thai Government is an injured party; or (c) the offender is an alien whose action is considered an offence in the State where the offence is committed under its jurisdiction, and if that individual appears in the Kingdom and is not extradited under the Extradition Act, Section 10 of the Penal Code shall apply mutatis mutandis.

C. Sections 13-23

These sections address the reporting of transactions and knowing your customer. Presently, there are three types of transactions that financial institutions and persons that have legal transaction reporting obligations have to report to the AMLO.

(1) Any cash transaction worth Bt 2 million or more.
(2) Any property transaction, including S.W.I.F.T. and Bahtnet transfers, worth Bt5 million or more (Bahtnet transfers are a kind of domestic money transfer between financial institutions).
(3) Any suspicious transaction, there is no threshold. (For example, any cash transactions worth almost 2 million baht, it may be 1.8 million baht or 1.9 million baht. It seems that these transactions have been made under two million baht in order to avoid reporting to the AMLO- that have been made more than one time a day in the same bank account number, or in a different bank account number but have the same bank account holder. In addition, these transactions have taken place over a short period of time.)

However, there is the exemption for the reporting of transactions if another party is in these six categories:

(1) Members of the Royal family.
(2) The public sector comprising the government, central government agencies, provincial and local government administrations; state enterprises and public organizations.
(3) The Foundations belonging to members of the Royal family comprising (a) the Chaipattana Foundation, (b) H. M. the Queen's Foundation for the Promotion of Supplementary Occupations and Related Techniques, and (c) Sai Jai Thai Foundation.
(4) Transactions connected with property under the movable category being made with financial institutions except for: (a) domestic money transfer transactions using the Bahtnet service under the Bank of Thailand rules governing the Bahtnet service or inter-bank cross-country money transfers using the service of the Society for Worldwide Interbank Financial Telecommunication, Limited Liability Co-operative Society (S.W.I.F.T. s.c.); (b) Transactions connected with ships having tonnage from six tons or more, steam ships or motor boats having tonnage from five tons or more, including rafts; (c) The transactions connected with vehicles, instruments or any other mechanical equipment.
(5) The execution of loss insurance contracts except for compensation under loss insurance contracts expecting to make payments of ten million baht or more.
(6) The registration of rights and juristic acts under the category of transfer to be public benefit land or the obtainment by possession or by prescription under Section 1382 or Section 1401 of the Civil and Commercial Code.

As for reporting forms (See Appendix C), there are seven transaction reporting forms as described as below:

(1) AMLO 1-01: The form for any cash transaction reported by financial institutions.
(2) AMLO 1-02: The form for any property transaction reported by financial institutions.
(3) AMLO 1-03: The form for any suspicious transaction reported by financial institutions.
(4) AMLO 1-04-1: The form for any cash transaction reported by insurance or assurance companies.
(5) AMLO 1-04-2: The form for any property transaction reported by insurance or assurance companies.
(6) AMLO 1-04-3: The form for any suspicious transaction reported by insurance or assurance companies.
(7) AMLO 1-05: The form for any suspicious transaction reported by investment consultants.

As for time periods for submitting the report to the AMLO, any cash or property transactions occurring during the first 15 days and the latter of a month must be reported to AMLO during periods of 16th day-22nd day of that month and of 1st day-7th day of the next month, respectively. Meanwhile, any suspicious transaction must be reported within seven days from the date having the reasonable suspicion.

Additionally, whoever handles any transaction with a financial institution has to present the citizen identification card or other identification cards issued by any government agencies, according to a measure on know your customer (KYC). All the above records must to be maintained for a period of five years from the date that the account was closed or the termination of relations with the customer, or from the date that such transaction occurred, whichever is longer, unless the competent official notifies that financial institution in writing to do otherwise.

D. Sections 24

This section addresses the composition of the Anti-Money Laundering Board who acts as the policy maker on money laundering issues. The Board comprises members not more than 27 persons as below:

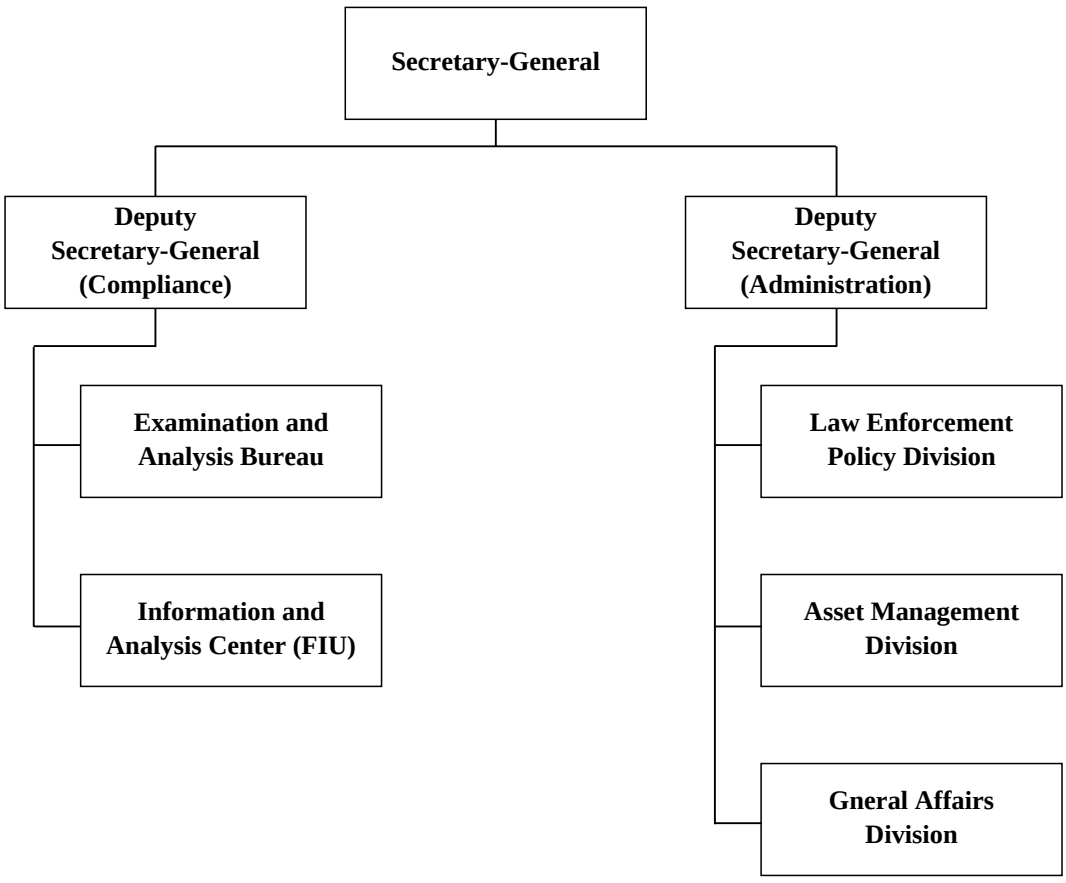
(1) The Prime Minister; (Chairman)
(2) Minister of Finance; (Vice-Chairman)
(3) The Permanent Secretary of the Ministry of Justice;
(4) The Attorney-General;
(5) The Commissioner-General of the Royal Thai Police;
(6) The Secretary-General of Office of the Narcotics Control Board;
(7) The Director-General of the Fiscal Policy Office;
(8) The Director-General of the Department of Insurance;
(9) The Director-General of the Department of Lands;
(10) The Director-General of the Customs Department;
(11) The Director-General of the Revenue Department;
(12) The Director-General of Department of the Treaties and Legal Affairs;
(13) The Governor of the Bank of Thailand;
(14) The President of the Thai Banking Association;
(15) The Secretary-General of the Securities Exchange Commission;
(16)-(24) Nine qualified experts appointed by the Cabinet from those who have expertise in economics, monetary affairs, finance, law or any other related fields beneficial to the execution of this Act with the consent of the House of Representative and the Senate respectively as a member of the Board;
(25) The Secretary-general of AMLO as the Secretary of the Board
(26)-(27) Two AMLO officials as the Assistant Secretaries of the Board.

E. Section 40

At the beginning of the office's establishment, the AMLO was supervised by the Office of the Prime Minister. Nonetheless, after the government restructuring on 2 October 2002, AMLO becomes an independent agency, under the supervision of the Minister of Justice. Functions and responsibilities of the AMLO are as follows:

(1) Acting in accordance with the resolutions of the Board and the Transaction Committee, and to carry out other administrative functions.
(2) Receiving transaction reports delivered in accordance with the requirements in chapter two, and to issue an acknowledgement of such report.
(3) Collecting, tracing, monitoring, studying, and analyzing reports or any other information related to financial transactions.
(4) Collecting evidence in order to prosecute any violator under the provisions of this Act.
(5) Launching an education programme in order to disseminate information, educate and provide training pertaining to the undertaking of this Act, or assist or support both public and private sectors to launch such programmes.
(6) Carrying out other functions in accordance with the provisions of this Act or other laws.

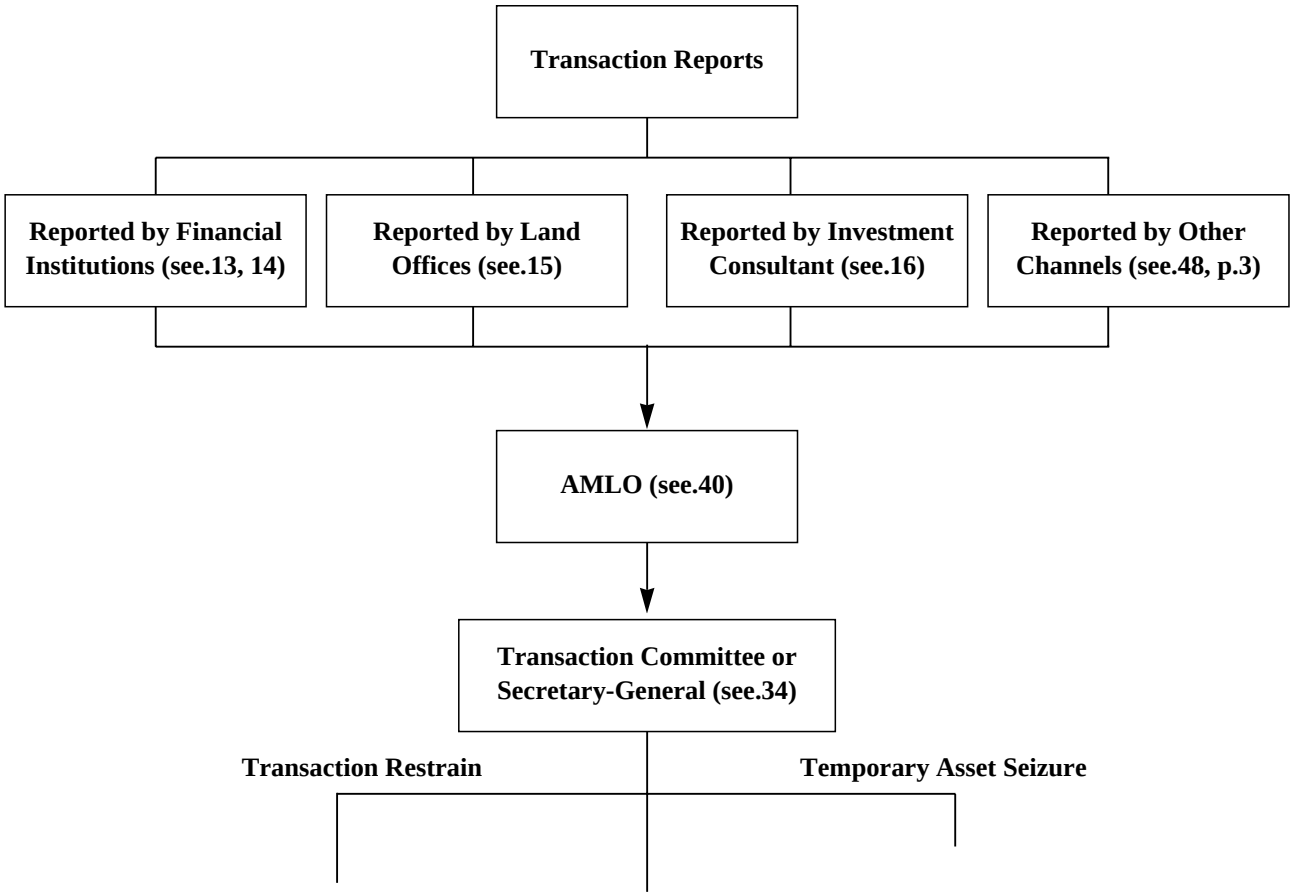
There are a Bureau and four Divisions in AMLO. The organization chart can be illustrated as below:

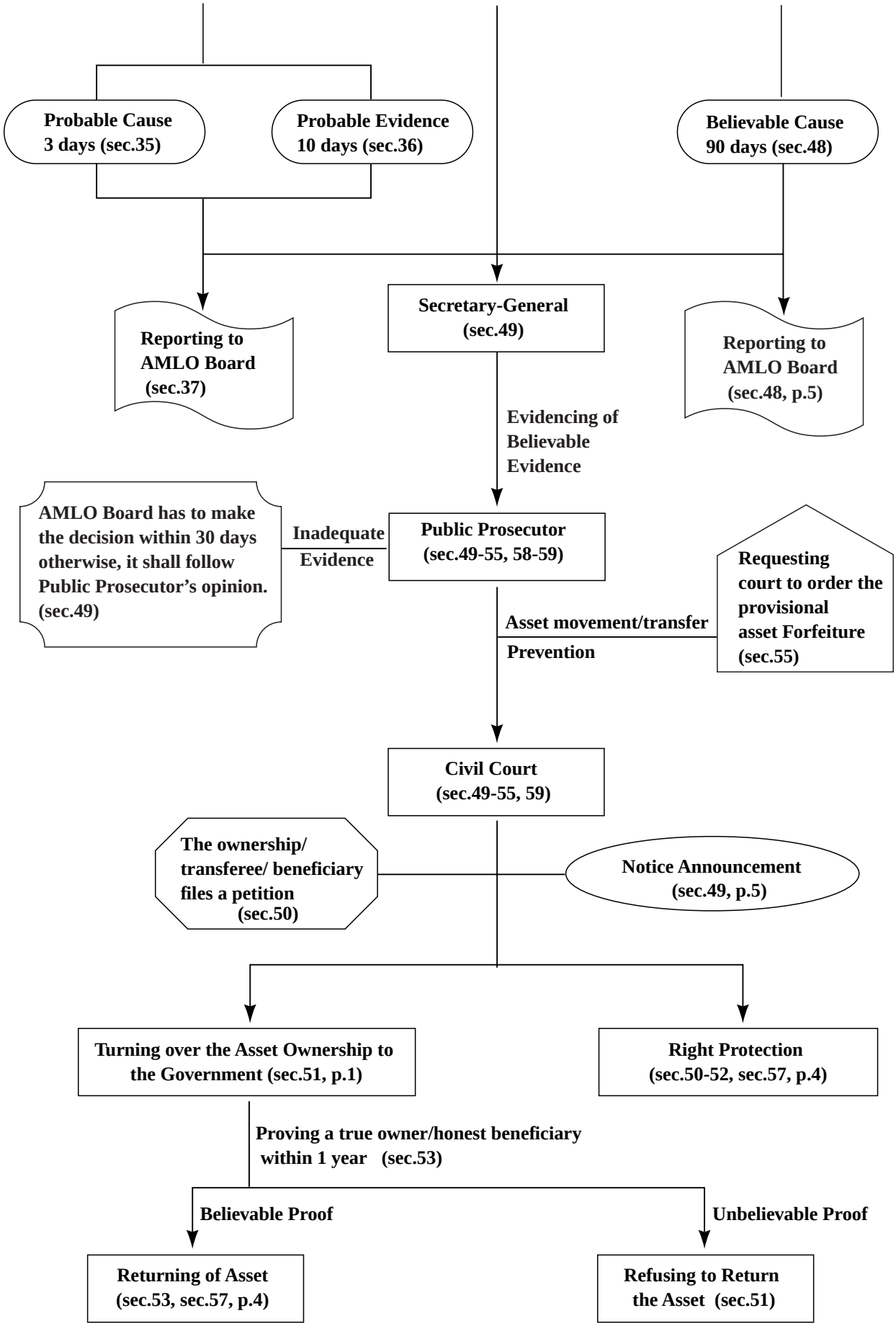


The head of the AMLO is the Secretary-General. There are two Deputy Secretary-Generals to assist the Secretary-General in supervising and administrating AMLO tasks. The Examination and Analysis Bureau is responsible for investigation and civil legal proceedings. The Information and Analysis Centre acts as the AMLO's FIU. It is responsible for transaction reports collection and analysis. The Law Enforcement Policy Division is responsible for anti-money laundering policy, training, public relations and foreign affairs. The Asset Management Division is responsible for storing, maintaining and disposal of seized asset. The last one is the General Affairs Division; it is responsible for personnel and budget managements.

F. Sections 48-59

These sections address the process of report examination and procedures concerning assets. The flow chart starting from obtaining transaction reports through money laundering prosecution is shown as below:




Probable Cause
3 days (sec.35)
Probable Evidence
10 days (sec.36)
Believable Cause
90 days (sec.48)
Reporting to
AMLO Board
(sec.37)
Secretary-General
(sec.49)
Reporting to
AMLO Board
(sec.48, p.5)
Evidencing of
Believable
Evidence
AMLO Board has to make the decision within 30 days otherwise, it shall follow Public Prosecutor's opinion. (sec.49)
Inadequate
Evidence
Public Prosecutor
(sec.49-55, 58-59)
Requesting court to order the provisional asset Forfeiture (sec.55)
Asset movement/transfer
Prevention
Civil Court
(sec.49-55, 59)
The ownership/ transferee/ beneficiary files a petition (sec.50)
Notice Announcement
(sec.49, p.5)
Turning over the Asset Ownership to the Government (sec.51, p.1)
Right Protection
(sec.50-52, sec.57, p.4)
Proving a true owner/honest beneficiary within 1 year (sec.53)
Believable Proof
Unbelievable Proof
Returning of Asset
(sec.53, sec.57, p.4)
Refusing to Return the Asset (sec.51)

After the AMLO have received the transaction reports, from financial institutions, land offices, investment consultants, other government agencies or even complaint letters, the AMLO will examine and analyze received transaction reports. The investigation will then be performed as well.

If there are grounds to believe that such transaction is related to predicate offences or a money laundering offence, an officer in charge will propose it to the Transaction Committee or the AMLO Secretary-General (in case of emergency) for consideration. In case the Transaction Committee considers that such transaction may be engaged with predicate offences or money laundering, the Transaction Committee has the power to restrain all transactions of involved suspected persons for three working days in case of having probable cause or for ten working days in case of having probable evidence. Furthermore, if there is a believable reason that the asset related to an offence may be transferred, distributed, moved or be transformed, the Transaction Committee has the power to seize such asset for not exceeding 90 days. All transaction restrains and temporary asset seizures shall be reported to the AMLO Board.

If the asset seized by the Transaction Committee Order or the Secretary-General Order is unsuitable to keep in custody or will be more burdensome to the Government rather than the utilization thereof for other purposes, the Secretary-General may:

- Order those who have a vested right in the asset to maintain and utilize the asset with bail or security;
- Issue an order for a sale by auction and then keep the cash in a bank account;
- Issue an order to utilize such asset for official purposes.

This is in order to prevent the devaluation of the asset occurring as a result of depreciation and of inappropriate asset maintenance. In the meantime, if at last the court issues an order to return the asset to the owner or holder or the vested interest recipient of the asset because the court believes that such person has owned the asset honestly and/or with compensation, this process would reduce damage occurring to such good faith person as well.

In case there is evidence to believe that such asset is related to an offence, the Secretary-General will forward the case to the public prosecutor to consider filing a petition to the court for the Government to take ownership of the asset. If the public prosecutor considers there is insufficient evidence to file a petition to the court, the case will be sent back to the Secretary-General for re-consideration and then to re-submit to the public prosecutor again. In case the public prosecutor still considers there is not enough evidence, the public prosecutor will urgently inform the AMLO Board via the Secretary-General for making a decision. The AMLO Board has to finish the consideration within 30 days from the date of receipt. Otherwise, the case will follow the public prosecutor's opinion.

During processing the case to the court, if there is probable cause to believe that there may be a transfer, distribution or movement of any asset related to an offence, the Secretary-General could pass the subject to the public prosecutor to file the petition to the court for the provisional asset forfeiture.

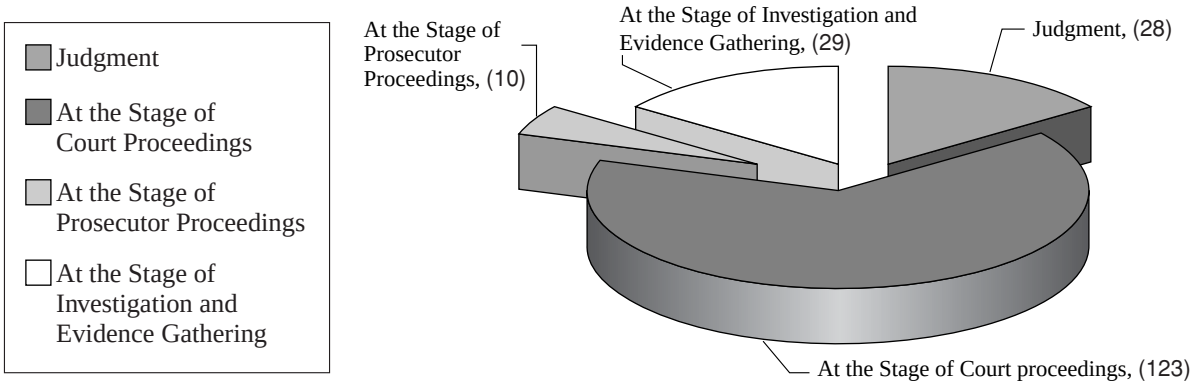
After receiving the petition to turn over the ownership of the asset to the Government from the public prosecutor, the court will make an order to post a notice at the court and to publish the notice in a local well-known newspaper for two consecutive days so that individuals who may claim ownership or have a vested interest in the asset can file an objection to the petition to the court prior to the issuance of the court order. In case the court believes that the asset named in the petition is related to an offence and the petition of the claimant has no merit, the court will give the confiscation order to turn the ownership of the asset over to the Government. However, if the court believes that the petition of the claimant has merit, the court may issue an order to protect the rights of the recipient claimant with or without conditions.

The petition for asset return must be sent to the court within 1 year from the date of the final court confiscation order. Unless the claimant has to prove that he did not file the petition within one year because he did not know of the notification or written notice of the Secretary-General. In case an owner or holder or a vested interest recipient of the asset can establish the validity of the claim to the satisfaction of the court, the court may order the return of the asset or may set any condition for claimant rights' protection.

Although the Anti-Money Laundering Act B.E.2542 (1999) has been in effect since 19 August 1999, operations of the AMLO did not start until a year later on 27 October 2000. This was because the necessary Ministerial Regulations needed to be completed.

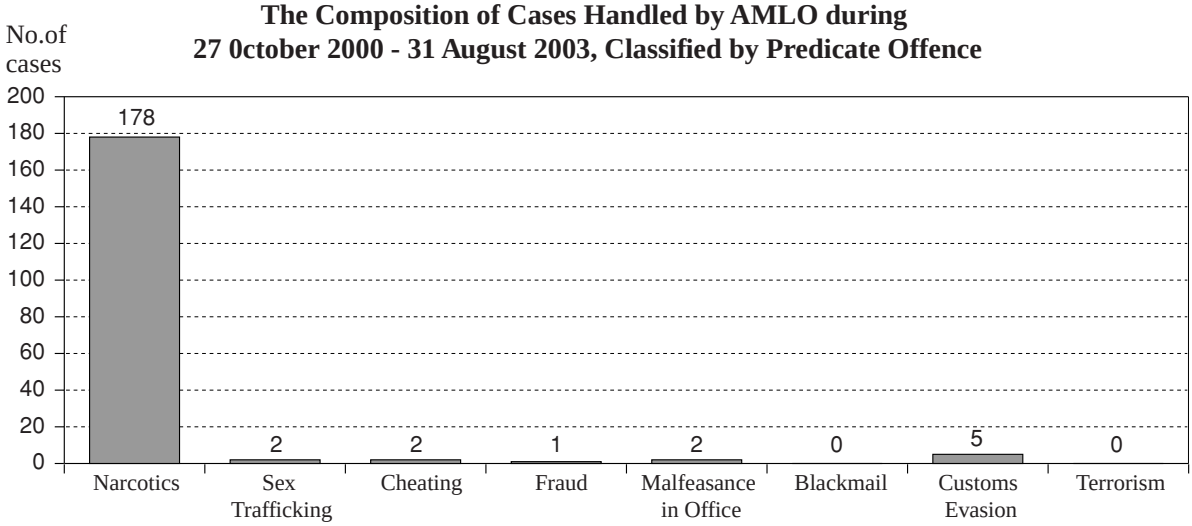
During 27 October 2000 - 31 August 2003, the AMLO handled 190 cases. There are ten cases that the court has already passed judgment. Meanwhile, most of them are in the stage of investigation and evidence gathering. Details are in the following Figure.

The Progression of Cases Proceeded under Anti-Money Laundering Act B.E.2542 (1999) during 27 October 2000 - 31 August 2003, Classified by Stage of Proceedings



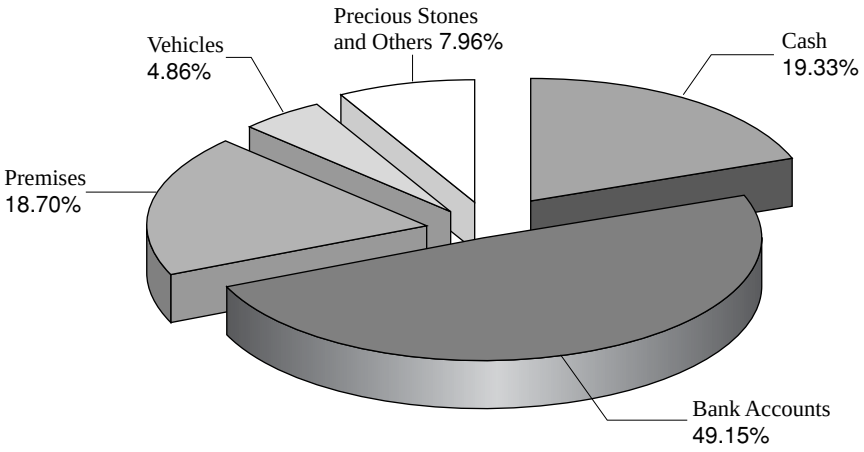
The Majority of the 190 cases are drug offences which covers 178 cases, accounting for 93.68% of total cases. The second are customs evasion offences which covers five cases, accounting for 2.63% of total cases. Meanwhile, there have been no cases concerning blackmail and terrorism as yet. Details are illustrated the following Figure.

The Composition of Cases Handled by AMLO during 27 0ctober 2000 - 31 August 2003, Classified by Predicate Offence



During the period of 27 October 2000 to 31 August 2003, the AMLO seized assets pertaining to predicate offences and money laundering totalling approximately Bt 2,000 million. According to the following Figure, most of them are in form of the attached bank accounts item that took a 49.15% stake, followed by the cash item that took a 19.33% stake.

The Proportion of Seized Assets during
27 0ctober 2000 - 31August 2003, Classified by Type of Asset



G. Sections 60-66

These sections address penalties in cases of violating or non-complying with the Act. Significant points can be concluded as below:

(1) An individual, who is found guilty of money laundering activities, will receive a jail term of one to ten years and/or fined from Bt 20,000 to Bt 200,000. Meanwhile, a juristic person will be fined from Bt 200,000 to Bt 1 million;

(2) If a person having a legal transaction reporting obligation fails to report, such person will receive a jail term not exceeding two years and/or fined from Bt50,000 to Bt500,000;

(3) Whoever discloses any official secret concerning the proceedings according to the Act without authorized legal power will receive a jail term not exceeding five years and/or fined not more than Bt100,000.

Penalties will be doubled for a public official, member of the House of Representatives, member of the House of Senators, member of a Local Administration Council, Local Administrator, Government Official, Employee of a local administration organization, or employee of an organization or a public agency, member of a board, manager, or executive official, or employee of a state enterprise, or member of a board, manager, or any individual who is responsible in the management of a financial institution, or member of any organizations under the Constitution.

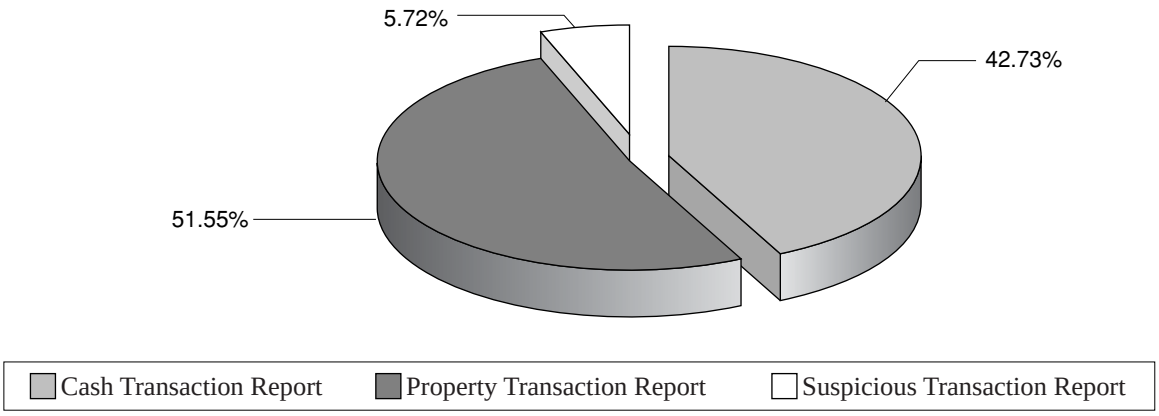
Penalties will be tripled for any member of the AMLO Board, or member of a Sub-Committee Board, or member of the Transaction Committee, or Secretary-General, or Deputy Secretary-General, or competent official, or public official empowered to act in accordance with this Act, who commits any malfeasance in office, or malfeasance in judicial office.

II. FINANCIAL INTELLIGENCE UNIT (FIU)

For Thailand, the Financial Intelligence Unit or FIU is a part of the AMLO. It can be said that the Information and Analysis Centre acts as the Thai FIU. Its main responsibilities can be described as the following:

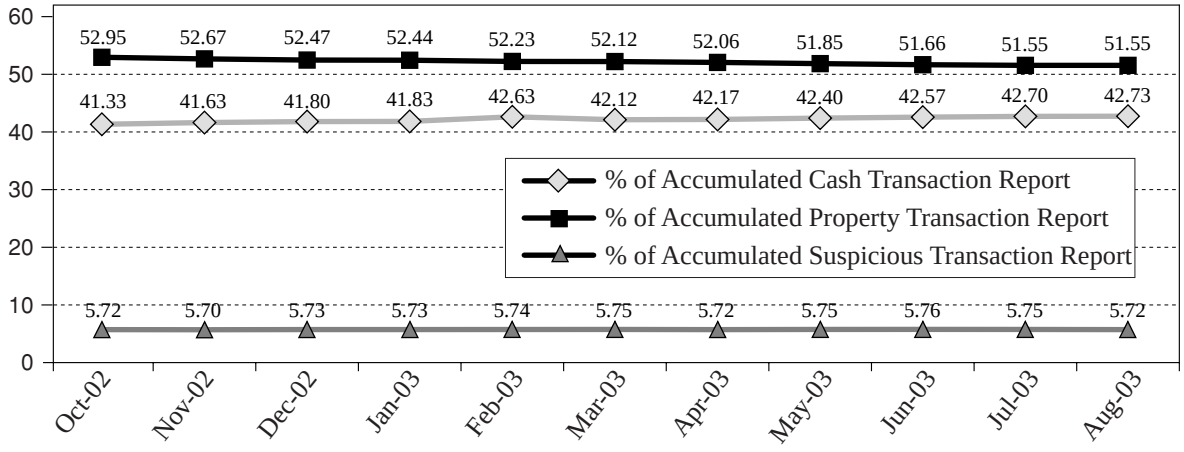
(1) To receive and to keep electronic transaction reports derived from financial institutions and other sources;
(2) To preliminary examine and to analyze transaction reports, particularly suspicious transaction reports, and information concerned;
(3) To act as the central authority of Thailand in exchanging of financial information, including signing the Memorandum of Understanding (MOU) on financial information exchange, with other foreign FIUs;
(4) To set up and to maintain an AMLO database, computer and communication systems.

The Averaged Proportions of Received Transaction Reports Derived from 27 October 2000 - 1 August 2003, Classified by Type of Report



According to the above Figure, at present, almost all transaction reports have been sent to the AMLO in the form of an electronic file. All the reports derived from 27 October 2000 - 31 August 2003 accumulated to 1,438,521 reports with a value of about Bt371 trillion. At the end of 31 August 2003, all these reports roughly comprised 51.55 percent of property reported; followed by a 42.73 percent cash reports and a 5.72 percent of suspicious transaction reports. These proportions are pretty constant from time to time as shown in the following figure.

The Proportions of Transaction Reports during October 2002 - August 2003, Classified by Type of Report



Presently, the Information and Analysis Centre or FIU has 15 manpower persons. These persons are divided into two groups: The first one is responsible for financial transaction analysis and information exchange. The other is responsible for the establishment and maintenance of the database and computer systems.

As for international cooperation, the AMLO is a member of the APG and the Egmont Groups. We have constantly supported the groups' activities and have cooperated and coordinated with member countries with our full efforts. We also realize that information exchange is one of the significant factors leading to law enforcement success. Hence, the AMLO, in association with the Ministry of Foreign Affairs, had drafted "the Memorandum of Understanding Concerning Cooperation in the Exchange of Financial Intelligence Related to Money Laundering" based on the Egmont Group Model. This MOU Draft was proposed to the Cabinet for consideration. On 12 February 2002, the Cabinet approved the MOU Draft and also authorized the AMLO Secretary-General to sign the MOU with other foreign FIUs on behalf of the AMLO. At the present time the AMLO has signed the mentioned MOU with six countries as below:

1. Belgium	MOU effective 24 April 2002.
2. Brazil	MOU effective 29 January 2003.
3. Lebanon	MOU effective 25 February 2003.
4. Indonesia	MOU effective 24 March 2003.
5. Romania	MOU effective 24 March 2003.
6. United Kingdom	MOU effective 11 June 2003.

Additionally, there are many countries in the process of MOU negotiations such as Australia, Malaysia, Russia and Korea.

As for non-MOU countries, we consider exchanging information with them on a case-by-case (based on reciprocity) basis.

III. THE WAR AGAINST DRUGS IN THAILAND

Since the drug situation in Thailand has been deteriorating, there has been a drug epidemic in many areas at both the village and community levels. The increasing of drug problems in the country tends to give more negative impacts to the economy, society and political affairs. This is partly as a result of criminal adaptation operating as a network making law enforcement officers have more difficulty in detecting criminal activities.

The Government, therefore, issued many measures focusing on drug prevention and also put the drug policy in the main policy on state stability. On 14 January 2003, the Prime Minister announced a War against Drugs in Thailand. Consequently, government agencies concerning drug prevention and suppression have been assigned to determine proactive measures on drug prevention and suppression, emphasizing asset forfeiture according to the Anti - Money Laundering Act B.E.2542 (1999). This operation was first set for the period of 1 February - 30 April 2003 and then was extended to 10 August 2003.

In compliance with the said Government announcement, the AMLO as the central authority on money laundering matters has converted the policy on the war against drugs into the operation plan in order to

support operations and tasks of both itself and other agencies concerned with drug elimination. The objectives of the AMLO operation plan can be described as the following:

1. To prevent narcotic law violators, particularly, drug trafficking groups and to stop their illegal activities;
2. To contribute to other government agencies' operations by joining operations, and by exchanging information leading to the seizure of assets and the arrest of offenders;
3. To convince people collaborate on drug prevention and suppression via public relations. For example, educating people on money laundering law; allowing people to give information to the Government via a post box, telephone, letter or e-mail.

There are two expected outcomes of the AMLO operation plan as below:

1. People will collaborate with the Government in drug prevention and suppression;
2. The Government can seize more assets pertaining to drug activities. This action would put pressure on handling drug activities and would also crack drug networks.

There are three stages for implementing measures according to the AMLO operation plan comprising short-term; medium-term and long-term sub-plans. Details are as follows:

A. Short-term Sub-plan

1. To conduct public relations in order to let people know the policy on drug prevention and suppression. The AMLO will facilitate people in giving information via the said channels and keep the names of informants in confidence. This measure took place from 15 January to 15 April 2003;
2. To follow financial movements along the Thai borders and urge the implementation of the measure on reporting of taking-in and out of the country of foreign currency exceeding US$10,000 or equivalent;
3. To urge the start of the enactment of the Office of the Prime Minister's Regulation on Award Payment concerning Asset Proceedings in Accordance with the Anti-Money Laundering Act B.E.2542 (1999);
4. To urge the addition of terrorism into the Anti-Money Laundering Act B.E.2542 (1999) as the eighth predicate offence and criminalizing terrorist activities in the Penal Code;
5. To arrange 24-hour-standby officers for joint operations with other government agencies such as the Bank of Thailand, the Royal Thai Police, Office of the Narcotics Control Board and Defence Ministry. This measure took place from 20 January to 30 April 2003;
6. To urge the disposal of seized assets, particularly perishable assets, high maintenance cost assets and assets that become rapidly worthless.

B. Medium-term Sub-plan

1. To provide instant training courses on money laundering control to government officials and financial institutions officers;
2. To urge the signing of the MOU concerning information exchange with other FIUs;
3. To request more manpower for AMLO task expansion;
4. To study and propose the issuance of Orders or the amendment of laws/regulations concerning money laundering so that operations would be more rapid and flexible.

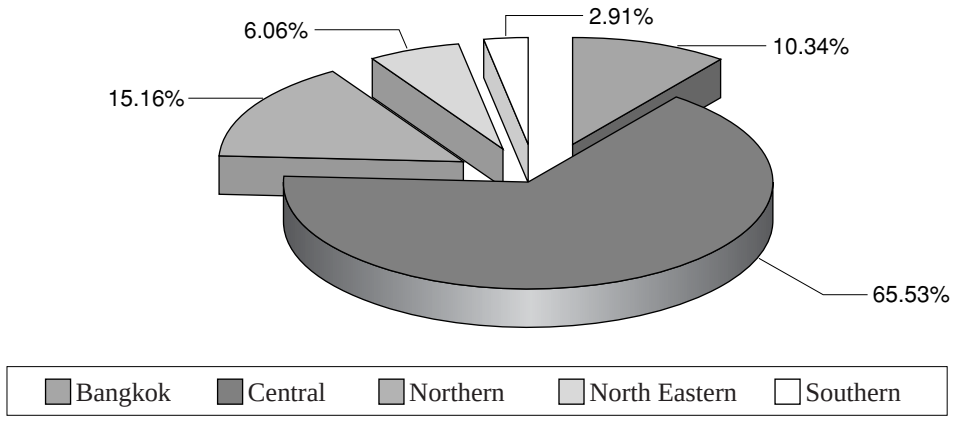
C. Long-term Sub-plan

1. To consider proposing additional predicate offences on money laundering;
2. To consider establishing AMLO Regional Offices and the construction of a warehouse for keeping seized assets.

By the end of the drug war policy period, Thailand was successful in dealing with drug barons and financiers. The Government seized billions bath of assets and put pressure on some drug dealers to give up the drug cycle.

As for AMLO performance, we searched 100 suspected places and investigated 721 cases during the period of 1 February - 10 August 2003. Consequently, we seized assets worth almost Bt530 million and some more after that. Two hundred and seventy cases were investigated in the Central Region, followed by 191 cases in Bangkok, 107 cases in the Southern Region, 103 cases in the Northern Region and of 47 cases in the North Eastern Region. As for asset seizures derived from this operation, about Bt347 million came from the Central Region cases, accounting for 65.53% of total seized assets of about Bt529 million. It was followed by a Bt80.25 million in seized assets from the Northern Region cases, accounting for 15.16% of total seized assets. (As shown in the following table and Figure.)

The Proportions of Asset Seizure Derived from the War against Drugs Implementation, in Part of AMLO, Classified by Region



IV. THAILAND'S IMPLEMENTATION OF CFT- SIGNING, RATIFICATION, AND IMPLEMENTATION OF ANTI-TERRORISTS INSTRUMENTS

Thailand has intensified efforts to implement the United Nations' resolutions related to counter-terrorism. Thailand has been a party to three Conventions and one Protocol: The Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963), The Convention for the Suppression of Unlawful Seizure of Aircraft (1970), and The Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, (1971), and The Protocol for the Suppression of Unlawful Acts of Violence at Airports serving the International Civil Aviation Organization (ICAO) 1988.

The Minister of Foreign Affairs of Thailand signed the International Convention for the Suppression of the Financing of Terrorism on 18 December 2001. Thailand expects to become a party to this Convention by the end of 2002. The Thai Cabinet also resolved on 11 December 2001 to endorse, for Thailand, to be a party to all the remaining conventions relating to counter-terrorism, pending the necessary amendments to the domestic laws.

On 25 February 2002, the Cabinet resolved to set up the National Committee on Consideration of Becoming a Party to International Conventions related to Counter-Terrorism to consider the remaining eight related international conventions in order to speed up the process of becoming a party to these

conventions. These conventions include the following:

1) Convention on the Marking of Plastic Explosives for the Purpose of Detection 1991
2) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988
3) Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf 1988
4) International Convention against the Taking of Hostages 1979
5) Convention on the Physical Protection of Nuclear Material 1980
6) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1973
7) International Convention for the Suppression of Terrorist Bombings 1998
8) International Convention for the Suppression of Financing of Terrorism 1999

Suppression of Terrorist Financing

Pursuant to the UN Security Council Resolutions 1267 (1999), 1269 (1999), 1333 (2001), and 1373 (2001) to counter-terrorism, Thailand issued circular letters to all related agencies to suppress the financing of terrorism and comply strictly with the UN resolutions and assigned the Council of State to consider relevant domestic laws.

A. Prevention of Terrorist Financing

In 1999, Thailand established the Anti-Money Laundering Office (AMLO) to take effective countermeasures against money laundering and other illegitimate financing. On 5 August 2003, the Thai Cabinet approved the two draft amendments becoming effective 11 August 2003 onwards of the Penal Code and the Anti-Money Laundering Act to prescribe financing of terrorism as a serious offence under the Thai criminal law and to empower the AMLO to freeze terrorist funds as mandated by the UNSC Resolution 1373.

On 27 October 2000, all financial institutions are required to report any transfer of funds in cash equal to or greater than 2 million Baht, or transfer of assets equal to or greater than 5 million Baht, and any suspicious financial transactions by their clients to the AMLO under the revised law. Also, the Exchange Control Act B.E. 2485 requires all persons or entities to report any remittance in the amount equal to or over US$ 10,000 to the Bank of Thailand and will soon have to report to the AMLO which maintains these financial records in its electronic database.

Suppression of Terrorist Financing

The Anti-Money Laundering Office (AMLO) is now acting as the Thai national financial intelligence unit (FIU) and has become a member of the EGMONT Group of Financial Intelligence Unit since 2001. The AMLO is ready to sign an MOU with all 69 members of the EGMONT Group to help facilitate the exchange of information on terrorist financing and tracking of blacklisted groups.

B. Financial Action Task Force on Money Laundering (FATF) Special Recommendations and Action Plan on the Suppression of Terrorist Financing

Thailand currently completed the self-assessment against the FATF's eight special recommendations on the suppression of terrorist financing.

C. Strengthening Aviation Security

According to the National Security Programme, Thailand is in the progress of revising its security programme, measures, and procedures to provide tighter civil aviation security systems in airports and the screening of passengers' luggage by the end of the year 2002. Thailand has been active in conducting training for emergency responses during aircraft hijacking situations among national authorities.

D. Strengthening Maritime Security

Thailand is implementing recommendations by the International Maritime Organization (IMO) to strengthen maritime security, including the installation of Automatic Identification System (AIS) on newly built ships. Thailand welcomes technical and financial assistance from international sources to help build the capacity of government agencies in improving maritime security. Thailand also continues to promote the strengthening of domestic coordination and international cooperation to suppress piracy and armed robbery.

E. National Counter-Terrorism Measures

The Royal Thai Government set up the Committee of Counter-International Terrorism (COCIT) chaired by the Prime Minister, to be a focal point for policy formulation. The Counter International Terrorist Operations Centre (CITOC), directed by COCIT, is responsible for the coordination between the policy level and the operational units. Both agencies are mandated by the Policy on Counter International Terrorism 1993, a broad framework proposed by the National Security Council and endorsed by the Thai Cabinet of 1983.

In October 2000, the Directive Committee on the Prevention and Solution of Transnational Crime was also created as part of the Office of the National Security Council by the Prime Minister to provide guidelines for coordination among agencies on transnational crime to suppress the movement of terrorist groups.

F. Progress on Energy Security

Thailand has undertaken a study on a National Oil Stockpiling Strategy to determine the feasibility and viability of establishing an official oil stockpile. Thailand has given cooperation in improving the ASEAN Petroleum Security Agreement (APSA) aiming to achieve an efficient regional energy security mechanism. Also, Thailand is willing to participate in real time information sharing measures and actively exchange energy dialogue at both the intra-regional and inter-regional levels with a view to strengthening energy security in the region as a whole.

G. Security of Information and Communication Infrastructures

The National Intelligence Agency of Thailand is entrusted with the coordinating intelligence on counter-terrorism and maintains close communications with foreign governments to suppress terrorism. Since 11th September 2001, the Agency has stepped up its effort to closely monitor international developments related to counter-terrorism and checking background information of suspicious groups travelling in and out of the country.

In April 2001, National Electronics and Computer Technology Center (NECTEC) established ThaiCERT as an electronic discussion forum among experts, governmental agencies, and the private sector on cyber security. ThaiCert, a five-year plan, provides online services of the computer emergency response team with up-to-date bulletin/announcements on outbreaks of viruses, new security threats, a cybersecurity laboratory, and training courses. ThaiCERT is now a well recognized body in Thailand.

On 20 July 2001, the National Information Technology Committee (NITC) chaired by the Prime Minister, announced 3 sets of policy aimed at enhancing information security. These policies involve: 1) The Communication Authority of Thailand to establish a formal agreement with its licensee ISPs to (a) synchronize their system clocks, (b) maintain customer access log (with caller ID data) for at least 3 months, (c) cooperate fully with the police in case of incidents, and (d) add a clause in their service contract identifying customers' responsibility regarding inappropriate use; 2) The Telephone Organization of Thailand to maintain caller ID records for Internet investigation purposes; 3) The Royal Thai Police to set up an Internet 'hotline' for incident report and to investigate whether it is necessary and

appropriate to regulate Internet cafes.

The Thai government plans to establish the National Information Security Centre to take action in cyber security violations and to serve as the point of contact for other agencies.

H. Protecting Cross-Border Security and Enhancing Business Mobility

The Thai authorities responsible for protecting national security have created a "watch list" database of suspicious terrorists groups. The Ministry of Interior formulated policies for cross-border security and alerted rural provinces to prevent, arrest, and suppress terrorists from using Thailand as a safe haven.

The Ministry of Foreign Affairs and other relevant authorities are doing their utmost to ensure that the procedure of issuing visas for entry and exit meets international standards and has taken steps to prevent passport counterfeit. The Thai Cabinet approved the reduction in the number of countries entitled to exemption of visa requirements for a stay of up to 30 days from 57 countries to 37 countries and the number of countries entitled to a visa-on-arrival for a stay of up to 15 days from 96 countries to 15 countries.

I. Countering Biological Terrorism

Thailand has organized seminars and roundtable discussions on how to prevent the use of Weapons of Mass Destruction through biological and chemical forms and is in the process of developing an expert group to stimulate the exchange of information among all relevant agencies.

The Office of the National Security Council of Thailand, with the US embassy, arranged the Weapons of Mass Destruction (WMD) First Responder Training Programme in June 2001 and also jointly held the Postal Chemical/Biological Incident Management Training Programme for relevant governmental agencies during April 2002.

J. Strengthening International Cooperation

Thailand has made measurable progress in strengthening the regional and bilateral cooperation efforts against counter-terrorism. At the regional level for instance, Thailand has been an active participant within the ASEAN Regional Forum (ARF) to promote discussions to prevent terrorism and contribute to security within the Asia-Pacific Region.

Thailand is in the process of acceding to the Agreement on Information Exchange and Establishment of Communication Procedures to which the Philippines, Malaysia, Indonesia, and Cambodia are Parties. The scope of cooperation under this Agreement includes better coordination through the exchange of information and use of standard communication procedures, with a view to combating and preventing international terrorism and transnational organized crime.

V. COMPLIANCE WITH FATF'S (FINANCIAL ACTION TASK FORCE) EIGHT SPECIAL RECOMMENDATIONS

In addition to the International Convention for the suppression of the Financing of Terrorism 1999, the United Nations Security Council passed Resolution 1373, which requires all UN member States to prevent and suppress the financing of terrorist acts and to freeze all assets linked to terrorists. Moreover, on October 2001, an emergency meeting was convened by the Financial Action Task Force [FATF] in Washington, D.C. FATF is an independent international body comprised of 29 country members and 18

regional bodies and observer organizations, which has set the international standards for anti-money laundering efforts through its issuance of the 40 Recommendations. Thailand participates in FATF through its membership in the Asia Pacific Group [APG]. At this extraordinary meeting, FATF considered what the worldwide response should be to combat terrorist financing. On October 31, 2001, FATF announced a Special Set of eight Recommendations on Terrorist Financing to supplement the existing 40 Recommendations.

The new framework announced by the FATF to assist in detecting, preventing, and suppressing the financing of terrorism and terrorists acts in which Thailand has completed the self-assessment against the FATF's eight Special Recommendations above is as follows:

VI. SUMMARY

Pursuant to the U.N. Security Council Resolutions 1267 (1999), 1269 (1999), 1333 (2001), and 1373 (2001), the Thai government issued instructions to all authorities concerned to comply with these U.N. resolutions, including the freezing of funds or financial resources belonging to the Taliban and the Al-Qaeda network. The relevant authorities and the Council of State have considered relevant domestic laws and regulations in order to make necessary amendments thereto in order to implement the Resolution in full.

On 5 August 2003, the Thai Cabinet approved the two draft amendments becoming effective 11 August 2003 onwards of the Penal Code and the Anti-Money Laundering Act to prescribe financing of terrorism as a serious offence under the Thai criminal law and to empower the AMLO to freeze terrorist funds as mandated by UNSC Resolution 1373.

In effect, all financial institutions in accordance with the Anti-Money Laundering Act are required to promptly report their suspicions of any transactions that may be linked, or related to, or are to be used for terrorism, terrorist acts or by terrorist organizations.

Intelligence and security agencies in Thailand have been on high alert since the 11 September incident. Thai intelligence agencies, both civilian and military/law enforcement, have placed a high priority on information sharing and networking with their foreign counterparts, especially the U.S. agencies. The Anti-Money Laundering Office of Thailand has become a member of the EGMONT Group since 2000. The membership has enabled the Office to have access to and exchange information with other members.

Thailand also has the Mutual Assistance in Criminal Matters Act (1992), which forms a broad basis for cooperation with other countries with regard to criminal matters i.e. taking testimony and statements of persons; providing documents, records and evidence for prosecution and search and forfeiture of properties. The law is supplemented by Treaties of Mutual Assistance in Criminal Matters that Thailand has with 5 countries: namely, the United States, Canada, the United Kingdom, France and Norway.

In conclusion, Thailand has adopted a firm policy in condemning terrorism in all forms and manifestations. In practices, all authorities have done their utmost to ensure that Thailand will not be used as a base for the commission of any terrorist acts against any other country and that terrorists will never find a safe haven in Thailand.

VII. THAILAND ASSESSMENT: EIGHT SPECIAL RECOMMENDATIONS

The framework announced by FATF to assist in detecting, preventing, and suppressing the financing of terrorism and terrorists acts in which Thailand has completed the self-assessment against the FATF's Eight Special Recommendations above is as follows:

A. Ratification and Implementation of UN Instruments

In complying with the related U.N. resolutions concerning actions taken on the Taliban Group in particular resolutions 1267/1999, 1269/1999, the Thai Cabinet issued an instruction on 21 December 1999 to all authorities concerned to comply with these U.N. resolutions, including the freezing of transfer funds or financial resources belonging to the Taliban.

On 5 August 2003, the Thai Cabinet approved the two draft amendments becoming effective 11 August 2003 onwards of the Penal Code and the Anti-Money Laundering Act to prescribe the financing of terrorism as a serious offence under the Thai criminal law and to empower the AMLO to freeze terrorist funds as mandated by the UNSC Resolution 1373.

In effect, all financial institutions in accordance with the Anti-Money Laundering Act are required to promptly report their suspicions if any transactions that may be linked, or related to, or are to be used for terrorism, terrorist acts or by terrorist organizations.

Thailand has been party to four conventions and protocols relating to terrorism concluded in the framework of the International Civil Aviation Organization (ICAO); namely, the Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963), the Convention for the Suppression of Unlawful Seizure of Aircraft (1970), the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971) and the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1988).

The Minister of Foreign Affairs of Thailand signed the International Convention for the Suppression of the Financing of Terrorism on 18 December 2001. As for the other seven conventions, the Cabinet resolved on 11 December 2001 to endorse, in principle, for Thailand to be a party to all the remaining conventions relating to terrorism pending the necessary amendments of domestic laws to enable full compliance with each convention.

On 25 February 2002, the Cabinet resolved to set up the National Committee on Consideration of Becoming a Party to International Conventions relating to Terrorism as proposed by the Ministry of Foreign Affairs. This National Committee is empowered: to consider details of the remaining eight related international conventions and to enact or amend relevant domestic laws in order to implement all obligations under those conventions.

B. Criminalizing the Financing of Terrorism and Associated Money Laundering

In 1999, Thailand established the Anti-Money Laundering Office to take effective countermeasures against money laundering and other illegitimate financing. According to the resolution of the Cabinet on 2 October 2001, the Council of State proposed the two draft amendments of the Penal Code and the Money Laundering Act. The draft amendment of the Penal Code defines the scope of terrorism and prescribes the act of terrorism as a serious offence with severe punishments under Thai criminal law.

On 5 August 2003, the Thai Cabinet approved the two draft amendments becoming effective 11 August 2003 onwards.

C. Freezing and Confiscating Terrorist Assets

At present, the existing domestic laws provide a legal basis for the Anti-Money Laundering Office, to freeze the transfer of funds or financial resources of persons or entities suspected of committing or facilitating the commission of terrorist acts. The amendments to the Penal Code and to the Money Laundering Act are to make terrorist acts under the Penal Code an offence under the Money Laundering Act. Accordingly, the laws empower the Anti-Money Laundering Office to freeze the transfer of funds or financial resources of alleged terrorists and their accomplices.

D. Reporting Suspicious Transactions Related to Terrorism

All financial institutions in accordance with the Anti-Money Laundering Act are required to promptly report their suspicions of any transactions that may be linked, or related to, or are to be used for terrorism, terrorist acts or by terrorist organizations.

E. International Cooperation

Intelligence and security agencies in Thailand have been on high alert since the 11 September incident. Thai intelligence agencies, both civilian and military/law enforcement, have placed a high priority on information sharing and networking with their foreign counterparts, especially the U.S. agencies. The Anti-Money Laundering Office of Thailand has been a member of the EGMONT Group since 2000. The membership has enabled the Office to have access to and exchange information with other members on the basis of the memorandum of understanding (MOU).

Thailand also has the Mutual Assistance in Criminal Matters Act (1992), which forms a broad basis for cooperation with other countries with regard to criminal matters i.e. taking testimony and statements of persons; providing documents, records and evidence for prosecution and search and forfeiture of property. The law is supplemented by Treaties of Mutual Assistance in Criminal Matters that Thailand has with five countries: namely, the United States, Canada, the United Kingdom, France and Norway.

At the regional level, Thailand has strengthened its counter-terrorism cooperation within the framework of ASEAN in accordance with the ASEAN leaders' Declaration on Joint Action to Counter Terrorism of November 2001. The Terrorism component of the Work Programme to Implement the ASEAN Plan of Action to Combat Transnational Crime was adopted at the Special ASEAN Ministerial Meeting on Terrorism, held in Kuala Lumpur on 20-21 May 2002. In addition, Thailand has expressed its willingness to accede to the Trilateral Agreement on Information exchange and Establishment of Communication Procedures between Indonesia, Malaysia and the Philippines, which was sighed on 7 May 2002.

F. Alternative Remittance

Under the Exchange Control Act, all persons or legal entities that provide services for the transmission of money or value must be approved by the Minister of Finance under the recommendation of the Bank of Thailand. Any persons or legal entities that carry out this service illegally are subjected to civil or criminal sanctions under this law. Commercial banks are required to report all transfers made with foreign countries within three days of the transaction date. Any suspicious activity will be reported to the Anti-Money Laundering Office. A number of laws and regulations have been enacted to curb informal activities. Education as well as measures such as a reduction of registered capital for money changers have been provided to encourage informal agents to enter the system.

In addition, another measure against alternative means of cash remittances is to enact the ministerial attachment to the Exchange Control Act on the declaration of the cash transition of foreign currency equivalent to or over USD 10,000.

G. Wire Transfers

Under the current Anti Money Laundering Act B.E. 2542, any person or legal entities that have the approval to provide the services for the transmission of money must require their customers to provide accurate and meaningful originator information. Furthermore, the Anti-Money Laundering Office imposes legal obligations for such persons or entities to report certain kinds of transactions namely: (1) a transaction involving cash in an amount equal to or exceeding two million baht (2) a transaction involving an asset equal to or exceeding five million baht; or (3) any suspicious transaction. If the money transmission service-providers fail to follow these instructions, they are subjected to substantial penalty fines (Bt 300,000).

H. Non-Profit Organizations

The amendments to the Penal Code and the Anti-Money Laundering Act prevent the possible misuse of non-profit organizations by terrorists, and empower the relevant Thai authorities to effectively impede terrorist activities and financing.

The legal regime of entities, particularly non-profit organization under the supervision of the Office of National Cultural Commission, Ministry of Culture would be reviewed to prevent any misuse for terrorist financing purposes.

APPENDIX A

ANTI-MONEY LAUNDERING ACT OF B.E. 2542 * (TRANSLATION)

Bhumibol Adulyadej, Rex.,
Given on the 10th Day of April B.E. 2542
Being the 54th Year of the Present Reign.

His Majesty King Bhumibol Adulyadej is graciously pleased to proclaim that:

Whereas it is expedient to enact a law on the anti-money laundering;

This Act contains some provisions restricting the rights and liberties of an individual set forth in of section 29 together with section 35, section 37, section 48 and section 50 of the Constitution of the Kingdom of Thailand, which was endorsed in the enactment of this law.

Be it, therefore, enacted by His Majesty the King, by and with the advice and consent of the National Legislative Assembly as follows:

Section 1: This Act shall be cited the "Anti-Money Laundering Act of B.E. 2542."

Section 2: This Act shall come into force on and after one hundred and twenty days of its publication in the Government Gazette.◆

Section 3: In this Act,
"Predicate offence" means:

(1) Offences relating to narcotics under the Narcotics Control Act or the Act on Measures for the Suppression of Offenders in an Offence relating to Narcotics.

(2) Offences relating to sexuality under the Penal Code, in particular to sexual offences pertaining to procuring, seducing, or taking or enticing for indecent acts on women or children in order to gratify the sexual desire of another person, and offences relating to the trafficking in children or minors, or offences under the Measures to Prevent and Suppress Trading of Women and Children Act, or offences under the Prevention and Suppression of Prostitution Act, in particular related to offences of procuring, seducing, enticing or kidnapping a person for the purpose of the prostitution trade, or offences relating to being an owner of a prostitution business, or an operator, or a manager of a place of prostitution business, or supervising persons who commit prostitution for trade in a prostitution business.

(3) Offences relating to cheating and fraud on the public under the Penal Code or offences pursuant to the Fraudulent Loans and Swindles Act.

(4) Offences relating to embezzlement or cheating and fraud involving assets, or acts of dishonesty or deception as described in the law governing commercial banks, or Act on the Undertaking of Finance Business, Securities Business and Credit Financier Business, or Act governing Securities and Stock Exchange, which is committed by a director, a manager or any person who

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* Translated by Pol. Maj. Gen. Peeraphan Prempooti, B.A. (Pol.Sc.), LL.B., LL.M., M.PA., Secretary-General, Anti-Money Laundering Office. Translation is for the convenience of those who are not familiar with the Thai language. For official purposes, only the Thai text will be relevant.

◆ Published in the Government Gazette Vol.116, Part 29 Gor. On the 21st Day of April of B.E. 2542 (B.E.=Buddhist Era, B.E.2542 is equivalent to A.D.1999).

is in charge of or having any vested interest relating to the management of a financial institution.

(5) Offences relating to malfeasance in office, or malfeasance in judicial office under the Penal Code, offences pertaining to the law governing public officials of a state enterprise or government office, or offences pertaining to malfeasance or dishonesty in carrying out official duties under other related laws.

(6) Offences relating to the commission of extortion or blackmail by a member of an unlawful secret society or organized criminal association as defined in the Penal Code.

(7) Offences relating to customs evasion under the Customs Act.

(8) Offences relating to terrorism under the Penal Code[1].

"Transaction" means any activity related to a juristic act, contract, or any commitment with other persons dealing with finance, business or involving assets;

"Suspicious transaction" means a transaction that is more complicated than the norm by which that transaction is usually conducted, a transaction that lacks economic rationale; a transaction where there is probable cause to believe that it was conducted for the purpose of avoiding the compliance of this Act; or a transaction related to or possibly related to a commission of any predicate offence, whether the commission of such transaction is conducted once or more than once;

"Asset involved in an offence" means:

(1) money or property derived from the commission of a predicate offence, or from aiding or abetting in the commission of a predicate offence;

(2) money or property derived from the sale, distribution, or transfer in any manner of the money or asset in (1); or

(3) fruits of the money and property in (1) or (2).

Notwithstanding how many times the asset in (1), (2), or (3) has been sold, distributed, transferred, or transformed, or found in whosoever possession, or being transferred to whomever, or bearing in registration or record under whosoever ownership.

"Financial institutions" means:

(1) The Bank of Thailand under the Bank of Thailand Act, a commercial bank under the Commercial Bank Act, or a bank established under the provisions of a specific law;

(2) Finance business and credit finance companies under the Act on the Undertaking of Finance Business, Securities Business and Credit Finance Business, and securities companies under the Securities and Exchange Act;

(3) The Industrial Funds Corporation of Thailand under the Industrial Funds Corporation of Thailand Act, and the small and medium enterprise funds corporation under the Small and Medium Enterprise Funds Corporation Act;

(4) Life insurance companies under the Life Insurance Act, and casualty insurance companies under the Casualties Insurance Act;

(5) Saving cooperative companies under the Savings Cooperatives Development Act; or

(6) Any juristic person undertaking non-bank business related to finance as provided by the Ministerial Regulations.

"Board" means the Anti-Money Laundering Board.

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[1] Executive Decrees published in the Government Gazette on August 11, B.E. 2546 (2003) to amend the Penal Code Section 135 and the Anti-Money Laundering Act of B.E. 2542 (1999) Section 3.

"Board Member" means a member of the Anti-Money Laundering Board and includes its chairman.

"Competent official" means the person appointed by the Minister to act in accordance with this Act.

"Secretary-general" means the secretary-general of the Anti-Money Laundering Board.

"Deputy Secretary-general" means the Deputy Secretary-general of the Anti-Money Laundering Board.

"Office" means the Anti-Money Laundering Office.

"Minister" means the Minister who is in charge of the enforcement of this Act.

Section 4: The Prime Minister shall be in charge of the enforcement of this Act and has the power to appoint competent officials, and to issue Ministerial Regulations, Rules, and Notifications in accordance with this Act.

Such Ministerial Regulations, Rules, and Notifications shall come into force upon their publication in the Government Gazette.

Chapter 1
General Provisions

Section 5: Whoever:

(1) transfers, receives the transfer, or changes the form of an asset involved in the commission of an offence, for the purpose of concealing or disguising the origin or source of that asset, or for the purpose of assisting another person either before, during, or after the commission of an offence to enable the offender to avoid the penalty or receive a lesser penalty for the predicate offence; or

(2) acts by any manner which is designed to conceal or disguise the true nature, location, sale, transfer, or rights of ownership, of an asset involved in the commission of an offence shall be deemed to have committed a money laundering offence.

Section 6: Whoever commits a money laundering offence, even if the offence is committed outside the Kingdom, shall receive the penalty in the Kingdom, as provided in this Act, if:

(1) either the offender or co-offender is a Thai national or resides in the Kingdom;

(2) the offender is an alien and has taken action to commit an offence in the Kingdom or is intended to have the consequence resulting therefrom in the Kingdom, or the Royal Thai Government is an injured party; or

(3) the offender is an alien whose action is considered an offence in the State where the offence is committed under its jurisdiction, and if that individual appears in the Kingdom and is not extradited under the Extradition Act, Section 10 of the Penal Code shall apply mutatis mutandis.

Section 7: Pursuant to the offence of money laundering, whoever undertakesone of the following acts shall receive the same penalty as a principal offender of such offence:

(1) aiding in the commission of an offence or abetting the offender, either before or during the

commission of the offence; or

(2) procuring or supporting with money or assets, means of transportation, shelter, or any other object, or undertaking any other acts in order to assist the offender to escape or to avoid the punishment from such offence, or to gain a benefit from the commission of an offence.

The Court may not impose a lesser punishment than that provided by the law for such offence where the person who procures or provides money or assets, shelter, or hiding place in order to assist his or her father, mother, son or daughter, wife or husband to avoid apprehension.

Section 8: Whoever attempts to commit an offence of money laundering shall receive the same penalty as provided by the law for a successfully committed offence.

Section 9: Two or more persons who conspire to commit the offence of money laundering shall each receive half of the punishment provided by the law for such offence.

If a money laundering offence is committed as a result of a conspiracy under the first paragraph, the conspirator shall receive the punishment provided by the law for such offence.

If a conspirator in the commission of an offence withdraws from the conspiracy or intervenes to prevent the commission of the offence and such committed offence does not achieve its end, the conspirator who withdrew from the conspiracy or intervened to prevent it shall receive the punishment provided in the first paragraph.

If an offender, described in the first paragraph, admits to the conspiracy to a competent official prior to the commission of the offence that he or she conspired to commit, the Court may or may not impose a penalty less severe than that provided by the law for such offence.

Section 10: Whoever, in their capacity as a public official, member of the House of Representatives, member of the House of Senators, member of a Local Administration Council, Local Administrator, Government Official, Employee of a local administration organization, or employee of an organization or a public agency, member of a board, manager, or executive official, or employee of a state enterprise, or member of a board, manager, or any individual who is responsible in the management of financial institution, or member of any organizations under the Constitution commits an offence under this chapter shall receive two times the punishment provided by law for such offence.

Any Member of the Board, or Member of Sub-Committee, or Member of the Transaction Committee, or Secretary-general, or Deputy Secretary-general, or competent official empowered to act in accordance with this Act, who commits an offence under this chapter shall receive three times the punishment provided by law for such offence.

Section 11: Any Member of the Board, or Member of Sub-Committee Board, or Member of the Transaction Committee, or Secretary-general, or Deputy Secretary-general, or competent official, or public official empowered to act in accordance with this Act, who commits any malfeasance in office, or malfeasance in judicial office as provided in the Penal Code in connection with the commission of an offence provided in this chapter shall receive three times the penalty provided by law for such offence.

Section 12: For purposes of this Act, Member of the Board, Member of a Sub-Committee, Transaction Committee, Secretary-general, Deputy Secretary-general and competent official are also competent officials under the Penal Code.

Chapter 2
Reporting and Identification

Section 13: Whenever a transaction takes place at a financial institution, the financial institution has a responsibility to file a report of that transaction with the Office, if any transaction appears to be one of the following:

(1) A transaction involving cash in an amount equal to or exceeding the significant amount set forth in the Ministerial Regulations;

(2) A transaction involving an asset equal to or exceeding the significant value set forth in the Ministerial Regulation; or

(3) Any suspicious transaction, whether or not it is in accordance with (1) or (2). A financial institution has a continuing obligation following the filing of a report to provide to the Office without delay any additional facts or significant information about which it becomes aware that is relevant to the reported transaction or to confirm or deny the original information about the reported transaction.

Section 14: Where a financial institution subsequently obtains probable cause to believe that any transaction previously carried out which was not reported in accordance with section 13 appears to have been a transaction that financial institution must report in accordance with section 13, then the financial institution shall report that transaction to the Office without delay.

Section 15: The Land Office of Bangkok Metropolitan, the Provincial Land Office, the Branch of Land Office, and the District Land Office, have a duty to report to the Office whenever a request for registration of rights and juristic act involving an immovable asset when a financial institution is not involved as any party to such request, and the transaction appears to involve any of the following:

(1) When payment is made in cash exceeding the significant amount as set forth in the Ministerial Regulations;

(2) When an immovable asset has an estimated value on the registration of rights and juristic act in an amount exceeding the significant amount set forth in the Ministerial Regulations, except in the case of transfer by succession to a statutory heir; or

(3) When it is a suspicious transaction.

Section 16: A person who is engaged in a business of operating, or advising to engage in investment transactions, or the movement of capital has a duty to report to the Office when there is probable cause to believe that such transaction may relate to asset involved in a commission of offence or is a suspicious transaction.

A person identified in the first paragraph who is subject to the reporting rules under this section has a continuing obligation following the filing of a report to provide to the Office without delay any additional facts or significant information about which it becomes aware that is relevant to the reported transaction or to confirm or deny the original information about the reported transaction.

Section 17: The reporting under the provisions of section 13, 14, 15 and 16 shall be made in accordance with the format, interval, guidelines and methods prescribed in the Ministerial Regulations.

Section 18: Any transaction that the Minister deems fit to exempt from the reporting requirement under the provision of section 13, 15 and 16 shall be in conformity with the Ministerial Regulations.

Section 19: A report submitted in accordance with section 13, 14, 15 and 16 in good faith by any individual capacity if it appears to cause damage to any person, that individual shall not be liable for any damage.

Section 20: A financial institution shall require all customers to show identification prior to conducting any transaction on behalf of a customer, as provided by Ministerial Regulations, unless that customer has previously identified. The customer identification under the first paragraph shall be in accordance with the procedures as the Minister may prescribe.

Section 21: A financial institution that conducts a transaction described in section 13 shall request that the customer provide all facts in connection with such transaction. If a customer refuses to fill out a form to provide all facts in accordance with the first paragraph, the financial institution shall record such refusal and report to the Office immediately. The fact and information requirement under the first and second paragraphs shall be the form, content, guidelines, and methods prescribed in the Ministerial Regulations.

Section 22: Financial institution shall maintain all customer identification records under section 20, and a record of facts and information under section 21 for a period of five years from the date that the account was closed or the termination of relations with the customer, or from the date that such transaction occurred, whichever is longer, unless the competent official notifies that financial institution in writing to do otherwise.

Section 23: The provisions in this chapter shall not apply to the Bank of Thailand governed by the Bank of Thailand Act.

Chapter 3
Anti-Money Laundering Board

Section 24: There shall be an Anti-Money Laundering Board consisting of the Prime Minister as Chairman, Minister of Finance as Vice-Chairman, the Permanent Secretary of the Ministry of Justice, the Attorney-General, the Commissioner-General of the Royal Thai Police, the Secretary-general of the Office of Narcotics Control Board, the Director-General of the Fiscal Policy Office, the Director-General of the Department of Insurance, the Director-General of the Department of Lands, the Director-General of the Customs Department, the Director-General of the Revenue Department, the Director-General of Department of the Treaties and Legal Affairs, the Governor of the Bank of Thailand, the President of the Thai Banking Association; the Secretary-general of the Securities Exchange Commission and nine qualified experts appointed by the Cabinet from those who have expertise in economics, monetary affairs, finance, law or any other related fields beneficial to the execution of this Act with the consent of the House of Representative and the Senate respectively as a member of the Board and the Secretary-general of the Office as Secretary of the Board.

The Board shall appoint no more than two government officials in the Office as the Assistant Secretary of the Board.

In case where the Chairman or Member of the Board in paragraph one can not attend the board meeting, one shall delegate a deputy who is knowledgeable relating to duties of the Board to attend that particular meeting.

Section 25: The Board shall have the duty to:

(1) propose to the Cabinet measures to combat money laundering;
(2) recommend to the Minister Ministerial Regulations, Rules and Notifications to enforce this Act;
(3) set rules pertaining to the custody, maintenance, sale by public auction, optimum usage, and damage evaluation, and depreciation of the assets in accordance with section 57;
(4) promote cooperation from the public in providing information to combat money laundering;
(5) monitor and evaluate the effectiveness of the enforcement of this Act; and
(6) perform other duties as provided in this Act or in other laws.

Section 26: The qualified experts appointed by the Cabinet shall serve a term of four years from the date of appointment, and shall be eligible to serve only one term.

Section 27: Apart from the term limit set forth in section 26. The appointment of a qualified expert by the Cabinet shall terminate from office upon:

(1) death;
(2) resignation;
(3) being removed by the Cabinet by the consent of the House of Representative and the Senate respectively;
(4) being a bankrupt;
(5) being an incompetent or quasi-incompetent person;
(6) being imprisoned by a final judgement to a term of imprisonment.

If a qualified expert is appointed during the term, whether as an addition or a replacement, that qualified expert shall serve the remainder of that term.

Section 28: If a qualified expert has fully served the term and no new qualified expert been appointed, such qualified expert shall remain in office until such time as a new qualified expert has been appointed.

Section 29: The meeting of the Board shall require of no less than one half of member of the Board in the presence to constitute a quorum.

The Chairman of the Board shall chair the meeting. If the Chairman is unable to attend the meeting or cannot execute the duty, then the Vice-Chairman shall chair the meeting. If the Vice-Chairman is unable to attend the meeting or cannot execute the duty, the members of the Board who are present shall elect one of the members of the Board to chair the meeting.

A resolution of the meeting shall pass by a majority of the votes cast. Each member of the Board shall have one vote. In the event of a tie, the Chairman shall cast an additional vote to be the deciding vote.

Except, however, a decision by the Arbitrary Sub-Committee under resolution to pass under paragraph three of section 49 shall require a majority of two third of the votes cast of participating members of the Sub-Committee.

Section 30: The Board may appoint a Sub-Committee to study and submit recommendations on any particular subject, or to undertake any action on behalf of the Board. Section 29 shall apply mutatis mutandis to any meeting of the Sub-Committee.

Section 31: Members of the Board and Members of the Sub-Committee may receive remuneration as determined by the Cabinet.

Chapter 4
Transaction Committee

Section 32: There shall be a Transaction Committee consisting of the Secretary-general as the Chairman of the Committee and four other qualified experts whom the Board appointed as members.

Qualification or disqualification of the Transaction Committee shall be as provided by the Minister's Announcement.A member of the Transaction Committee appointed by the Board shall serve a two year term. A member of the Transaction Committee whose term is ended may be reappointed and the provisions of section 27 and 28 shall apply mutatis mutandis, except that termination from office in accordance with section 27 (3) shall not apply.

Section 33: The meetings of the Transaction Committee shall be in accordance with section 29 mutatis mutandis.

Section 34: The Transaction Committee has the following duties:

(1) to audit transactions or assets involved in the commission of an Offence;
(2) to restrain a transaction under section 35 or 36;
(3) to restrain or seize in accordance with section 48;
(4) to report to the Board on its work performed under this Act; and
(5) to undertake other functions designated by the Board.

Section 35: In case where there is probable cause that any transaction is involved or may be involved in the commission of a money laundering offence, the Transaction Committee shall have the power to issue a written order to restrain such transaction, within the time prescribed but not exceeding three business days.

In the case where it is necessary or in an emergency, the Secretary-general shall have the power to issue an order to restrain a transaction in accordance with the provisions under the first paragraph, and then report to the Transaction Committee.

Section 36: In the case where there is evidence to believe that any transaction is involved or may be involved in the commission of a money laundering offence, the Transaction Committee shall have the power to issue a written order to restrain that transaction temporarily within the time prescribed but not exceeding ten business days.

Section 37: When the Transaction Committee or the Secretary-general, whichever it may be, issues a restraining order in accordance with section 35 or 36, then the Transaction Committee shall file a report to the Board.

Section 38: In order to undertake a duty in accordance with this Act, the Transaction Committee, the Secretary-general and competent official designated by the Secretary-general in writing shall have the power to do the following:

(1) inquire in writing or compel a financial institution, government agency, organization, or public office or state enterprise, whichever is the case, to send a relevant official to testify, to submit a written explanation, or to submit an account, document or any other evidence for examination or consideration;
(2) issue a written inquiry or summons anyone to appear to testify, to submit an explanation note, or account, document or any evidence for examination or consideration;
(3) have access into a residence, place, or any transporting conveyance in which there is probable

cause to suspect that any asset involved in the commission of an offence, or evidence involved in a money laundering offence is hidden or kept, in order to search or for the purpose of tracing, monitoring, seizing or attaching any asset or any evidence. Such access is authorized when it is too late to obtain a search warrant and the asset or evidence may be moved, concealed, destroyed, or transformed from its origin nature of appearance.

In the performance of duty under (3), the competent official designated under paragraph (1) shall produce his or her identification card and assignment document to the individual concerned.

The identification card according to paragraph (2) shall be in the form prescribed by the Minister, which is published in the Government Gazette.

The Secretary-general shall be responsible for the custody and use of all information derived from testimony, written explanation, account, document, or any other evidence which has the characteristic of being specific information of an individual, financial institution, government agency, government organization or state enterprise.

Section 39: Members of the Transaction Committee may receive remuneration as prescribed by the Cabinet.

Chapter 5
The Office of Anti-Money Laundering

Section 40: There shall be an Office of Anti-Money Laundering in the Office of the Prime Minister which shall have the power to:

(1) act in accordance with the resolutions of the Board and the Transaction Committee, and to carry out other administrative functions;
(2) receive transaction reports which are delivered in accordance with the requirements in chapter two, and to issue an acknowledgement of such report;
(3) collect, trace, monitor, study, and to analyze reports or any other information related to financial transactions;
(4) collect evidence in order to prosecute any violator under the provisions of this Act;
(5) launch an education programme in order to disseminate information, educate and provide training pertaining to the undertaking of this Act, or assist or support both public and private sectors to launch such programmes; and
(6) carry out other functions in accordance with the provisions of this Act or other laws.

Section 41: There shall be a Secretary-general who has the duty and responsibility to report directly to the Prime Minister, to oversee the performance of the Office in general, and to supervise the public official of the Office. There shall be a Deputy secretary-general to assist the overseeing and supervising of the performance of the Office.

Section 42: The Secretary-general shall be a civil servant who is appointed by His Majesty the King by and with the advice and consent of the Cabinet and the House of Representatives and the Senate respectively.

Section 43: The Secretary-general shall have the qualifications as follows:

(1) knowledge and expertise in the field of economics, finance, fiscal policy or law;
(2) be a Deputy secretary-general or a civil servant at a position classification level not less than or equivalent to a Director-General;

(3) not be a member of any Board of any state enterprise or any other government agency; and
(4) not be a member of the board, or manager, or consultant, or hold any similar position or have any vested interest in any limited partnership, company, financial institution, or work in any profession, vocation, or any other establishment which is in contradiction to this Act.

Section 44: The Secretary-general shall hold office for a term of four years from the date of the order of His Majesty the King.

The Secretary-general shall not be reappointed upon completion of the term served.

Section 45: Notwithstanding serving out the term as provided in section 44, the Secretary-general shall be terminated from the position in the case of:

(1) death;
(2) resignation;
(3) disqualification in accordance with section 43; or
(4) by the order of His Majesty the King, by and with the advice of the cabinet and the House of Representative and the Senate respectively.

Section 46: Where there is probable cause to believe that a customer's account at a financial institution, equipment or communication device, or any computer has been used or may be used for the purpose of the commission of a money laundering offence, the competent official, designated in writing by the Secretary-general, shall submit a petition to the Civil Court to issue a warrant to have access to obtain information from the account, communication data, or computer files.

In accordance with paragraph one, the Court may authorize the competent official who submits such petition to use any appropriate instrument or access device. The warrant in each endorsement shall not exceed ninety days.

Once the Court has issued a warrant in accordance with paragraph one or two, the individual concerned with the account, the communication data or the computer file shall cooperate to comply with the provisions of this section.

Section 47: The Office of Anti-Money Laundering shall submit an annual performance report to the Cabinet. The annual performance report shall contain essential details including, but not limited to:

(1) a report on the management of assets and all proceedings in accordance with this Act;
(2) problems or obstacles encountered in carrying out the responsibilities of the Office; and
(3) a report on fact or observations made in carrying out the responsibilities of the Office, including opinions and recommendations.

The Cabinet shall submit the annual performance report described in paragraph one together with the Cabinet's observations to the House of Representative and the Senate.

Chapter 6
The Asset Management

Section 48: In examining reports and data on financial transactions, if there is probable cause to believe that there may be a transfer, distribution, placement, layering, or concealment of any asset related to the commission of an offence, the Transaction Committee shall have the power to restrain or seize that asset temporarily for a period not exceeding ninety days.

In case where it is necessary or in an emergency the Secretary-general may issue an order to restrain or seize such asset in accordance with paragraph one and then report to the Transaction Committee.

The examination of reports and transaction data in accordance with paragraph one shall be as prescribed in the ministerial regulations.

Any individual who conducts any transaction or an individual who has a vested interest in the asset being seized or restrained shall produce evidence to prove that the money and asset in the transaction are not related to the commission of an offence, so that the restraint or seizure order can be withdrawn. The proceeding and guidelines shall be administered in accordance with the Ministerial Regulations.

When the Transaction Committee or the Secretary-general, whoever it may be, orders the restraint or seizure of an asset, or withdraws such an order, then the Transaction Committee shall report to the Board.

Section 49: Under the provisions of paragraph one of section 48, in the case where there is evidence to believe that an asset is related to the commission of an offence, the Secretary-general shall forward the case to the prosecutor for consideration to file a petition to the Court to order the forfeiture of such asset for the benefit of the State without delay.

In a case where the prosecutor deems that the evidence is inadequate to file a petition to the Court for the forfeiture of the asset, in whole or in part, the prosecutor shall inform the Secretary-general of such inadequate evidence so that he may proceed to obtain additional information.

The Secretary-general shall proceed without delay in response to paragraph two and submit additional evidence for the prosecutor to reconsider. Should the prosecutor deem that the evidence is still inadequate to file a petition to the Court for the forfeiture of an asset in whole or in part, the prosecutor shall inform the Secretary-general in order to forward the matter to Arbitrary Committee for consideration. The Arbitration Committee shall deliver the decision within thirty days as from the date of receipt from the Secretary-general.

The prosecutor and the Secretary-general shall follow the decision of the Arbitrary Committee. When the Arbitrary Committee fails to issue a decision within the prescribed time limit, then the prosecutor's determination will be final.Where the prosecutor's determination pertaining to paragraph three has been fulfilled then it shall be final. There shall be no more motion against that individual in connection with the same asset unless new crucial evidence has arisen to convince the Court to order the forfeiture of that individual asset to the State.

When the prosecutor has filed a petition to the Court, the Court shall order that a notice be posted at the Court and have it published for two consecutive days in a local, well known, newspaper so that individuals who may claim ownership or have a vested interest in the asset can file an objection to the petition to the Court prior to the issuance of an order. In addition, the Court shall send a copy of such notice to the Secretary-general to post at the Office and at the police station where the asset is located. If there is evidence of an individual who may claim ownership or has a vested interest in the asset then the Secretary-general shall send a notice to that individual and inform him/her of their rights. The notice shall be delivered via certified registered mail to the individual's last known address.

Notwithstanding paragraph one, under a probable cause to act in order to protect the right of a complainant in the predicate offence, the Secretary-general may forward the matter to the competent official who is investigating the commission of that offence on the undertaking of such law to protect the right of the victim.

Section 50: An individual, who claims ownership of the asset which the prosecutor has filed a petition to forfeit to the State in accordance with section 49, may file a petition before the Court issues an order under section 51 showing to the Court that:

(1) he or she is the true owner and the asset is not related to any offence or

(2) he or she has received the transfer of ownership honestly and with compensation, or he has acquired the asset honestly and morally, or by charity.

An individual who claims to have a vested interest in an asset on which the prosecutor has filed a petition to forfeit to the State under section 49 may file a petition for a protection of his rights before the

Court issues an order. The petitioner must satisfy the Court that he or she is an honest recipient and a bona fide purchaser or that he or she has acquired the interest honestly and morally, or by charity.

Section 51: If, after investigating the petition of the prosecutor in accordance with section 49, the Court believes that the asset named in the petition is related to, an offence and the petition of the claimant filed pursuant to, section 50, paragraph one, has no merit, the Court shall order the forfeiture of the asset to the State.

According to this section, if the claimant in section 50, paragraph one is related to or used to be related to any person who committed the predicate offence or the offence of money laundering, the presumption shall be that the money or asset is related to an offence or has been transferred dishonestly, whichever the case may be.

Section 52: Where the Court has ordered the forfeiture of the asset to the State according to section 51, and it subsequently has inquired and believes that the petition of the claimant in section 50 paragraph two has merit, the Court may issue an order to protect the rights of the recipient claimant with or without conditions.

According to this section, if the claimant of being a recipient in section 50 paragraph two is related to or used to be related to any person who committed the predicate offence or the offence of money laundering, the presumption shall be that the claimant has acquired his vested interest in possession dishonestly.

Section 53: If, after the Court has ordered the forfeiture of the asset to the State in accordance with section 51, the claimant, either an owner or holder or a vested interest recipient of that asset, can establish the validity of his claim under section 50 to the satisfaction of the Court, the Court may order the return of the asset or may set any condition in order to protect the rights of the claimant. If the asset can not be returned or protected any right, then the claimant shall be entitled to compensation or damage, whichever the case may be.

The petition under paragraph one shall be filed within one year from the date of the final Court order of forfeiture. The claimant has to prove that he could have filed the petition under section 50 because he or she did not know of the notification or written notice of the Secretary-general or if with any other reasons.

The Court shall inform the Secretary-general regarding the petition before issuing any order under paragraph one. The public prosecutor may object to the claimants.

Section 54: In the case that the Court has ordered the forfeiture of an asset to the State according to section 51, if there are additional assets related to the offence, the public prosecutor may file a motion requesting the Court to order the forfeiture of those assets to the State.

The provisions of this chapter shall apply mutatis mutandis.

Section 55: After the public prosecutor has filed a petition with the Courtunder section 49, if there is probable cause to believe that there may be a transfer, distribution, placement of any asset related to an offence, the Secretary-general may submit the facts to the public prosecutor to file a petition to the Court to order a provisional seizure or restraint of the asset prior to issuing the order under section 51. The Court shall consider such petition immediately. If the petition is supported by probable cause, the Court shall issue the order without delay.

Section 56: Once the Transaction Committee or the Secretary-general, as the case may be, issues an order to seize or restrain any asset under section 48, the designated competent official shall execute the seizure or restraining order. There will be a report of the execution along with the assessment of the value

and condition of such asset.

The seizure or restraint of the asset, and the assessment of the value of the asset seized shall be in accordance with the rules, procedure and conditions prescribed in the Ministerial Regulations; provided that, the Civil Procedure Code shall apply mutatis mutandis.

Section 57: The custody and maintenance of the asset seized or restrained by the order of the Transaction Committee or the Secretary-general, as the case may be, shall be in accordance with the Rules prescribed by the Board.

In the case that the asset under paragraph one is unsuitable to keep in custody, or there will be more burden to the Government rather than the utilization thereof for other purposes, the Secretary-general may order those who have a vested interest in the asset to maintain and utilize the asset and may require any collateral or security assurance. There will be a report to the Board if such asset is ordered to be sold by auction or used for official purposes.

The custody, maintenance, utilization of forfeited assets by those who have a vested interest, or a sale by auction, or the utilization of the asset for official purposes under paragraph two shall be in accordance with the Rules prescribed by the Board.

If it appears thereafter that the asset sold by auction, or utilized for official purposes under paragraph two, was not the asset involved in the commission of an offence, the Board shall return the asset to the rightful owner or legal custodian together with compensation and the depreciation value. If the seized asset can not be returned, then the restitution shall apply in an amount equivalent to the price of the seized asset as assessed on the day of seizure or restraint on that asset or the value realized at the auction, whichever the case may be. The rightful owner or custodian person shall receive an interest based on the amount of the restitution or compensation at the highest rate of the fixed deposit savings account of the Government Savings Bank, as the case may be.

The assessment of the compensation and the depreciation value under paragraph four shall be in accordance with the Rules prescribed by the Board.

Section 58: Where the asset involved in the commission of an offence is subject to another legal process which has not yet commenced or is pending or if it would be more effective to proceed under this Act, then the Government shall proceed as provided in this Act.

Section 59: The Court proceeding under this chapter shall be filed with the civil court and the Civil and Commercial Code shall apply mutatis mutandis.

The prosecutor is exempted from all court fees in the undertaking of all proceedings.

Chapter 7
Penal Provisions

Section 60: Any individual who is found guilty of the crime of money laundering shall receive a term of imprisonment of one to ten years, or a fine of twenty thousand to two hundred thousand Baht, or both.

Section 61: Any juristic person which is found guilty of an offence under sections 5, 7, 8, or 9 shall receive a fine in the amount of two hundred thousand to a million Baht.

A Director, Manager, or any person responsible for the operation of the juristic person under the first paragraph which is found guilty of an offence shall receive a term of imprisonment of one to ten years, or a fine of twenty thousand to two hundred thousand Baht, or both, unless he can prove that he had no part

in the commission of such offence of the juristic person.

Section 62: Any individual who is found guilty of an offence under sections 13, 14, 16, 20, 21, 22, 35, or 36 shall receive a fine not exceeding three hundred thousand Baht.

Section 63: Whoever reports or makes a statement according to section 13,14, 16, or 21 paragraph two with the assertion of a falsehood or the concealment of the facts which should be revealed to the officials shall receive a term of imprisonment not exceeding two years, or a fine of fifty thousand to five hundred thousand Baht, or both.

Section 64: Any individual who fails to appear or refuses to testify, or to submit an explanation in writing, or to submit the account document, or evidence required under section 38 (1) or (2), or who obstructs, or fails to cooperate under section 38 (3) shall receive a term of imprisonment not exceeding one year, or a fine not exceeding twenty thousand Baht, or both.

Any individual who acts by any means to leak restricted information to others under section 38 paragraph four, except in the course of doing his/her job or according to the law, shall receive the penalty set forth in paragraph one.

Section 65: Any person who diverts, damages, destroys, conceals, takes away, loses or renders useless the document, memoranda, information, or asset which has been ordered seized or restrained by official action, or which one knows or should have known will be forfeited to the State according to this Act, shall receive a term of imprisonment not exceeding three years, or a fine not exceeding three hundred thousand Baht, or both.

Section 66: If any person who knows or should have known confidential government information in proceeding according to this Act, acts in any means to let others know or may have the knowledge of that confidential information, except in the course of conducting his/her work or according to the law, he or she shall receive a term of imprisonment not exceeding five years, or a fine not exceeding one hundred thousand Baht, or both.

Countersigned by
Chuan Leekpai
Prime Minister

Principle and Rationale Accompanying The Anti-Money Laundering Act of B.E. 2542

Principle

To enact a law to prohibit money laundering

Rationale

Presently offenders who violate certain laws have benefited from money or assets obtained from the offences via money laundering.

In addition, money laundering can enable these offenders to use this money or assets to further their

criminal activity and to commit other offences.

This situation has caused problems for law enforcement officers.

Existing laws are not adequate to suppress either money laundering or illegal use of crime-related money and assets.

Thus, in order to cut off this vicious circle of crimes, measures to effectively combat money laundering must be established.

Therefore, this law must be enacted.

APPENDIX B

AMENDMENTS OF THE PENAL CODE AND ANTI-MONEY LAUNDERING ACT

To comply with UN Resolution 1373, On August 5, 2003, Thailand has passed two major Executive Decrees to amend the Penal Code and the Anti-Money Laundering Act becoming effective from August 11, 2003 onwards.

1 The Amendments to the Penal Code Section 135

Section 135/1
Any person, committing any of the criminal offences stated below:

1. using force to cause death, damage, or serious injury to the life and freedom of an individual;
2. causing serious damage to a public transportation system, a telecommunication system, or an infrastructure facility of public use; or
3. causing damage to property, places, facilities or systems belonging to a State or government, a person or an environment system, resulting or likely to result in major economic loss;

who causes serious damages, evokes public fear, or raises civil unrest with the intention to intimidate a population, to threaten or compel the Royal Thai Government, or any government or an international organization to do or abstain from doing any act; that person shall be deemed to have committed an act of terrorism and shall receive a sentence of either a death penalty, life imprisonment, or an imprisonment from three to twenty years. The person shall also pay a fine of 60,000 to 1,000,000 baht.

Any demonstration, gathering, protest, or movement that calls for the government's assistance or for fair treatment, which under the Thai Constitution are legal exercises, shall not be regarded as a terrorist offence.

Section 135/2
Any person who:

1. threatens to commit a terrorist act and shows behaviour convincing enough to believe that the person will do as said;
2. collects manpower or stockpiles weapons, provides or compiles any property, or organizes any preparation or conspires for the purpose of committing a terrorist act; or commits any offence which is part of a terrorist plan; or abets persons to participate in the commission of terrorism; or is aware of the act of terrorism and conceals such act; that person shall receive a sentence of imprisonment from

two to ten years and shall pay a fine of 40,000 to 200,000 baht.

Section 135/3
Any person who is involved or collaborates with the offender as stated in 135/1 or 135/2 shall receive identical punishment.

Section 135/4
Any person who is a member of a group of people classified as a terrorist organization by either the United Nations Security Council resolution or declaration, which Thailand has endorsed; that person shall be deemed to have committed an act of terrorism. The person shall receive a sentence of imprisonment not exceeding seven years and shall pay a fine not exceeding 140,000 baht.

2 The Amendments to the Anti-Money Laundering Act (2542/1999) Section 3

Section 3/8
Offences relating to terrorism under the Penal Code
Once the offences involving terrorist acts have been enacted, suspicious activity reporting [SAR] will automatically extend to this new offence.

APPENDIX C

The Foreign Banks' Association

PorPorNgor. 1-01 Form

Cash Transaction Report Number ☐☐☐ - ☐☐☐ - ☐☐ ☐

(Please check boxes that apply and complete all applicable parts) Financial Institution Branch B.E. (last 2 digits) Report Number

☐ Main report ☐ Amended report No._____ Date_____ Total no. of pages _____

Part 1 Transacting Person ☐☐☐☐☐☐☐☐☐☐☐☐☐

1.1 First name, Last name_____

☐ Transact for own account (specify details of other persons in part 2 in case of joint account)

☐ Transact on behalf of another person (please specify details of person on whose behalf transaction is conducted in part 2)

Please enter ID number. Foreigner, please enter passport number or number of other ID. Enter the first digit in the left-most box.

1.2 Address_____

_____Telephone_____Fax_____

1.3 Occupation _____Company's name _____Telephone_____

1.4 Contact address _____

_____Telephone _____Fax_____

1.5 Verification evidence ☐ ID/Government employee/State enterprise employee ID ☐ Passport ☐ Alien ID

☐ Other (please specify)_____

Number _____ Issued by_____ On_____ Expiry Date_____

Part 2 Person Who Jointly Conducts Transaction, on Whose Behalf Transaction is Conducted or Who Grants Power of Attorney (POA) ☐☐☐☐☐☐☐☐☐☐☐☐☐

☐ Person jointly conducting this transaction

☐ Person on whose behalf transaction is conducted

☐ Person granting POA

Please enter ID number. Juristic person, please enter taxpayer's ID number. Foreigner, enter passport number or number of other ID. Enter the first digit in the left-most box.

2.1 Name_____

2.2 Address_____

_____

Telephone_____ Fax_____

2.3 Occupation _____Company's name _____Telephone_____

Juristic person, specify type of business_____

2.4 Contact address_____

_____Telephone_____ Fax_____

2.5 Verification evidence ☐ ID/ Government official/State enterprise employee ID ☐ Passport

☐ Alien identification ☐ Copy of registration issued by Registrar within 1 month ☐ Other (specify)_____

Number_____ Issued by_____ On_____ Expiry Date_____

Part 3 Details of Transaction Date of transaction_____

3.1 Type and amount of transaction

☐ Deposit	Amount (Baht)
Account number ☐☐☐☐☐☐☐☐☐☐	
Related account (if any) ☐☐☐☐☐☐☐☐☐☐	
☐ Purchase of financial instrument	
☐ Cheque	
☐ Draft	
☐ Other	
☐ Purchase of foreign currency (specify currency)	
☐ Other (specify)	
Total	
(Amount in writing)	

☐ Withdrawal	Amount (Baht)
From account number ☐☐☐☐☐☐☐☐☐☐	
Related account (if any) ☐☐☐☐☐☐☐☐☐☐	
☐ Sale of financial instrument	
☐ Cheque	
☐ Draft	
☐ Other	
☐ Sale of foreign currency (specify currency)	
☐ Other (specify)	
Total	
(Amount in writing)	

3.2 Name of beneficiary (if any)_____

3.3 Objective of transaction _____

Part 4 ☐ Completed by financial institution (Day/month/year of completion)

☐ Signature is not provided by customer

(Day/month/year of report)

Signature of Transacting Person/ Person who Completes this Form

Signature of Reporter

Min Reg – AML 2543

Explanation

1. Cash transaction means any legally and binding activity conducted with financial institution involving cash.
2. Cash means banknotes and coins legally used to repay debt.
3. Transacting Person means an individual who conducts transaction with financial institution.
4. Person on whose behalf transaction is conducted means a person, who assigns another person to conduct transaction on their behalf, irrespective of whether there is a proxy.
5. Person who grants power of attorney means a person assigning another person to conduct transaction on his/her behalf by a signed power of attorney. In case of juristic person granting power of attorney, the power of attorney must have signature(s) of authorized signatories of that juristic person accompanied by the affixing of corporate seal.
6. Reporter means an officer of financial institution with whom this transaction is conducted.

Instructions for completion of Cash Transaction Report

1. For cash transaction of 2 million Baht or more, transacting person must complete the report by marking "Main report" box. If prior report has been filed and correction or amendment is required, then select "Amended report" box. Number of times that the report has been amended must be specified together with reporting date.
2. If provided space is insufficient to fill in all information or additional details, use A4 sized paper and attach it to this report. Total number of pages must be specified in "Total no. of pages_____" .
3. Part 1:Transacting Person. Following details must be entered:
   - 1.1 First name- last name of transacting person. For individual, ID number must be entered in the boxes on the right-hand side. For foreigner, specify passport number or other identification number. For individual conducting transaction for own account, choose "Transact for own account". If this transaction is being conducted by more than one person, enter information of the other person(s) in part 2. If this transaction is conducted on behalf of another person, choose "Transact on behalf of another person" box and enter information of the assigning person in part 2.
   - 1.2 Enter the address according to household registration of the transacting person or address in Thailand for foreigner together with telephone or fax number.
   - 1.3 Specify occupation, company's name or work place, and telephone number of the transacting person.
   - 1.4 Enter contact address and telephone or fax number (if different from 1.2 and 1.3).
   - 1.5 Specify type and details of evidence used to verify the transacting person.
4. Part 2: Person Who Jointly Conducts Transaction, on Whose Behalf Transaction is Conducted or Who Grants Power of Attorney. Following details must be entered:
   - 2.1 Name(s) of the person who jointly conducts transaction, on whose behalf transaction is conducted or who grants power of attorney (POA) (select appropriate box at the end of the names). The person may be an individual or a juristic person. For an individual, ID number must be entered in the boxes on the right. For a juristic person, enter taxpayer's ID number. For a foreigner, passport number or number of other identification must be specified.
   - 2.2 Enter address according to household registration of the person who jointly conducts transaction, on whose behalf transaction is conducted or who grants power of attorney (POA) or address in Thailand for foreigner (or location of the juristic person) including telephone or fax number.
   - 2.3 For individual, specify occupation, company's name or work place, and telephone number of the person who jointly conducts transaction, on whose behalf transaction is conducted or who grants power of attorney (POA). For juristic person, type of business such as selling construction materials, auditing company, etc. must be specified.
   - 2.4 Enter contact address and telephone or fax number (if different from 2.2 and 2.3).
   - 2.5 Specify type and details of evidences used to verify the person who jointly conducts transaction, on whose behalf transaction is conducted or who grants the power of attorney (POA).
5. Part 3: Details of Transaction. Specify details as follows (enter date of transaction on the right-hand side).
   - 3.1 Specify type and amount of reported transaction, in the appropriate space. Transactions are separated into two types. One is inward transaction (financial institution is the receiver of cash) such as deposit (specify account number and related account numbers if the cash is deposited into more than 1 account), purchasing of financial instruments on cash such as cheque, draft, etc. The other is outward transaction (financial institution is the payer to the person conducting the transaction) such as withdrawal (specify account number and related account numbers if withdrawal is from more than 1 account), or when there is purchasing/ selling of foreign currencies, specify currencies.
   - 3.2 Specify beneficiary of the transaction (if any) such as name(s) of the owner(s) of the account for which cash is deposited or beneficiary of the purchased instrument.
   - 3.3 Specify objective of the transaction such as deposit to receive interest, withdrawal for business operation, purchasing cheque to pay for goods, etc.
6. Part 4: Section 1: Transacting person or person who completes the report, must provide signature including legible first and last name in a parenthesis. Specify date of which this form is completed on upper right side of the section.
   Section 2: (Bank) officer with whom the transaction is conducted and who has the responsibility to submit the report must sign and include legible first and last name in a parenthesis. Specify reporting date on upper right side of the section.

Note

1. Transacting person must complete this report form by the virtue of Section 13, Section 14, Section 17, and Section 21 of Anti-money Laundering Act B.E. 2542.
1. If a report made in earnest causes damages to any parties, the reporter is not held liable by virtue of Section 19 of Anti-money Laundering Act B.E. 2542.
2. Reporter, making false statement or concealing any required information, is subject to imprisonment with maximum term of 2 years, a fine of no less than 50,000 and no more than 500,000 Baht or both.

PorPorNgor. 1-02 Form

Asset Transaction Report Number ☐☐☐ - ☐☐☐ - ☐☐ ☐☐☐☐

(Please check boxes that apply and complete all applicable parts) Financial institution Branch B.E. (last 2 digits) Report number

☐ Main report ☐ Amended report No. _____ Date_____ Total no. of pages _____

Part 1 Transacting Person ☐☐☐☐☐☐☐☐☐☐☐☐☐

1.1 First name, Last name_____

☐ Transact for own account (specify details of other persons in part 2 in case of joint account)

☐ Transact on behalf of another person (please specify details of person on whose behalf transaction is conducted in part 2)

Please enter ID number. Foreigner, please enter passport number or number of other ID. Enter the first digit in the left-most box.

1.2 Address_____

_____Telephone_____Fax_____

1.3 Occupation _____Company's name _____Telephone_____

1.4 Contact address _____

_____Telephone _____Fax_____

1.5 Verification evidence ☐ ID/Government employee/State enterprise employee ID ☐ Passport ☐ Alien ID

☐ Other (please specify)_____

Number _____ Issued by_____ On_____ Expiry Date_____

Part 2 Person Who Jointly Conducts Transaction, on Whose Behalf Transaction is Conducted or Who Grants Power of Attorney (POA) ☐☐☐☐☐☐☐☐☐☐☐☐☐

☐ Person jointly conducting this transaction

☐ Person on whose behalf transaction is conducted

☐ Person granting POA

Please enter ID number. Juristic person, please enter taxpayer's ID number. Foreigner, enter passport number or number of other ID. Enter the first digit in the left-most box.

2.1 Name_____

2.2 Address_____

_____

Telephone_____ Fax_____

2.3 Occupation _____Company's name _____Telephone_____

Juristic person, specify type of business_____

2.4 Contact Address_____

_____Telephone_____ Fax_____

2.5 Verification evidence ☐ ID/ Government official/State enterprise employee ID ☐ Passport

☐ Alien identification ☐ Copy of registration issued by Registrar within 1 month ☐ Others (please specify)_____

Number_____ Issued by_____ On_____ Expiry date_____

Part 3 Details of Transaction Date of Transaction _____

3.1 Type of transaction ☐ Mortgage ☐ Consignment ☐ Money transfer ☐ Other (please specify)_____

3.2 Type of involved asset ☐ Land ☐ Land and building ☐ Building ☐ Other (please specify)_____

Please specify details of asset_____

_____

3.3 Total value of involved asset _____Baht

(If value is in other currency, please specify amount and currency._____)

(Amount in writing)

3.4 Account number ☐☐☐☐☐☐☐☐☐☐☐☐☐

Name of account_____ Owner of account_____

3.5 Related account (if any) ☐☐☐☐☐☐☐☐☐☐☐☐☐

Part 4 ☐ Completed by financial institution (Day/month/year of completion)

☐ Signature is not provided by customer

(Day/month/year of report)

Signature of Transacting Person/ Person who Completes this Form

Signature of Reporter

Name of account_____ Owner of account_____

Relationship_____

3.6 Name of beneficiary (if any)_____

3.7 Objective of transaction_____

Explanation

1. Asset transaction means any legally and binding activity conducted with financial institution involving asset.
2. Asset means any movable and immovable property (according to the Civil and Commercial Code).
3. Transacting Person means an individual who conducts transaction with financial institution.
4. Person on whose behalf transaction is conducted means a person, who assigns another person to conduct transaction on their behalf, irrespective of whether there is a proxy.
5. Person who grants power of attorney means a person assigning another person to conduct transaction on his/her behalf by a signed power of attorney. In case of juristic person granting power of attorney, the power of attorney must have signature(s) of authorized signatories of that juristic person accompanied by the affixing of corporate seal.
6. Reporter means an officer of financial institution with whom this transaction is conducted.

Instruction for completion of Asset Transaction Report

1. For transaction involving asset with value of 5 million Baht or more, transacting person must complete the report by marking "Main report" box. If prior report has been filed and correction or amendment is required, then select "Amended report" box. Number of times that the report has been amended must be specified together with reporting date.
2. If provided space is insufficient to fill in all information or additional details, use A4 sized paper and attach it to this report. Total number of pages must be specified in "Total no. of pages_____" .
3. Part 1:Transacting Person. Following details must be entered:

1.1 First name- last name of transacting person. For individual, ID number must be entered in the boxes on the right-hand side. For foreigner, specify passport number or other identification number. For individual conducting transaction for own account, choose "Transact for own account". If this transaction is being conducted by more than one person, enter information of the other person(s) in part 2. If this transaction is conducted on behalf of another person, choose "Transact on behalf of another person" box and enter information of the assigning person in part 2.

1.2 Enter the address according to household registration of the transacting person or address in Thailand for foreigner together with telephone or fax number.

1.3 Specify occupation, company's name or work place, and telephone number of the transacting person.

1.4 Enter contact address and telephone or fax number (if different from 1.2 and 1.3).

1.5 Specify type and details of evidence used to verify the transacting person.

4. Part 2: Person Who Jointly Conducts Transaction, on Whose Behalf Transaction is Conducted or Who Grants Power of Attorney. Following details must be entered:

2.1 Name(s) of the person who jointly conducts transaction, on whose behalf transaction is conducted or who grants power of attorney (POA) (select appropriate box at the end of the names). The person may be an individual or a juristic person. For an individual, ID number must be entered in the boxes on the right. For a juristic person, enter taxpayer's ID number. For a foreigner, passport number or number of other identification must be specified.

2.2 Enter address according to household registration of the person who jointly conducts transaction, on whose behalf transaction is conducted or who grants power of attorney (POA) or address in Thailand for foreigner (or location of the juristic person) including telephone or fax number.

2.3 For individual, specify occupation, company's name or work place, and telephone number of the person who jointly conducts transaction, on whose behalf transaction is conducted or who grants power of attorney (POA). For juristic person, type of business such as selling construction materials, auditing company, etc. must be specified.

2.4 Enter contact address and telephone or fax number (if different from 2.2 and 2.3).

2.5 Specify type and details of evidences used to verify the person who jointly conducts transaction, on whose behalf transaction is conducted or who grants the power of attorney (POA).

5. Part 3: Details of Transaction. Specify details as follows (enter date of transaction on the right-hand side).

3.1 Specify type of transaction by selecting appropriate box. For non-specified transaction, select "Other___"

3.2 Specify type of asset used in the transaction by selecting appropriate box. For non-specified type, select "Other___"

3.3 Specify value of the involved asset. If it is foreign currency, please specify amount, currency and written amount in the box on the right.

3.4 If transaction involves an account at the financial institution, specify the account number.

3.5 If other accounts are involved, specify other account number.

3.6 Specify beneficiary of the transaction (if any). For example, for whose benefit the mortgage renders or name of the recipient of the money transfer.

3.7 Specify objective of the transaction. For example, property serves as collateral for a loan, etc.

Part 4: Section 1: Transacting person or person who completes the form, must provide signature including legible first and last name in a parenthesis. Specify date of which this form is completed on upper right side of the section.
Section 2: (Bank) officer with whom the transaction is conducted and who has the responsibility to submit the report must sign and include legible first and last name in a parenthesis. Specify reporting date on upper right side of the section.

Note

1. Transacting person must complete this report form by the virtue of Section 13, Section 14, Section 17, and Section 21 of Anti-money Laundering Act B.E. 2542.
2. If a report made in earnest causes damages to any parties, the reporter is not held liable by virtue of Section 19 of Anti-money Laundering Act B.E. 2542.
3. Reporter, making false statement or concealing any required information, is subject to imprisonment with maximum term of 2 years, a fine of no less than 50,000 and no more than 500,000 baht or both.

Suspicious Activity Report Number ☐☐☐ ☐☐☐ - ☐☐ ☐☐☐☐☐

(Please check boxes that apply and complete all applicable parts) Financial institution Branch B.E. (last 2 digits) Report number

☐ Main report ☐ Amended report No. _____ Date_____ Total no. of pages _____

Part 1 Transacting Person

☐☐☐☐☐☐☐☐☐☐☐☐☐

1.1 First name, last name_____

Please enter ID number.

☐ Transact for own account (specify details of other persons in part 2 in case of joint account)

☐ Transact on behalf of another person (please specify details of person on whose behalf transaction is conducted in part 2)

Foreigner, please enter passport number or number of other ID. Enter the first digit in the left-most box.

1.2 Address_____

_____Telephone_____Fax_____

1.3 Occupation _____Office _____Telephone_____

1.4 Contact address_____

_____Telephone _____Fax_____

1.5 Verification evidence ☐ ID/Government employee/State enterprise employee ID ☐ Passport ☐ Alien ID

☐ Others (please specify)_____

Number _____ Issued by_____ On_____ Expiry Date_____

Part 2 Person Who Jointly Conducts Transaction, on Whose Behalf Transaction is Conducted or Who Grants Power of Attorney (POA)

☐ Person jointly conducting this transaction

☐ Person on whose behalf transaction is conducted

☐☐☐☐☐☐☐☐☐☐☐☐☐

Please enter ID number.

Juristic person, please enter taxpayer's ID number. Foreigner, enter passport number or number of other ID. Enter the first digit in the left-most box.

2.1 Name_____ ☐ Person granting POA

2.2 Address_____

_____

Telephone_____ Fax_____

2.3 Occupation _____Company's name _____Telephone_____

Juristic person, specify type of business_____

2.4 Contact address_____

_____Telephone_____ Fax_____

2.5 Verification evidence ☐ ID/ Government official/State enterprise official ID ☐ Passport ☐ Alien ID

☐ Copy of registration issued by Registrar within 1 month ☐ Other (please specify)_____

Number_____ Issued by_____ On_____ Expiry Date_____

Part 3 Details of Transaction

Date of Transaction_____

3.1 Value of transaction_____Baht

(If value is in another currency, please specify amount and currency._____)

(Amount in writing)

3.2 Type of transaction ☐ Cash Transaction (please specify type)_____

☐ Asset Transaction (please specify type of asset)_____

3.3 Account number ☐☐☐☐☐☐☐☐☐☐☐

Name of account_____Owner of account_____

3.4 Related account (if any) ☐☐☐☐☐☐☐☐☐☐☐

Name of account_____Owner of account_____

Relationship_____

_____

3.5 Name of beneficiary (if any)_____

3.6 Objective of transaction_____

Part 4

(Day/month/year of completion)

Signature of Person who Completes this Form

(If Cash Transaction Report or Assets Transaction Report has been submitted, enter the reference number of the main report and complete only Part 5 Cause of Suspicion.)

Reference No. [ ][ ][ ] - [ ][ ][ ] - [ ][ ] - [ ]

Financial institution Branch B.E. (last 2 digits) Report number

Part 5: Cause of Suspicion

Part 6:

(Day/month/year of completion)

Signature of Person who Completes this Form

Explanation

1. Suspicious activity means an intricate transaction deviated from normal practice of similar transaction, a transaction which does not make economic sense, a transaction believed to have executed to evade the Anti-money Laundering Act B.E. 2542, or any activity pertaining to or may be involved with basic wrongdoing, regardless of the number of transactions.
2. Transacting Person means an individual who conducts transaction with financial institution.
3. Person on whose behalf transaction is conducted means a person who assigns another person to conduct transaction on their behalf, irrespective of whether there is a proxy.
4. Person who grants power of attorney means a person assigning another person to conduct transaction on his/her behalf by a signed p of attorney. In case of juristic person granting power of attorney, the power of attorney must have signature(s) of authorized signator of that juristic person accompanied by affixing of corporate seal.
5. Reporter means an officer of financial institution with whom this transaction is conducted.
6. If there is more than one person conducting the transaction, person on whose behalf transaction is conducted or person who grants p of attorney, specify details of such person in part 2.
7. Part 3: Detail of Transaction (enter date of transaction on the right-hand side).
   3.1 Specify value of suspicious transaction. Specify amount in writing in the assigned space on the right.
   3.2 Specify type and details of suspicious transaction.
   3.3 Specify account number of suspicious transaction (if none, do not complete).
   3.4 Specify number of account related to the suspicious transaction and how it is related (if none, do not complete).
   3.5 Specify name of beneficiary of transaction (if any). For example, for cash or asset transaction specify the recipient of the transac
   3.6 Specify objective of transaction such as payment of purchased goods, deposits, etc.
8. Part 4: Person who completes the report must provide signature including legible first and last name and completion date of the repo the upper right.
9. If Cash Transaction Report or Assets Transaction Report has been submitted, enter the reference number of the main report in the assigned space. Do not complete page 1 (Part 1 through 4). Only complete Cause of Suspicion in Page 2.
10. Part 5: Specify cause of suspicion in detail.
11. Part 6: (Bank) officer with whom the transaction is conducted and who has the responsibility to submit the report must sign and incl legible first and last name in a parenthesis. Specify reporting date on upper right side of the section.
12. Because of the limited space, submit additional information on A4 paper and attach it with this report. Total number of pages must b specified in "Total no. of pages_____" .

Note

1. Transacting person must complete this report form by the virtue of Section 13, Section 14, Section 17, and Section 21 of Anti-mo Laundering Act B.E. 2542.
2. If a report made in earnest causes damages to any parties, the reporter is not held liable by virtue of Section 19 of Anti-money Laundering Act B.E. 2542.

   Reporter, making false statement or concealing any required information, is subject to imprisonment with maximum term of 2 years, a fine of no less than 50,000 and no more than 500,000 Baht or both.

PorPorNgor. 1-04-1 Form

Cash Transaction Report (Life Insurance) No. ☐☐☐ ☐☐☐ - ☐☐ ☐☐☐☐☐

(Please check boxes that apply and complete all applicable parts) Company Branch B.E. (last 2 digits) Report number

☐ Main report ☐ Amended report No. _____ Date_____Total no. of pages _____

Part 1. Details of Transaction

Date of contract	Policy number	Insurer's name	ID number	Total insured amount (Baht)	Insurance premium (baht)

Part 2. Others_____

Part 3

☐ Completed by financial institution (Day/month/year of completion) ☐ Signature is not provided by customer Signature of Transacting Person/ Person who Completes this Form	(Day/month/year of report) Signature of Reporter

Explanation of Cash Transaction (Life Insurance)

1. Cash transaction means any legally and binding activity conducted with financial institution involving cash.
2. Cash means banknote and coins legally used to repay debt.
3. Transacting Person means an individual who conducts transaction with company such as insurer.
4. Reporter means an officer of the company with whom this transaction is conducted.

Instructions

1 For cash transaction of 2 million Baht or more, transacting person must complete the report by marking "Main report" box. If prior report has been filed and correction or amendment is required, then select "Amended report" box. Number of times that the report has been amended must be specified together with reporting date.

2 Part 1:Details of Transaction. Enter contract date for life insurance as well as policy number, insurer's name and ID number. For foreigner, enter passport number or other identification number and specify type of documents and total insurance amount. For "insurance premium" bracket, specify amount of insurance premium paid in cash for each transaction.

3 Part 2: Others. Specify details of transaction involving cash other than payment of insurance premium such as debt repayment, etc.

4 Part 3: Section 1: Transacting person or person who completes the form, must provide signature including legible first and last name in a parenthesis. Specify date of which this form is completed on upper right side of the section.
Section 2: Officer with whom the transaction is conducted and who has the responsibility to submit the report must sign and include legible first and last name in a parenthesis. Specify reporting date on upper right side of the section.

5. If provided space is insufficient to fill in all information or additional details, use A4 sized paper and attach it to this report. Total number of pages must be specified in "Total no. of pages_____".

Note

1. Transacting person must complete this report form by the virtue of Section 13, Section 14, Section 17, and Section 21 of Anti-money Laundering Act B.E. 2542.
2. If a report made in earnest causes damages to any parties, the reporter is not held liable by virtue of Section 19 of Anti-money Laundering Act B.E. 2542.
3. Reporter, making false statement or concealing any required information, is subject to imprisonment with maximum term of 2 years, a fine of no less than 50,000 and no more than 500,000 Baht or both.

Asset Transaction Report PorPorNgor. 1-04-2 Form

(Redemption of property and casualty insurance) Number ☐☐☐ ☐☐☐ - ☐☐ ☐☐☐☐

(Please check boxes that apply and complete all applicable parts) Company Branch B.E. (last 2 digits) Report number

☐ Main report ☐ Amended report No. _____ Date_____Total no. of pages _____

Part 1. Details of Transaction

Date (D/M/Y) (Of incident)	Policy number	Insurer's name	Name, address of recipient of redemption	ID number or taxpayer number	Expected redemption payable (Baht)

Part 2.

☐ Completed by financial institution (Day/month/year of completion) ☐ Signature is not provided by customer Signature of Transacting Person/ Person who Completes this Form	(Day/month/year of report) Signature of Reporter

Explanations for Asset Transaction Report (Redemption of property and casualty insurance)

1. Transaction person means an individual conducting transaction with company such as insurer.
2. Reporter means an officer of the company with whom this transaction is conducted.

Instructions

1. When payable redemption is expected to be "10 million Baht or more", reporter must complete this form by selecting "Main report" box. If prior report has been filed and correction or amendment is required, then select "Amended report" box. Number of times that the report has been amended must be specified together with reporting date.
2. Part 1. Details of Transaction. Enter date of incident together with policy number, insurer's name, name & address of the recipient of redemption and ID number of the recipient. For foreigner, enter passport number or number of other identification and specify the type of document. For juristic person, enter tax ID number. Specify expected redeeming amount from 10 million Baht or more.
3. Part 2: Section 1: Transacting person or person who completes the form, must provide signature including legible first and last name in a parenthesis. Specify date of which this form is completed on upper right side of the section.
   Section 2: Officer with whom the transaction is conducted and who has the responsibility to submit the report must sign and include legible first and last name in a parenthesis. Specify reporting date on upper right side of the section.
4. If provided space is insufficient to fill in all information or additional details, use A4 sized paper and attach it to this report. Total number of pages must be specified in "Total no. of pages_____".

Note

1. Transacting person must complete this report form by the virtue of Section 13, Section 14, Section 17, and Section 21 of Anti-money Laundering Act B.E. 2542.
2. If report made in earnest causes damages to any parties, reporter is not held liable by virtue of Section 19 of Anti-money Laundering Act B.E. 2542.
3. Reporter, making false statement or concealing any required information, is subject to imprisonment with maximum term of 2 years, a fine of no less than 50,000 and no more than 500,000 Baht or both.

PorPorNgor. 1-04-3 Form

Suspicious Activity Report Number
(Please check boxes that apply and complete all applicable parts)

Company | Branch | B.E. (last 2 digits) | Report number

☐ Main report ☐ Amended report No. _____ Date_____Total no. of pages _____

Part 1. Life Insurance

1.1 Details of Transaction

Date of contract	Policy number	Insurer's name	ID number	Total insured amount (baht)	Insurance premium (baht)

1.2 Others_____

Part 2. Property and Casualty Insurance

Date (D/M/Y) (Of incident)	Policy number	Insurer's name	Name, address of receiver of redemption	ID number or taxpayer number	Expected redemption payable (Baht)

Part 3.

(Day/month/year of completion)

Signature of Person who Completes this Form

(If Cash Transaction Report or Assets Transaction Report has previously been submitted, enter the reference number of the main report and complete only Part 5 Cause of Suspicion. ⇨	Report number Company - Branch - B.E. (last 2 digits) - Report number

Part 4. Cause of Suspicion

Part 5.

(Day/month/year of report)

Signature of Person who Completes this Form

Explanation

1. Suspicious activity means an intricate transaction deviated from normal practice of similar transaction, a transaction which does not make economic sense, a transaction believed to have executed to evade Anti-money Laundering Act B.E. 2542, or any activity pertaining to or may be involved with basic wrongdoing, regardless of the number of transactions.
2. Transacting Person means an individual who conducts transaction with company such as insurer.
3. Reporter means an officer of the company with whom this transaction is conducted.

Instructions

1. When a suspicious transaction occurs, reporter must complete this form by selecting "Main report" box. If prior report has been filed and correction or amendment is required, then select "Amended report" box. Number of times that the report has been amended must be specified together with reporting date.
2. Part 1. Life Insurance 1.1 Details of Transaction. Specify date of contract of life insurance together with policy number, insurer's name, ID number (for foreigner, specify passport number or number of other identification and specify type of such documents), total amount of insured money. For "insurance premium" bracket, enter amount of insurance premium paid in cash for each transaction.

1.2 Others. Specify details of cash transaction other than payment of insurance premium such as debt repayment, etc.

3. Part 2. Non-life Insurance. Specify date of incident together with policy number, insurer's name, name and address of recipient of redemption and ID number of recipient. Foreigner, specify passport number or number of other identification and type of such documents. Juristic person, specify taxpayer ID number. In addition, specify expected amount of redemption.
4. Part 3. Person who completes the report must provide signature including legible first and last name and completion date of the report on the upper right.
5. Part 4. Specify cause of suspicion in detail
6. Part 5. Officer with whom the transaction is conducted and who has the responsibility to submit the report must sign and include legible first and last name in a parenthesis. Specify reporting date on upper right side of the section.
7. If provided space is insufficient to fill in all information or additional details, use A4 sized paper and attach it to this report. Total number of pages must be specified in "Total no. of pages_____".

Note:

1. Transacting person must complete this report form by the virtue of Section 13, Section 14, Section 17, and Section 21 of Anti-money Laundering Act B.E. 2542.
2. If a report made in earnest causes damages to any parties, the reporter is not held liable by virtue of Section 19 of Anti-money Laundering Act B.E. 2542.
3. Reporter, making false statement or concealing any required information, is subject to imprisonment with maximum term of 2 years, a fine of no less than 50,000 and no more than 500,000 Baht or both.

PorPorNgor. 1-05 Form

Suspicious Activity Report Number

(Please check boxes that apply and complete all applicable parts)

☐ Main report ☐ Amended report No. _____Date_____ Total no. of pages _____

Part 1 Transacting Person

1.1 First Name, last name_____

☐ Transact for own account (specify details of other persons in part 2 in case of joint account)

☐ Transact on behalf of another person (please specify details of person on whose behalf transaction is conducted in part 2)

Please enter ID number. Foreigner, please enter passport number or number of other ID. Enter the first digit in the left-most box.

1.2 Address_____

_____Telephone_____Fax_____

1.3 Occupation _____Company's name _____Telephone_____

1.4 Contact address _____

_____Telephone _____Fax_____

1.5 Verification Evidence ☐ ID/Government employee/State enterprise employee ID ☐ Passport ☐ Alien ID

☐ Others (please specify)_____

Number _____ Issued by_____ On_____ Expiry date_____

Part 2 Person Who Jointly Conducts Transaction, on Whose Behalf Transaction is Conducted or Who Grants Power of Attorney (POA)

☐ Person jointly conducting this transaction

☐ Person on whose behalf transaction is conducted

☐ Person granting POA

Please enter ID number. Juristic person, please enter taxpayer's ID number. Foreigner, enter passport number or number of other ID. Enter the first digit in the left-most box.

2.1 Name_____

2.2Address_____

_____

Telephone_____ Fax_____

2.3 Occupation _____Company's name _____Telephone_____

Juristic person, specify type of business_____

2.4 Contact address_____

_____Telephone_____ Fax_____

2.5 Verification evidence ☐ ID/ Government official/State enterprise official ID ☐ Passport ☐ Alien ID

☐ Copy of registration issued by Registrar within 1 month ☐ Others (please specify)_____

Number_____ Issued by_____ On_____ Expiry date_____

Part 3 Details of Transaction Date of transaction_____

3.1 Value of transaction_____Baht

(If value is in another currency, please specify amount of money and currency)_____)

(Amount in writing)

3.2 Type / detail of transaction_____

Part 4. Cause of Suspicion

Part 5.

(Day/month/year of report)

Signature of Reporter

Explanation

1. Transaction means any legally and binding activity conducted with others financially, in business, or operation pertaining to assets.
2. Suspicious activity means an intricate transaction deviated from normal practice of similar transaction, a transaction which does not make economic sense, a transaction believed to have executed to evade Anti-money Laundering Act B.E. 2542, or any activity pertaining to or may be involved with basic wrongdoing, regardless of the number of transactions.
3. Transacting Person means an individual who conducts transaction with financial institution.
4. Person on whose behalf transaction is conducted means a person who assigns another person to conduct transaction on their behalf, irrespective of whether there is a proxy.
5. Person who grants power of attorney means a person assigning another person to conduct transaction on his/her behalf by a signed power of attorney. In case of juristic person granting power of attorney, the power of attorney must have signature(s) of authorized signatories of that juristic person accompanied by affixing of corporate seal.
6. Reporter means an officer of financial institution with whom this transaction is conducted.
7. If there is more than one person conducting the transaction, person on whose behalf transaction is conducted or person who grants power of attorney, specify details of such person in part 2.
8. Part 3: Detail of Transaction (enter date of transaction on the right-hand side).
   3.1 Specify value of suspicious transaction. Specify amount in writing in the assigned space on the right.
   3.2 Specify type and details of suspicious transaction.
   Part 4. Specify cause of suspicion in detail
   Part 5. Reporter must sign and provide legible first and last name in a parenthesis. Specify reporting date on upper right side of the section.
9. If provided space is insufficient to fill in all information or additional details, use A4 sized paper and attach it to this report. Total number of pages must be specified in "Total no. of pages_____".

Note

1. If a report made in earnest causes damages to any parties, the reporter is not held liable by virtue of Section 19 of Anti-money Laundering Act B.E. 2542.
2. Reporter, making false statement or concealing any required information, is subject to imprisonment with maximum term of 2 years, a fine of no less than 50,000 and no more than 500,000 Baht or both

PARTICIPANTS' PAPERS

THE CURRENT SITUATION CONCERNING DRUG RELATED CRIMES AND MONEY LAUNDERING IN ESTONIA

Aro Siinmaa *

I. INTRODUCTION

Estonia, a former republic of the Soviet Union, only regained its independence in 1991. The rapid transition from one political system to another brought about a situation where it became essential to change the entire legislative basis. Naturally, it was impossible to carry out such an enormous task at once and it could be said that even the so-called transitional period or the period of continual amending of the legislation is not over yet. This in turn has inhibited the formation of a stable practice in all fields of law, especially in criminal and procedural law.

Although Estonia has established working relationships with many international organizations, acceded to international conventions and followed the directives of the European Union, there is still much to do in the building up of our legal system. Currently there are debates going on over the competence of law enforcement authorities, their position in relation to each other and the scope of cooperation.

Today the Estonian justice system has reached a most crucial stage as on September 1, 2002 the new Penal Code entered into force replacing the Criminal Code, which dated back to the Soviet period and had been amended on several occasions. The alteration of the system of provisions of criminal law in the middle of the calendar year is the reason why the statistics dealt with in this report are inaccurate and the review itself incomplete.

The reform of the criminal procedural law is also under way. The Riigikogu (the parliament) passed the Code of Criminal Procedure on February 12, 2003, which will enter into force on July 1, 2004 replacing the old Code dating back to the Soviet regime. The new Code of Criminal Procedure will finally establish the adversarial procedure and will change considerably the competence of the law enforcement authorities. So far pre-trial investigation was carried out by the police or in the case of certain crimes provided by law by other authorities (for example the customs, border guard and tax board). The police also brought charges and referred the matter to the court through the Prosecutor's Office. The Prosecutor's Office exercised supervisory control over the pre-trial investigation and represented public prosecutions.

According to the new Code the Prosecutor's Office will lead the pre-trial investigation. In that way the responsibility of the Prosecutor's Office for the quality and efficiency of the pre-trail investigation will increase considerably and thus cooperation between the Prosecutor's Office and the police in the fields of investigation and surveillance must become more efficient. It is too early to say how it will work out in practice.

Because of the above mentioned reasons it is obvious that at the level of international cooperation, including in matters under review at this time, we have little experience to share with our colleagues from countries whose legal systems have developed undisturbed for decades or even centuries. Our role is

* Prosecutor, Estonia.

therefore to be attentive and grateful learners.

The lack of practice in matters under review is also the result of the small size of Estonia. The area is only 45,000 square kilometres and the population is approximately 1.5 million, which is many times smaller than that of many cities of other countries, including Tokyo. It must be emphasised that during the last 12 years of independence the criminal groups have also made principal changes in their structure and methods used and found new targets to attack. They have managed to do all that as fast as, or probably faster than, the legislation has developed.

II. CURRENT SITUATION OF ORGANIZED CRIME IN ESTONIA

In the beginning of the 1990s a new organized underworld, which was more orientated towards maximising profit, emerged alongside the old subculture of theft based on the Soviet prison hierarchy. Criminal groups, with notable levels of organization, operating in Estonia were (and still are) of Russian or former Soviet Republics' origin and often operated on behalf of criminal groups there. Estonian criminals had little to say in the criminal world. For example, according to the surveillance agencies, during the first years of independence there was only one competitive criminal group established by Estonians and comprising mainly of Estonians. As is typical with the early days of capitalism organized crime in Estonia was openly violent for a long time focusing on extortion, robbery, arbitrary behaviour, trafficking of timber, organized theft, pimping, trafficking of guns and, to a certain extent, drug trafficking. In time criminals learned to profit from the geographical position of Estonia between Europe and the former Soviet republics.

The so-called "white collar trend" in organized crime has only become more obvious during the last few years. Therefore it must be recognised that investment of money received from, for example, drug trafficking into legal businesses to conceal its origin has not yet been officially detected. It means that not only is there no judicial practice in the form of binding judicial decisions but there are no criminal cases where these connections have been the subject matter of the investigation. Some connections have clearly been detected but as long as no criminal proceedings are commenced the relevant information is available only to surveillance agencies and is not within the competence of the Prosecutor's Office. Therefore, I, as a prosecutor, have no right either to rely on that information or to comment on it.

As from 1996 there was, and is, in the new Penal Code, with certain exceptions, a section in the Criminal Code that states that membership in, or the forming of, criminal organizations or recruiting members thereto or leading such organizations or parts thereof is punishable. During its period of validity there has been only one case where the organiser of a criminal organization and its border guard members were convicted, by virtue of this provision, for smuggling stolen cars into Estonia. Several other criminal proceedings have also commenced and referred to the court but they were all either terminated during the preliminary investigation because they were impossible to prove or the court passed a judgement of acquittal. Therefore it must be admitted that although persons or groups of persons have been convicted for smuggling or handling narcotic substances it has not been proven by a binding decision that such activities were carried out by a criminal organization or, in other words, connections between organized crime and drug trafficking or money laundering have not yet been detected.

We can discuss money laundering as an independently punishable crime only theoretically as, so far, no one has been convicted for this crime. According to the surveillance information criminal organizations are associated with money laundering but in these cases prior crimes are economic or tax related.

III. DRUG RELATED CRIMES

The Estonian Police have the following drug units:

1) The Narcotic Crime Department of the Central Criminal Police (a national unit), which comprises a Procedural Division (10 officials) and an Analysis Division (5 officials).
2) Narcotic Divisions of local police prefectures and individual officials dealing with narcotic crimes. Larger divisions are located in Tallinn (29 officials), Johvi (9 officials), Tartu (7 officials) and Narva (4 officials); there are also a total of 19 officials in the smaller prefectures. The total number of officials dealing only with narcotic crimes is 84.

Apart from the police there are five officials in the Border Guard and at the end of 2002 a narcotics division was established within the Investigation Department of the Customs Board. Cooperation agreements have been concluded between the different divisions (police-customs, police-border guard, customs-border guard) which enables an exchange of information, organizes training, and helps each other with transportation, etc. There is also a legal basis for cross-usage of the databases but this field needs to be developed. The main aim of cooperation is to prevent illicit trafficking.

The following data was supplied mainly by the Central Criminal Police (CCP) and the Forensic Service Centre (FSC) but, due to the above mentioned transitional difficulties, there might be some discrepancies.

According to the Central Criminal Police, criminal organizations are currently looking for new possibilities to invest their illegally acquired money into legal businesses. Drug trafficking is becoming more intensive every day and, for that purpose, established channels are used and new ones are sought out. Transit of the following narcotic substances and precursors is going on throughout Estonia:

- heroin and lately fentanyl from Russia, mainly to the Nordic Countries (Scandinavia);
- hashish mostly from Spain to the Nordic Countries (Scandinavia);
- ecstasy (MDMA) from the Netherlands and Belgium, mainly to the Nordic Countries;
- cocaine from Venezuela, mainly to the Nordic Countries and Russia.

Heroin, fentanyl and precursors are imported from Russia into Estonia, amphetamine and heroin are exported from Estonia into the Nordic Countries (Scandinavia) and precursors are exported from Estonia mainly to Western Europe. Transit constitutes approximately 70 percent of the drug trafficking while local consumption constitutes 30 percent. In addition to transit and imported narcotic substances drugs are manufactured locally as well. In 2001 no illicit narcotic laboratories were destroyed but in 2002 four laboratories for manufacturing synthetic drugs (amphetamines, ecstacy, GHB and GHB and amphetamines) were found. In 2001, thirteen plantations of cannabis (with a total area of 400 square metres) were destroyed in Estonia, the production of which was meant for the local market. In 2002 seven major plantations of cannabis were found.

According to the Forensic Service Centre altogether 22 expert analyses were conducted which identified the plants as cannabis but these also included cases where only single plants were involved. In 2002 amphetamine constituted 36 percent of the expert analyses, products of cannabis 35 percent, ecstasy 13 percent and heroin 9 percent. The percentage is calculated taking into account only the number of expert analyses carried out, not the quantity of narcotic substances. According to the Central Criminal Police the know-how for manufacturing narcotic substances is spreading rapidly and the manufacturing of amphetamines and ecstasy has become more common. New narcotic substances like GHB and fentanyl have also come onto the market. A very strong drug, fentanyl (a synthetic heroin or the so-called "China White") and one of its counterparts, methylfentanyl, which is even stronger than fentanyl, and which are

now used instead of heroin, came onto the market at the end of 2001. In 2001 fentanyl was not found but in 2002 it was confiscated in 71 cases. The reason why fentanyl has spread so quickly is probably that it has become more complicated to get heroin and also because of the low quality of the heroin.

It is a significant trend we are up against as in 2001 heroin constituted 90 per cent of the gross turnover of the narcotic business amounting to approximately 900 million kroons. Due to the difficulties in getting heroin, the usage of narcotic substances home-produced from the opium poppy increased considerably. In 2001 39.4 kg of opium poppy bolls, dust and residues of manufacture were confiscated while in 2002 the amount was 102 kg.

Cannabis products are continually popular. In 2000, 72 kg of cannabis plants, parts of plants and marihuana (hashish and cannabis seeds are not included here) were confiscated, in 2001 the amount was 260 kg but in 2002 it dropped to 81 kg.

Since the year 2000 the amount of confiscated cocaine has doubled while the amount of confiscated GHB has also increased massively. One of the acute problems is the production of amphetamines stimulated by the enormous demand of the Nordic market. In 2002 amphetamine and methamphetamine was confiscated in 344 cases amounting to 35.1 kg. One of the facts indicating the wide circulation of narcotic substances is the stabilisation of prices. In 2000, narcotic crimes constituted 2.7 per cent, in 2001 3.9 per cent and in 2002 2.3 per cent of all crimes committed.

The 2002 percentage, however, is debatable as in that year the reform of the criminal law was carried out which brought with it a temporary decrease in statistical numbers. Therefore, there was no actual decrease in narcotic crimes and this is supported by the fact that during the first quarter of 2003 the increase in narcotic offences was 61 per cent when compared to the same period of 2002. These kinds of statistics are actually the least informative as all kinds of narcotic related crimes are taken into account on an equal basis.

Lately the police have paid more attention to serious drug related crimes and the new Penal Code denounced some of the offences classified as crimes during the first half of 2002. Namely, a person who has used narcotic and psychotropic substances repeatedly without a prescription will not be punished as a criminal offender as, according to the Narcotic Drugs and Psychotropic Substances Act, this kind of action is deemed to be a misdemeanour.

The priority of the police is to damage criminal organizations and not to apprehend minor dealers. This is also supported by the statistics, which show that although the total number of criminal cases dealing with the trafficking of narcotics has decreased, the amounts of confiscated substances have increased significantly. For example, the amount of confiscated heroin increased over three times in 2002 compared to the year before, although the number of cases decreased more than three times.

In the field of cooperation, apart from the above mentioned agreements concluded between the police, customs and the border guard, there is a rather active exchange of information between the police and the State Agency of Medicine and between the police and businesses selling chemicals. When talking about combating narcotic crimes at the international level, it is important to mention that Estonia is a member of EUROPOL and participates in regional cooperation projects such as FINESTO (Estonian-Finnish joint working group) and FER (Finnish- Estonian-Russian) which was launched at the end of 2002. Estonia also participates in the project "Gulf of Finland" and the European joint project N-Hero, led by Russia. The aim of the latter is to profile heroin which means that confiscated heroin is analysed and, as a result, a unique characterisation of the batch or "fingerprint" of the batch is compiled. On the basis of the data, the

batch can be compared with other confiscated batches of heroin, similarities can be detected and thus the origin of the batch can be established along with other important factors like place and time of production, persons involved, etc.

In addition to the police representatives of the Finnish and Estonian, border guard and customs have also joined the FINESTO working group. The aim of this working group is to detect and hinder drug trafficking between Estonia and Finland. Since the end of 2000, when the work was commenced, tens of kilos of amphetamine and hashish have been confiscated and tens of criminals apprehended. The Finnish Central Criminal Police has also engaged a Swedish liaison officer in the work of FINESTO. There is a contact person in the Swedish Central Criminal Police who co-ordinates the cooperation. Cooperation between the Estonian and Swedish police is also active and all official communication channels are being used - INTERPOL, EUROPOL and the liaison officer at the Swedish Embassy in Estonia, appointed by the Swedish police.

There is a special unit in the Stockholm Police for combating crime originating from the Baltic States with whom the Estonian Central Criminal Police has good contacts. As Estonia is going to accede to the European Union the narcotic units of the Estonian Police are ready for this - there is an operable national electronic data exchange and in cooperation with our German colleagues we have drawn up a national narcotics strategy based on relevant EU documents.

It is appropriate to start the survey on the legislative basis for combating narcotic crimes with the fact that on June 5, 1996 the Riigikogu voted to ratify the UN 1961 Single Convention on Narcotic Drugs and the UN 1971 Convention on Psychotropic Substances. In 1997 the Narcotic Drugs and Psychotropic Substances Act entered into force and the Minister of Internal Affairs established the procedures for documentation of the delivery and storage of narcotic drugs and psychotropic substances and for storing seized narcotic substances which serve as physical evidence. The same year the Minister of Social Affairs issued a regulation on the Implementation of the Narcotic Drugs and Psychotropic Substances Act which comprised schedules of specific substances the handling of which, without a prescription, is prohibited.

The Government of the Republic has passed the following regulations: "The definitions of small and large quantities of narcotic drugs and psychotropic substances", "The procedure for handling opium poppy and cannabis for the purpose of agricultural production" and "The procedure for handling precursors". On May 31, 2000 the Riigikogu voted to ratify the UN 1998 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. During the reform of penal power in the middle of 2002 the system of provisions regulating the punishment for narcotic crimes was changed to a certain extent. The use of narcotic substances was decriminalised and is now punishable as a misdemeanour pursuant to the Narcotic Drugs and Psychotropic Substances Act. In the systematic classification of legal provisions narcotic crimes are deemed as crimes against public health and not as crimes against public order, as they used to be. An entirely new definition introduced by the new Penal Code was one of corporate liability which, within the meaning of sanctions, is expressed in punishing a legal person (body corporate) for committing a crime by pecuniary punishment or compulsory dissolution.

Illegal handling of narcotic drugs and psychotropic substances in small or large quantities is punishable by different lengths of imprisonment while the handling of large quantities by a group of persons or a criminal organization is punishable by two to ten years imprisonment. It is a criminal offence to induce a person or a minor (a more serious criminal offence) to illegally consume narcotic drugs or psychotropic substances; to prepare for distribution of narcotic drugs or psychotropic substances (which is a rather exceptional provision as the Penal Code has generally decriminalised the preparation of a crime); as well as to violate the requirements for handling precursors and related reporting.

Illicit international traffic and transit of narcotic substances are not deemed as crimes against public health but are punishable pursuant to section 392 of the Penal Code as smuggling of merchandise that is prohibited or requires a special permit by law, by a pecuniary punishment or by up to five years' imprisonment. The same act, if committed by an official taking advantage of his or her official position, or by a group, is punishable by five to ten years' imprisonment. The court shall confiscate the substance or object which was the direct object of the commission.

In the Penal Code smuggling is classified in the division of tax frauds in the chapter of economic offences. Although, theoretically it is not impossible to charge a person with illicit trafficking as well as jeopardising public health, with regard to the same batch of narcotic substances, judicial practice has shown that if there are features of illicit traffic a person is punished only for that crime. When talking about combating narcotic crimes we cannot ignore certain problems involved. Officials assigned to deal with narcotic crimes in prefectures often lack professional training and experience, even on the management level. As the dealers operating in the territory of a county are active not only all over the republic but also abroad, relevant information should be gathered and disseminated but local police authorities do not have the resources. Surveillance information on narcotic crimes is received randomly.

The solutions to this problem proposed by the Central Criminal Police are continuous training, surveillance and analysis. Duplicating each others' work must be avoided, information must be accessible to all officials working in this field and the Central Criminal Police, local prefectures and the Prosecutor's Office must enhance cooperation when introducing a single practice. Educational institutions offering police oriented education must include in their curriculum basic and in-service training in the field of narcotic offences. I, myself, may add that prosecutors and judges also need this kind of training, especially when bearing in mind that, as of next year, the role of the Prosecutor's Office in preliminary investigation and adversial procedure will increase considerably.

IV. MONEY LAUNDERING

Money laundering became a criminal offence in Estonia as of July 1, 1999 when the Money Laundering Prevention Act, passed by the Riigikogu on November 25, 1998 entered into force. In the Republic of Estonia money laundering is defined as the conversion or transfer of, or the performance of legal acts with, property acquired as a direct result of an act punishable pursuant to criminal law, the purpose or consequence of which is the concealment of the actual owner or the illicit origin of the property.

Two new paragraphs were entered into The Criminal Code that were titled "Money Laundering" and "Failure To Follow The Requirements of the Money Laundering Prevention Act". In the new Penal Code the regulation is similar: paragraph 394 is titled "Money Laundering" and according to that money laundering is punishable by pecuniary punishment or by up to five years imprisonment. If money laundering is committed by a group of persons or by a criminal organization, repeatedly (at least twice) or on a large scale the punishment is two to ten years imprisonment. If such a crime is committed by a legal person the sanction is either pecuniary punishment or compulsory dissolution. The court shall confiscate the direct object of the commission. Failure to comply with the identification requirement, failure to notify suspicions of money laundering to the financial intelligence unit by the head or a contact person of a financial institution or an entrepreneur or the submission of untrue information are separately criminalised and punished by pecuniary punishment or up to one year imprisonment.

On June 25, 1999 Estonia signed, and on March 8, 2000, ratified the Council of Europe 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. According to article 6 of the Convention, Member States may establish which intentionally committed offences shall be deemed as crimes:

- the conversion or transfer of property, knowing that such property is proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of the predicate offence to evade the legal consequences of his actions;
- the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property is proceeds of crime;
- the acquisition, possession or use of property, knowing, at the time of receipt, that such property was proceeds of crime;
- participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

According to the Convention Member States may also establish whether:

- a predicate offence shall be considered as a criminal offence;
- the above mentioned offences committed by a person who has committed a predicate offence shall be considered criminal or not;
- knowledge, intent or purpose required as an element of an offence set forth in that paragraph may be inferred from objective, factual circumstances.

The Republic of Estonia has established that predicate actions must be separately punishable as criminal offences and that it is also possible to punish a person for money laundering when he/she has himself committed the predicate offence.

In practice, no criminal cases concerning money laundering have reached court judgement. Two cases have been referred to the court and several cases are still under investigation. So far none of the money laundering cases has been connected with illicit trafficking in narcotic substances. Predicate offences are mainly of an economic nature: misuse by an official of his or her official position, tax offences and cases of bankruptcy, where owners attempt to maintain control over assets that belonged to the bankrupt enterprises and were at their disposal.

Example One

A moratorium was declared on a bank and without the consent of the moratorium administrator the former leaders of the bank could not conduct any transactions. But they learned that it was most likely that bankruptcy proceedings would be commenced and so they sold the assets of the subsidiaries of the bank for a very low price to other companies which sold them on. These companies were in fact controlled by the former bank leaders and the leaders of the companies were only 'puppets' following their orders.

Example Two

Another bankruptcy case, where just before the commencement of the bankruptcy proceedings company assets were transferred to another company to cover a fictitious debt. The company, in turn, sold the assets on trying to make it look as if they had acquired them in good faith.

These two criminal cases are currently being heard in court but there is no judicial decision yet.

Example Three

A preliminary investigation is currently being conducted into a case where, during the years 1998 to 2000, a company owned by a real estate businessman received more than 44 million kroons through off-shore companies. To that end money received allegedly from the timber business was transferred to the accounts of so-called "shelf companies" (companies that are not actually economically active). Cash was drawn from the accounts and delivered to the office of the real estate company. Fictitious loan agreements were then concluded with offshore companies to legalise this cash in the vaults of the real estate company.

A. Effective Investigation Methods for Gathering Evidence in Cases of Money Laundering and Drug Related Crimes

Effective investigation methods for gathering evidence in cases of money laundering and narcotic crimes are to a large extent the same as those used for investigating organized crime in every field of activity. The admissibility of evidence and methods for gathering the evidence depends on the compatibility with requirements established by the Code of Criminal procedure and the Surveillance Act.

1. Criminal Intelligence

In any organized crime related criminal case (I am talking about cases based on surveillance, which means that proceedings are commenced on the initiative of a law enforcement authority and not because of a complaint) formalising the evidence must be preceded by the gathering of information and analysis. So far systemised analysis has been conducted mostly by the Central Criminal Police but we should not underestimate the contribution of the local prefectures. Information is being gathered on the sources and channels of large-scale narcotic crimes, on the persons involved as well as on the activities, structure and dynamics of criminal organizations. In the field of economics, surveillance is used for checking suspicious transactions and companies whose actual activities and financial status do not correspond either to the officially registered fields of activity or to their documented financial status. Criminal intelligence may result in commencing actual criminal proceedings but also information gathered, but not actually used, might prove to be useful in the future. Surveillance information is formalised as evidence by a report accompanied, if necessary, by database extracts proving the use of the means of communication, sound or video recordings and their transcripts. In certain cases statements of police officers may be used but so far this area has been poorly regulated and the courts have neither common practice nor serious precedents.

2. Surveillance

According to the Surveillance Act, surveillance activities are divided into special and exceptional surveillance activities. The police may conduct the following special activities without applying for the permission of the court: covert collection of information by persons who are engaged in surveillance activities or recruited for such; covert collection of comparative samples, and the covert examination and initial examination of documents and objects; and covert surveillance and covert identification. Exceptional surveillance activities that require the permission of the court are: covert entry for the

purpose of collecting and recording information and installing the necessary technical appliances; covert examination of postal items; wire tapping and recording of messages and other information forwarded by technical communication channels; and staging of criminal offences. In cases of urgency, court permission for declaring activities justified may be applied for after the commencement of the activities, but not later than on the next working day. If the court refuses to issue a permit the activities must be terminated promptly. It is pointless to emphasise how effective these measures are but, due to the current legal regulations and additional bureaucratic rules within the agencies, the commencement of exceptional surveillance activities is a painstaking process, and therefore, often lags behind the quick and persistent operation of criminals.

3. Undercover Operations

Undercover operations are something that might be effective in cases of economic and narcotic crimes but their implementation in Estonia is problematic. So far short-term undercover operations have been exercised particularly in the fields of combating narcotics, illegal alcohol and cigarettes as well as in revealing gun trafficking and cases where officials are taking bribes. In cases of undercover operations where the activities of an undercover agent are qualified as criminal (for example when an agent sells a gun or offers a bribe) permission for staging a criminal offence must be applied for from the court as the action is considered to be an exceptional surveillance activity. Undercover operations related to narcotics are also based on the provisions of the Narcotic Drugs and Psychotropic Substances Act, which permits the handling of narcotic drugs and psychotropic substances for preventing, detecting and combating narcotic crimes. In undercover operations agents over the years have played all kinds of roles: as buyers, sellers, deliverers, suppliers, retailers, financers and corrupt officials. In many cases during the staging of a crime an agent has offered a bribe or a deal of some kind to an official suspected of corruption. Undercover work in Estonia is problematic because of the smallness of the country - people know each other or have been in contact at some time or another. Therefore, instead of police officials ordinary citizens or former criminals willing to co-operate have been recruited as temporary undercover agents. But there are certain risks involved. Of all kinds of undercover work short-term operations are most commonly used because in the case of deep undercover assignments the risk of being exposed is great. Undercover store fronts are also seldom used because of the lack of resources and the risk of exposure due to the smallness of the country.

4. Immunity

Immunity from liability for crimes committed is not applied in Estonia as it is precluded by law. Unless the crime has been committed on the basis of the permission issued by the court to imitate a crime, the person is held liable for his/her actions. Prior to September 1, 2002 section 501 of the Criminal Code was valid, on the basis of which the court or the prosecutor could release the convicted offender from punishment if important evidence provided by him/her resulted in the finding out of the truth and the conviction in a criminal case of another person/persons. This meant that in order to release a person from punishment it was necessary for: a) the person to be found guilty of all the crimes committed by him/herself; b) the case in which the person rendered assistance being closed after the final judicial decision; c) the prosecutor agreeing to submit an application for the release of the person from punishment; and d) the court being willing to comply with this. Assessing the extent of assistance was a totally subjective criterion and was not thoroughly regulated. The new Penal Code does not provide for the release of a person from punishment and the only tools in the hands of police/prosecutors are: the imposition of minor preventive measures such as a signed undertaking not to leave their place of residence, probation or bail instead of holding a person in custody or assistance in premature release of the person.

5. Protection of Witnesses

A witness protection system is still being set up. Currently negotiations are being held with other Baltic countries and Finland to establish a joint witness protection programme. The geographic position and small area of Estonia, its language and financial situation does not enable us to implement a classical model of witness protection where a key witness is given a new identity and gets a new place to live as well as a new job. However, in Estonia a witness is allowed to remain anonymous if he/she has a justified reason to be afraid for him/herself or the well-being of his/her relatives. The interrogation record of an anonymous witness is enclosed in the criminal file under a fictitious name. A sealed envelope with information concerning the name and contact information of the witness declared anonymous is safely located in the vault of the investigator and later in that of the court. Interrogation of an anonymous witness in the court is conducted separately, in the presence of only the panel of the court. The defence attorney and the prosecutor may question the witness in writing through the court. There have been many problems implementing the anonymous witness system and currently higher courts are trying to limit the exploitation of anonymous witnesses relying on the precedents of the European Court of Human Rights.

6. Controlled Delivery

The definition of controlled delivery is used in the Customs Act but the requirements of the Code of Criminal Procedure and the Surveillance Act must be adhered to as the controlled delivery method comprises several investigative surveillance actions. The controlled delivery method could serve as an effective means for detecting a chain of narcotic crimes. It requires, however, cooperation between the police, customs and the border guard as the custom authorities have no right to commence exceptional surveillance activities and the customs frontier usually runs along the state border. It is also important to co-operate with other countries as the above mentioned method must be authorised in every state the parcel crosses (in practise there have been problems with the Netherlands when monitoring the route of narcotics to Germany). It would be practical to conclude relevant agreements with other countries similar to the one Estonia has concluded with Finland.

B. The Creation of a System of Notification of Suspicious Transactions and the Establishment and Operation of the Financial Intelligence Unit (FIU); Cooperation with Banks and other Financial Institutions

With the adoption of the Money Laundering Prevention Act the Financial Intelligence Unit was established. The FIU verifies information relating to suspicious transactions pursuant to the procedure provided for in the Code of Criminal Procedure takes the necessary measures to preserve property and, if elements of a criminal offence are detected, sends material to a pre-trial investigation authority for a decision to be made on the commencement of criminal proceedings. The Financial Intelligence Unit is a structural unit of the Police Board within the administrative area of the Ministry of Internal Affairs. Currently seven persons work in the Unit: One chief superintendent, three leading police inspectors and three senior officials.

The functions of the Financial Intelligence Unit are:

- to collect, register, process and analyse the information received. In the course of these activities, the significance of the information submitted to the Financial Intelligence Unit for the prevention, establishment or investigation of money laundering and criminal offences related thereto is assessed and a decision is made on the use of the information;
- to inform persons who submit information to the Financial Intelligence Unit of the use of the information in the prevention, establishment or investigation of money laundering and criminal offences related thereto, with the aim of improving the performance of the notification obligation;

- to conduct investigations into money laundering, improve the prevention and establishment of money laundering and inform the public thereof;
- to co-operate with credit and financial institutions, entrepreneurs and police authorities in the prevention of money laundering; and
- to organize foreign relations and the exchange of information.

The Financial Intelligence Unit maintains a database which includes information received in notices submitted by credit and financial institutions and other relevant undertakings on transactions about which there is a suspicion of money laundering, all suspicious and unusual transactions and acts, as well as additional information on transactions, their participants and other circumstances related to the transactions which are collected in cases provided by law.

According to the current Money Laundering Prevention Act it is mandatory for credit and financial institutions to identify all persons or representatives of persons who carry out non-cash transactions involving sums of more than 200 000 kroons or cash transactions involving sums of more than 100 000 kroons.

Credit or financial institutions are also required to identify any person about whom there is a suspicion that the money which is the object of the transaction is derived from criminal activity.

According to the Money Laundering Prevention Act insurers, insurance agents, insurance brokers, investment funds and professional securities market participants are considered to be financial institutions. However, provisions of this Act extend also to those undertakings which are not credit or financial institutions but which can be used for money-laundering purposes:

1) undertakings the principal or permanent activity of which are transactions involving real estate or the organization of gambling or lotteries, and undertakings which operate as intermediaries in such areas of activity;
2) other undertakings which carry out, or act as intermediaries for, transactions during which they receive, act as intermediaries for or pay out more than 100 000 kroons in cash, more than 200 000 kroons in the event of a non-cash settlement, or more than 200 000 kroons in total as cash and non-cash payments in the event of both a cash and non-cash settlement for a transaction or for transactions which are clearly interconnected.

According to section 10 of the Act it is prohibited to carry out the transaction if it is impossible to identify the person on whose behalf, or for whose account, another person is acting. The credit or financial institution or the relevant undertaking is also required to inform the Financial Intelligence Unit immediately of an expression of intent by the person to carry out a transaction, or of a transaction which has already been carried out by the person.

The Money Laundering Act also provides that a credit or financial institution has the right to refuse to carry out a transaction if a person does not submit documents certifying the legality of the source of the money or other property which is the object of the transaction despite a corresponding demand having been made.

According to section 13 of the above-mentioned Act the head of a credit or financial institution has to appoint a person to be a contact for the Financial Intelligence Unit. The duties of the contact person are:

- to monitor compliance with money laundering prevention requirements in the credit or financial institution;
- to forward information to the Financial Intelligence Unit in the event of a suspicious transaction; and

- to inform the head of the credit or financial institution in writing of deficiencies in compliance with the internal audit rules.

In addition to the general identification requirement, credit and financial institutions are required to notify the Financial Intelligence Unit immediately about any suspicion of money laundering. In the event of justified suspicion of money laundering, the Financial Intelligence Unit may suspend a transaction or impose restrictions on the use of money in an account for up to two working days from the first attempt to carry out the transaction.

According to section 17 of the said Act credit and financial institutions and undertakings and employees thereof and persons acting on their behalf are not liable for damages which result from failure to carry out a transaction, or from failure to carry out a transaction within the given term and which is caused to a client in connection with informing the Financial Intelligence Unit of a suspicious transaction, nor can they be accused of a breach of a confidentiality requirement imposed on them by law or contract.

The Money Laundering Prevention Act provides for the following liability for committing a misdemeanour in the event of institutions/undertakings and their employees who do not perform their obligations:

Section 26 [1] Violation of requirement to register and preserve data

(1) Violation of the requirement to register and preserve data provided for in the Money Laundering Prevention Act is punishable by a fine of up to 100 fine units (a fine unit in Estonia presently is 60 kroons).

(2) The same act, if committed by a legal person, is punishable by a fine of up to 20 000 kroons.

Section 26 [2] Failure to submit or late submission of mandatory information

An employee of a credit or financial institution who fails to submit, or does not submit on time, mandatory information provided for in the Money Laundering Prevention Act to the contact person or head of the institution shall be punished by a fine of up to 200 fine units.

Section 26 [3] Failure to implement internal security measures

The head of a credit or financial institution who fails to implement the internal security measures provided for in the Money Laundering Prevention Act shall be punished by a fine of up to 200 fine units.

Section 26 [4] Illegal notification of information submitted to the Financial Intelligence Unit

The head, contact person or another employee of a credit or financial institution who unlawfully notifies a person whose activities involve a suspicious transaction, or a third person, of information submitted to the Financial Intelligence Unit shall be punished by a fine of up to 300 fine units.

Section 26 [5] Failure to comply with the identification requirement

An employee of an undertaking specified in subsection 5 (1) of the Money Laundering Prevention Act who fails to comply with the identification requirement provided by law shall be punished by a fine of up to 300 fine units.

Extra-judicial proceedings concerning these misdemeanours shall be conducted either by police prefectures or the Financial Supervision Authority.

In addition to the above-mentioned Act the Governor of Eesti Pank (The Bank of Estonia) has adopted a Decree on the Procedure for the Internal Security Measures of Credit Institutions for the

Prevention of Money Laundering and a List of Suspicious and Unusual Transactions. According to this Decree in order to decide whether a transaction or operation is suspicious or unusual, credit institutions must pay special attention to:

- the content and extent of the economic activity of the client and a good knowledge thereof (due diligence); and
- clarification of the background to transactions and operations that have the features stipulated in section 6 of the Money Laundering Prevention Act.

Such transactions and operations of clients that lack a definite economic or legal justification and differ from the ordinary economic activity of clients shall be considered as suspicious. Also cases where the credit institution has reason to suspect the illicit origin of the assets that are the objects of such transactions.

The Decree includes a list specifying suspicious and unusual transactions and operations or transactions linked to each other such as:

- depositing an extraordinarily large amount of cash by a client who usually uses cheques and other similar instruments in his/her business activities;
- a considerable increase in cash payments to the client's account without any obvious reason, especially if the amounts paid to the accounts are deposited in the account for a short period of time or the next beneficiary of the transfer of such amounts cannot be linked to the ordinary activities of the client;
- numerous accounts of the client that are individually small and inconsiderable as to their amount but which, when summarised, form the amount stipulated in Article 6 of the Money Laundering Prevention Act;
- cash transactions of legal persons, cash deposits as well as cash withdrawals, in case normal activities would provide for non-cash transactions;
- constant cash payments to the client's account in order to make money transfers and pay invoices or for other financial instruments;
- clients' transactions with the aim of exchanging large amounts in notes of small denominations for notes of bigger denominations;
- consistent exchange of cash for foreign currency;
- depositing transactions in cases where counterfeit money or any other similar forged instruments are discovered;
- large deposit transactions performed through ATMs;
- circulation of the client's funds (money) between various banks and offices without any economic grounds;
- investment transactions of the client in foreign currency or securities, when the sources of the foreign currency or securities are unknown or do not comply with the potential of the client or the usual economic operations of the client;
- trading in securities without an understandable reason or in an unusual situation;
- payments made by a large number of persons to the same account without providing sufficient payment details;
- payments to the client's account that are received from the accounts with banks or finance institutions of foreign countries where evidently active drug trading is performed;
- routine or frequent payment to the client's account (or from the account) exceeding the threshold amount stipulated in Article 6 of the Money Laundering Prevention Act from countries (or to the countries) where evidently active drug trading is performed;
- frequent transactions in traveller's checks without obvious economic or legal justification;
- unexpected repayment of a problematic or bad loan;
- suggestions of lending against such securities, the sources of which are unclear or unknown;

- investments in objects or instruments that have no logical connection to the previous business activity of the client;
- turnover of the client's account is out of proportion to its normal economic activity;
- short-term deposits of a client who is a foreign resident if, upon the expiry of the deposit term, the money is withdrawn from the account;
- a deposit transaction made from a foreign country to the account of a local client if this is followed by withdrawal of the funds from the account.

The Minister of Internal Affairs has adopted a regulation which establishes the requirements and contents of the notices submitted to the Financial Intelligence Unit. The FIU must examine notices immediately after their submission and if no features of money laundering are detected issue written permission for the performance of the transaction.

C. Freezing of Assets, Confiscation, Seizure and Recovery of Legal Expenses

Section 146[1] of the Code of Criminal Procedure provides for the freezing of assets in case of suspicion of money laundering. Property, which is the object of suspicion of money laundering, is frozen by the preliminary investigator conducting the proceedings in the criminal offence of money laundering in order to secure a request for international legal assistance, seizure or civil matter if other measures are exhausted.

The difference compared with an ordinary freeze of property is in the fact that, in this case, the property can be frozen only with the consent of a judge (a prosecutor's sanction is not enough).

The Code of Criminal Procedure imposes, upon judgement for conviction, compensation of the value of the proceeds on convicted offenders. Legal costs, which a convicted offender has to meet consist of amounts collected for the benefit of witnesses, victims, experts or, in connection with expert assessment, for the benefit of state forensic institutions, other agencies or legal persons, and amounts paid or payable to specialists and impartial observers of investigative activities; amounts spent on the storage, forwarding and investigation of physical evidence; amounts payable for the participation of sworn advocates and; bailiff's fees and other costs which are borne by a preliminary investigation authority or a court in connection with the proceedings in a criminal matter.

Thus, for example, the costs related to the extradition of a person from a foreign state have been reclaimed from a convicted offender.

Section 83 of the Penal Code allows the court to apply confiscation of the objects used to commit an intentional offence and of the assets acquired through the offence, if these belong to the offender at the time of the making of the judgement. In the absence of the permission necessary for the possession of a substance, object or organism (firearm, drugs, etc.), such substance, object or organism shall certainly be confiscated.

As regards drugs, the Chapter of the Penal Code on Offences against Public Health includes a provision which allows the court to confiscate an object or substance, which was the direct object of the commission of the offence, or an object used for the preparation of such an offence.

If the property gained by criminal means has been transferred or used, or if its confiscation is not possible for some other reason, the court may reclaim the payment of the sum which equals the value of the property to be confiscated.

The state shall acquire the ownership of confiscated property or, in cases stipulated in international

agreements, it shall be returned to another state.

D. Shifting the Burden of Proof to the Defendant

As mentioned before, no judicial decision on money laundering has ever been made in Estonia. Therefore there is no court practice related to the burden of proof in this area. However, in judgements concerning tax offences judges have been of the opinion that in certain cases the burden of proof lies with the accused at trial.

For example: a pre-trial investigation proved that a person managed a company which offered services and/or sold goods and added VAT (value added tax) to the services/goods. Therefore, he had to pay VAT to the state withholding the sum which the company had paid for purchased services/goods to other companies. The investigation also proved that the company did not pay VAT and that it had not bought any services/goods from other companies liable to value added tax i.e. the company had no right to recalculate VAT. The accused at trial claimed that the company had bought goods/services from other companies i.e. it had expenses. However, he could not specify from whom, or what amount of goods/services, the company had bought. Neither could he submit any account of charges. With regard to a situation like this Estonian courts have come to the opinion that an accused at trial must be able to prove that the company had incurred such expenses - oral claims are not enough. The accused has to actively defend him/herself (submit the necessary documents or offer the court, or a prosecutor, an actual chance to check his/her claims).

E. State of Affairs and Problems Concerning International Cooperation

1. Mutual Assistance

Mutual assistance in criminal matters is carried out on the basis of the 1959 European Convention on Mutual Assistance in Criminal Matters according to which the Ministry of Justice is the national central authority responsible for the co-ordination of international relations concerning legal assistance. Several bilateral and multilateral agreements, based on the above-mentioned Convention, concluded by the Republic of Estonia also regulate certain aspects of mutual legal assistance. Such agreements have been concluded with Latvia, Lithuania, Finland, Ukraine, Poland, the USA and the Russian Federation. On the basis of these agreements the Public Prosecutor's Office may also act as a central authority co-ordinating legal assistance.

International police cooperation is carried out with the assistance of the International Criminal Police Organization, Interpol, the European Police Office, Europol, and the International Criminal Intelligence Department of the Central Criminal Police, which acts as their national unit in Estonia. In order to make police cooperation more efficient Interpol has been included as an entitled subject in several international treaties and conventions. Cooperation between the Republic of Estonia and Europol is regulated by an agreement of cooperation. Through the International Criminal Intelligence Department of the Central Criminal Police it is possible to submit inquiries and applications for professional assistance to the law enforcement authorities of foreign countries which are members of Interpol.

Through the International Criminal Intelligence Department of the Central Criminal Police it is also possible to exchange surveillance information with other countries and to co-ordinate cross-border surveillance, carried out with the help of liaison officers representing European Union member states and cooperation partners of Europol who are located at the Europol Headquarters in The Hague.

The slowness of the procedures related to legal assistance is the biggest problem hindering international cooperation.

2. Extradition

With regard to extradition, Estonia follows the 1957 European Convention on Extradition which Estonia signed on 4 November 1993 and ratified on 19 February 1997.

According to the said Convention the Contracting Parties undertake to surrender to each other all persons against whom the competent authorities of the requesting Party are preceding against for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order.

Extradition shall be granted in respect of offences punishable under the laws of both the requesting Party and of the requested Party by deprivation of liberty or under a detention order for a maximum period of at least one year, or by a more severe penalty. Where a conviction and prison sentence have occurred, or a detention order has been made in the territory of the requesting Party, the punishment given must be for a period of at least four months.

If the request for extradition includes several separate offences each of which is punishable under the laws of the requesting Party and the requested Party by deprivation of liberty or under a detention order, but some of which do not fulfil the condition with regard to the amount of punishment which may be awarded, the requested Party shall also have the right to grant extradition for the latter offences.

The Government of the Republic of Estonia decides whether to extradite its citizens to other countries. In 2001 Estonia extradited 23 persons and the same number of persons was extradited to Estonia. In 2002 Estonian extradited 17 persons and 38 persons were extradited to Estonia by other states.

To sum up, I would like to say that despite the fact that the Estonian authorities are well-aware of the problem of drug trafficking, as well as money laundering, and try to take all possible measures to prevent them and to bring offenders to justice, the criminal world has a head start and in order to avoid the worst we need all the help we can get from countries and authorities who have long-term experience, the necessary know-how and means to tackle such crime.

PAKISTAN: NOT A SOURCE BUT A VICTIM COUNTRY

Syed Nayyar Abbas Kazmi *

I. INTRODUCTION

In the last several decades the use and trafficking of drugs has created problems for society in general and for law enforcement authorities in particular. The drug traffickers have always been a source of a relatively high level of crime but especially those of the modern day who are much more wealthy, powerful and even influential to the extent that they can pose a threat to national and international security. In some countries the drug trafficking organizations even have their own armed personnel. Drug trafficking involves an entire economic process including cultivation, harvesting, transportation, distribution and sales.

Enforcement efforts can be targeted against any aspect of this illicit economic system. A systematic assault at all levels of illicit activity within the network is most likely to produce successful results.

II. ANTI NARCOTICS FORCE PAKISTAN - AN OVERVIEW

In February 1995 the Anti Narcotics Force (ANF) was constituted, which is now the Premier Law Enforcement Agency in the field of narcotics control. This composite and highly mobile force was given intensive training with a change in basic tactics from static check posts to mobile operations. Moreover tireless efforts by the Anti Narcotics Force of Pakistan to strengthen national and international cooperation in the war against illicit drug production have finally borne fruit, with the country having been declared 'Poppy Free' by UNDCP.

The Anti Narcotics Force of Pakistan has made remarkable efforts to dismantle and unearth the drug mafia and seized huge quantities of illicit drugs and precursors and made thousands of arrests. The success was massive and unprecedented and jolted the entire drug mafia. In this context the commendable performance of ANF Pakistan speaks for itself.

A. The Special Investigation Cell (SIC)

The Special Investigation Cell is part and parcel of the Anti Narcotics Force. It has the same objectives and mission, nonetheless, its modus operandi are somewhat different: more scientific than the rest of the force and its performance due to these distinguishing characteristics has been manifold. Be it seizures, arrests, investigations or gathering of intelligence, SIC has always been ascending in attempting to achieve its objectives. It has a commitment to its mission and will continue to fulfil this challenging mission.

B. Current Drug Situation in Pakistan

At the time of independence in 1947, Pakistan was deficient in Opium, as it could not meet the

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requirements of its own Opium addicts, whose number at that time was fairly limited. Up until 1956, the country imported Opium from India. Thereafter, only the production of licensed Opium for medical needs was permissible in a few selected areas and under strict control. Even subsequently, the number of Opium addicts in Pakistan never touched an alarming level. The production of licensed Opium continued until 1979 when two important developments i.e. The Islamic Revolution in Iran and the Promulgation of the Prohibition Enforcement of Hadd Order 1979 in Pakistan took place.

C. Impact of Afghanistan

Afghanistan emerged as a major drug producer in the 1990s. It accounts for more than 70% of global Opium production. The bulk of Afghan Opium is processed into morphine base in Helmand, Nimroz, Nangarhar, Oruzgan, Kandahar, Badakhshan, Konar and Paktia provinces of Afghanistan and then smuggled into Pakistan for local consumption and onward transportation to other parts of the world. Afghanistan, the source country of the illicit drugs is the next-door neighbour of Pakistan. The Pak-Afghan border stretches from north-east to south-west over an area of 2,538 kilometres, while the Pak-Iran border stretches over an area of 900 kilometres in the south-west.

D. Drugs Smuggling

Afghanistan is a major source country for the cultivation, processing and trafficking of opiate and cannabis products. Morphine base, heroin and hashish produced in Afghanistan are trafficked worldwide. Narcotics remains the largest source of income in Afghanistan due to the decimation of the country's economic infrastructure caused by years of warfare. Following the withdrawal of the Soviets ten years later, civil strife ensued in Afghanistan.

Hashish originating in Afghanistan is trafficked throughout the region, as well as to international markets. Although the bulk of the hashish intended for international markets is routed through Pakistan and sent by sea, air, or by road. Gulf Countries and especially Saudi Arabia, UAE, Oman,etc. are considered suitable for the hashish produced in Afghanistan. The Coastal area of Baluchistan and the Seaport of Karachi is being used by the traffickers for the shipment of hashish and other narcotics to Gulf and other countries. Due to large seizures made by the ANF, the smugglers have changed their modus operandi and now the mother ship anchors in deep waters and high-speed motor boats carry the drugs up to the mother boat. The same method is used while unloading the drugs. From April to June smuggling by sea remains at its peak and diminishes in July- August due to rough weather. On the other hand during this period humidity severely damages the quality of the drugs; particularly hashish.

While moving on the road the smugglers are well armed and use highly sophisticated communications equipment to monitor the movements of law enforcement agencies. These smugglers' weaponry goes far beyond simple assault rifles, to include anti-tank rockets and anti-aircraft "stinger" missiles. Rough terrain and flexibility also aid the smugglers in transport methods. They travel in armed convoys, sometimes using speedy vehicles, sometimes camel caravans and motorcycles.

E. Smuggling Routes

Drugs are being smuggled from Afghanistan into Pakistan by trespassing the long stretch of border by using different means of transportation i.e., vehicles and camel caravans. These drugs are being smuggled to Iran, the Middle East and onward to Europe, USA and other countries of the world. Acetic anhydride, the main precursor used in the manufacturing of heroin is smuggled into Afghanistan through Pakistan mainly from European countries. However, it is also being smuggled from China via the Khunjerab Pass and Dubai by sea and by air.

Heroin is trafficked to worldwide destinations by many routes. The traffickers quickly adjust

smuggling routes based on political and weather-related events. Reports of heroin shipments from North Afghanistan through the Central Asian States to Russia have increased the use of Tajikistan as a frequent destination for both opium and heroin shipments. Heroin also continues to be trafficked from Afghanistan into Pakistan. Seizures are frequent at Pakistan's International Airports. Heroin is also smuggled by sea on vessels leaving the port city of Karachi.

F. Drugs Manufacturing

Before 1981 heroin-manufacturing laboratories were initially located in Herat Province of Afghanistan near the Iran border, these heroin laboratories were shifted from Afghanistan to Pakistan due to the simultaneous Islamic revolution in Iran and the Russian intrusion in Afghanistan. These laboratories were initially located in the villages of Tehsil Landikotal as well as in Choora Valley of Khyber Agency. These laboratories were mainly operated, managed, and financed by Afghan Refugees whereas Afridi and Shinwari tribes provided local protection and land. Operations against these drug manufacturing labs were conducted in different phases. In 1986, an operation against heroin labs was carried out and the Heroin Labs were destroyed. The last operation conducted against the Heroin Labs was in December 1996. The Taliban's liberal policy regarding cultivation of opium and the continuous pressure of the Pakistan Government on local Maliks, forced the remaining laboratories to move back to Afghanistan.

G. Enforcement

Just to acquaint you with the performance of the Anti Narcotics Force during the last few years, some of the statistics are given below:

Year	Persons Arrested	Morphine	Heroin	Hashish	Opium	Others
1999	536	-	2143.846	25546.569	7662.742	231 ltrs AA
2000	656	3060.500	1847.529	36742.623	4241.860	42 ltrs AA
2001	601	1199.000	3068.168	29983.870	2626.350	-
2002	474	-	4361.438	22443.995	924.970	-
2003 (30-06-03)	198	300.00	308.868	11615.067	2548.650	12379 Kgs opium straw

H. Special Courts

Special Courts have been established under the Control of Narcotics Substances Act-1997 and have the exclusive jurisdiction to try an offence cognizable under this Act. After the establishment of the Special Courts quick and speedy decisions are being announced. On the contrary these drugs cases were lying pending in other courts for years due to the enormous number of cases.

I. Drug Trafficking Trends

Over the years, it has been observed that drug trafficking trends are rapidly changing.

Criminal groups adopt various strategies to hoodwink law enforcement agencies by adopting new modus operandi of transporting drugs to different destinations. A few glimpses of new methods are as follows:

1. <u>International</u>

Drug routes

(i) Newly built Eldoret airport in Central Kenya is being used for drug trafficking through cargo flights because of its lack of modern technical equipment, which are in the process of

installation.

(ii) Entebbe airport (Uganda) is considered a soft touch regarding drug trafficking due to a lack of modern technical/interception facilities.

(iii) Dubai, Bombay, Dacca and Colombo are being extensively used as transit airports.

(iv) Commercial containers, with mislabelled boxes, holding Acetic Anhydride, are being transited from Busan Port, South Korea to Afghanistan via Bandar Abbas Port, Iran.

Couriers

(i) Initially African couriers were used but now European and locals have also become couriers.

(ii) At least two couriers carry one consignment to its destination. The use of multiple couriers is arranged to conceal any direct links.

Concealments

(i) African drug traffickers use different portable articles for the concealment of drugs, which are later dispatched through courier services/mail.

(ii) Africans bring special spray nozzles from Africa to fill heroin inside small cavities of items of daily use.

(iii) African ladies usually wear a hair attachment sewn to their head and heroin is concealed inside.

2. Domestic

Drug Routes

(i) From NWFP to Europe and USA, small quantities of drugs are being sent through air couriers.

(ii) Large shipments are also sent through Makran coast and the coastal belt of Karachi.

(iii) Sri Lanka and Dacca are the new destinations from coastal areas of Karachi for large shipments by sea.

Couriers

(i) Besides Africans, Pakistanis are also swallowing heroin filled capsules.

(ii) Taxi drivers, supplied with mobile telephones by the African drug traffickers based in Pakistan are facilitating the supply of drugs from one place to another and even storage at safe places.

(iii) Drug couriers are mostly using Karachi, Lahore and Peshawar airports.

Concealments

(i) Heroin is also concealed in formation signs (Uniform Badges).

(ii) Books, greeting and birthday cards filled with heroin are registered through mail courier services.

J. Concealment in Capsules

This is the most common method of concealment and has been used by drug traffickers for years.

1. Heroin Filled Capsules

Carrying heroin filled capsules inside body cavities is considered to be the safest way of smuggling drugs. Most of the couriers of various nationalities, especially Africans are using this modus operandi. Some of them swallow capsules while others conceal the capsules inside their body through the rectum.

Sometimes it becomes difficult to detect such capsules as the machine throws X-rays towards the object, which scatter in different directions and some rays reflect which cannot form a clear image. This occurs due to the reflecting capability and hardness of the aluminium foil/ capsules. A remedy to this problem is a Barium Test, which is an effective tool to detect such capsules. Even with this test, one

cannot see the capsules but the process helps the doctors make an opinion due to the unusual shape of the stomach and intestines.

III. EXCHANGE OF INFORMATION

Exchanging information and intelligence between ANF and the other law enforcement agencies of the world by establishing focal points on each side can enhance cooperation between the countries. The international strategy maintains interdiction as an important component and emphasizes the Pakistan government's pursuit of cooperative efforts with other nations, having the political and economic will to defeat international drug syndicates.

Cooperation with foreign law enforcement agencies and Drug Liaison Officers is essential to the ANF mission, as the trafficking organizations responsible for the drug trade inside Pakistan do not operate solely within its boundaries. To further support this mission, a number of countries are operating in Pakistan through their diplomatic missions. The ANF has always cooperated with them by remaining within the legal purviews.

All these foreign countries actively participate by developing sources of information and an effective flow of information about the drug traffickers by the foreign agencies to ANF has always been very helpful in launching timely interdiction operations.

IV. EXTRADITION TREATIES

The ANF, being the premier Federal Agency, deals with narcotics issues exclusively and operates on the basis of her own national enacted legislation i.e. CNS Act-1997, which grants them wide ranging powers to exercise within their national territories for their own purpose as well as in cases of transnational drug trafficking in collaboration with the accredited International Law Enforcement Agencies. Pakistan has ratified the Single Convention on Narcotic Drugs- 1961, the UN Convention on Psychotropic Substances 1971, the UN Convention-1988 and other treaties. The Extradition Treaty with 19 countries was concluded by the then British Government, which was adopted by Pakistan. The names of countries are as follows:

Argentina	Austria	Belgium	Columbia
Cuba	Denmark	Ecuador	France
Greece	Iraq	Liberia	Luxembourg
Monaco	Netherlands	Portugal	San Marino
Switzerland	U.S.A.	Yugoslavia	-

Pakistan has directly concluded Extradition Treaties with the nine countries listed below:

Australia	Egypt	Iran	Italy	Maldives
Nigeria	Saudi Arabia	Turkey	Uzbekistan	-

On the other hand the Government of Pakistan has signed Memorandum of Understandings to make joint efforts for the control of drugs trafficking with China, Egypt, Iran, Kyrgyzstan, Nigeria, Russia, UAE and Uzbekistan. While six fresh MOUs with Italy, Kuwait, Morocco, Romania, Syria and Turkey are under process.

Pakistan has received requests for the extradition of 23 accused persons so far and out of these seven persons have been extradited to the respective countries and the rest of the cases are pending with the competent courts.

V. CONTROLLED DELIVERY (CD) OPERATIONS

Controlled Delivery Operations are conducted under the 1988 UN Convention and the Government of Pakistan was keen enough to join the international community by allowing these to be conducted under the CNSA-1997. A deliberate effort was made to streamline the procedures involving the conduct of CD operations keeping in mind the national and international laws. Comments and suggestions were asked from concerned agencies and different DLOs and a detailed Standing Operating Procedure (SOP) was formed.

As a result of a CD operation a big gang involved in the illicit export of drugs to different countries was unearthed for the first time and all the members were arrested in Saudi Arabia and Pakistan simultaneously. Moreover an all time record seizure of acetic anhydride was also made as a result of a successful CD operation. Apart from these there are some other CD operations in progress.

VI. JOINT INVESTIGATION & BORDER CONTROL

As ever the US government has been the largest donor and has played a major role in strengthening the efforts in Pakistan against the drug traffickers. The ANF has always extended its help to foreign countries and made all-out efforts in joint investigations pertaining to drugs smuggling and to unearth the group/s involved in this heinous crime.

As already described Afghanistan is the buffering state between Russia and Pakistan and there is inhospitable and difficult terrain between these two countries. To penetrate the drug Mafia operating in these border areas is an arduous task for law enforcement agencies of these countries. To combat this situation bilateral agreements on joint efforts towards control of narcotics trafficking have been signed with Russia, Kazakhstan and Uzbekistan. Timely and credible information regarding drug related activities could help to check the border areas, as this long and porous border cannot be sealed off. Pakistan has experienced illegal immigrants, mostly from Afghanistan. The illegal immigrants have not only caused social and other problems but drug trafficking also. Due to inaccessible and hilly border areas it is impossible for either country to stop illegal immigration and border crossings.

VII. MONEY LAUNDERING

A. Introduction

Money laundering as a crime is a fairly recent phenomenon. It has emerged as an internationally recognized crime in the last two decades as a consequence of an upsurge in the illegal trade of narcotics. Possession and control over money is a major concern of a criminal. It is a criminal's sole concern in narcotics and white-collar crimes. Money laundering is a multi dimensional crime with transnational characteristics. It implies the concealment and legitimization of proceeds from a broad range of criminal activity. Profits from criminal acts including tax evasion, bank fraud, corruption by public officials, narcotics and terrorism are laundered by their perpetrators. Drug traffickers are the main beneficiaries of money laundering.

B. Objectives

Broadly speaking, the only logical objective of a money launderer is to use his dirty money in a legitimate way with impunity after it has been laundered. However, the aims and objectives of money launderers may vary considerably depending on the nature of their crime and the resulting proceeds thereof. Thus, the money laundering objective of a narcotics dealer may be considerably different from

the money laundering objective of an ideologically motivated terrorist. However, the common feature remains the "utilization after legitimization of illegitimate wealth".

C. Money Laundering in Pakistan

Money laundering, at present is not recognized as a criminal offence in Pakistan. However, Pakistan does recognize its international obligations in this context. It has been a party to the Vienna Convention since October 25, 1991, and is under a legal obligation to eradicate narcotics related business and criminal activities including money laundering. In Pakistan, money laundering is carried out through two methods i.e. banking and the private sector.

Some forged identity documents can be procured and can be used to open a personal or a corporate account in any bank. Money laundering has been carried out through banks for a wide variety of purposes. The State Bank of Pakistan has recently issued regulations to banks in this respect. The private sector is more extensively used for money laundering purposes.

The Hawala and Hundi system is a lucrative business and is being used for remitting funds in and out of the county by the public.

Black money is also present in the unregulated economy. Successive governments with a view to legalize the available black money have enacted laws. For instance, tax incentives were offered by the government for legalizing foreign exchange available in the black market through the Protection of Economic Reforms Act, 1992.

Laws dealing with narcotics and corruption were implemented in 1997 and 1999, namely the Control of Narcotic Substances Act, 1997 (CNSA) and the National Accountability Bureau Ordinance, 1999 (NAB). Although these laws do not exclusively deal with money laundering, however, they do contain provisions, which may be invoked for freezing and forfeiture of assets acquired through narcotic and corruption related sources.

D. Major Beneficiaries of Money Laundering

- Drug Barons
- Drug traffickers also involved in others crimes
- Foreign criminals using Pakistan for money laundering through local partners

E. Common Conduits Used For Money Laundering

1. Formal Methods
   - Banks have been the channels used for money laundering
   - To open accounts in banks fraudulently and to use them for money laundering
   - Other formal methods, including, credit cards, travellers' cheques, etc. are not commonly in vogue

2. Non Formal

(i) Hundi / Hawala
   - Age old method - money can easily be remitted through this informal and unregulated channel
   - This is a simple and untraceable method
   - Cash is paid at one point in a certain currency, which is delivered at a desired location anywhere in the world
   - Business is done without any footprint or traces

3. Prize Bonds

Prize bonds with high prizes are bought off the counter, taxes are paid and black wealth gets whitened.

4. Sham Real Estate Schemes

Investments in real estate are made and high profit margins are declared. Housing societies are used in this method. Huge chunks of land at a low cost are purchased, developed, and then sold in the form of plots. Inflated costs are shown as profits, taxes are paid and black money gets laundered.

5. Hotel Industry/ Retail Businesses

Hotels and restaurants, superstores and fast food points are declared as generating high sale proceeds. Profits are declared and taxes paid.

6. Film Industry

Cheap films are produced with minimum possible investment. High profits are declared and money is laundered.

F. Pakistan and Anti Money Laundering Laws

1. International Laws

Pakistan has ratified the following conventions and has taken up the implementation of obligations under international law:

(i) UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988

- The Single Convention on Narcotics Drugs-1961 had earlier addressed this problem. It was later amended through a Protocol in 1972. Later, it became the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988. It was adopted on the basis of UN General Assembly's Resolution 39/141 on 14 December 1984.
- Pakistan joined the convention in 1991. More than 60 countries have ratified the Convention so far.

(ii) UN Convention on Transnational Organized Crime

This Convention has not yet entered into force. However, Pakistan has signed it and participated in all the proceedings.

(iii) Asia Pacific Group (APG)

- This is an Australia based informal group. It was established in 1997. Its objective is to pursue implementation of FATF Recommendations in member states.
- Its aim is to highlight the negative implications and recommend measures for dealing with money laundering.
- Pakistan has been a member of the APG since July 2000.
- Pakistan regularly submits annual reports to the APG.
- However, the recommendations of the APG cannot be fully acted upon due to the absence of Anti-Money Laundering Laws in Pakistan.

2. National Laws

There are no laws directly dealing with money laundering, however a draft bill is under consideration. There are a few Acts and ordinances which partly address money laundering; however, in an indirect manner:

(i) Control of Narcotic Substances Act, 1997 (CNSA)

(ii) National Accountability Bureau Ordinance, 1999 (NAB)

Although these laws do not exclusively deal with money laundering, they contain provisions which may be invoked for freezing and forfeiture of assets acquired through narcotic and corruption related sources.

Control of Narcotic Substances Act, 1997

- Section 67 (1) of CNSA requires banks and financial institutions to pay special attention to all unusual patterns of transactions having no apparent economic or lawful purposes.
- The section imposes strict obligations upon a manager or a director of such a bank or financial institution to immediately inform the Director General, Anti Narcotics Force, if it is suspected that a suspicious transaction having a nexus with illicit narcotic activities is being conducted. A violation of this provision is punishable with imprisonment for three years with or without fine.
- Section 31 (1) (d) empowers an investigating officer to ask for information from a bank or any financial institution.
- There are many other provisions in the CNSA empowering the authorities to freeze assets, which they suspect to have been acquired through illicit dealings in narcotics and courts are there for forfeiture of such assets.
- Such wide-ranging powers facilitate the authorities in effectively interdicting the proceeds from narcotics trading; if not strictly preventing money laundering.

The National Accountability Bureau Ordinance, 1999

- Section 20 makes it obligatory upon the managers and directors of banks and financial institutions to inform the Chairman of the National Accountability Bureau immediately of any transaction, which they suspect to be unusual and involves huge sums of money and does not have an apparently genuine economic or lawful purpose.
- A violation of this obligation is made punishable with five years imprisonment with or without fine.
- Section 20 requires that the burden of proof shall be discharged by the suspect or the accused in proving his innocence.

Prudential Regulations - State Bank of Pakistan, 2002

Most recently, the State Bank of Pakistan has issued Prudential Regulation No. XII and XIII to safeguard the banking sector from the menace of money laundering and other unlawful activities. The regulations stress the importance of the "Know Your Customer" rule and require a bank to take all required measures to ascertain the actual identity of their customers and to vigilantly guard against suspicious transactions.

G. Proposed Anti-Money Laundering Ordinance 2002

This law is in draft form and it is still under consideration by the government. The draft bill proposes various measures for combating the menace of money laundering, including the offence of money laundering, predicate offences, punishment, establishment of a National Advisory Committee for combating money laundering and the establishment of a Financial Intelligence Bureau, etc.

H. Recommendations

- The UN, international and regional agencies should adopt anti-money laundering treaties and conventions having legally binding provisions with a view to counter the problem.
- Efforts should be directed towards effective implementation of the existing anti-money laundering conventions in their signatory states in letter and spirit.
- Non-signatory and non-ratifying states must be encouraged to sign and ratify the anti-money laundering and related conventions.
- States with anti-money laundering legislation should bring their laws in conformity with others having similar legislation in order to remove the existing deficiencies in their systems so as to deprive the money launderers from taking advantage of loopholes.
- Banks and financial institutions should be encouraged to offer information to the law enforcement

agencies. Incentives should be offered for this purpose. For instance, in some countries their law offers exemptions to banks from various penalties if they volunteer information regarding suspicious transactions.

- Increased cooperation should be effected between law enforcement agencies and financial institutions within the country.
- Officials from financial institutions and law enforcement agencies should be provided cross training opportunities within each others' disciplines for increasing their understanding of technical issues.

VIII. CONCLUSION

Drug money has all the chances to be diverted towards the ills of society, which includes terrorism/corruption and posing a threat to the stability of any government, which works against the motives and interests of drug barons. The crime of money laundering is a corollary of other crimes. This crime is committed in a most organized manner and is very difficult to detect and prosecute successfully as compared to other offences. It is committed to conceal the origin of the proceeds of its predicate offences. No matter how large the profit of the drug trade, drug money is almost worthless until it can be moved into legitimate financial and commercial channels. This thing makes drug money an evil and it causes a profound subversive effect on democratic society, legitimate economies and government institutions.

LEGAL APPROACH TO COMBATING ILLICIT DRUG TRAFFICKING AND MONEY LAUNDERING IN THAILAND

Krirkkiat Budhasathit *

I. THE CURRENT SITUATION OF DRUG PROBLEMS

A. Drug Related Crime

During the last decade (1992-2002), a dramatic number of drug problems have been found in Thailand. Although the Thai Government has applied extreme measures to suppress drug trafficking, the number of drug cases and offenders throughout the country are still high. The drug problem of Thailand nowadays is that the country is frequently used as a transit place to the international market while the epidemic within the country is also radical. The number of domestically produced drugs like opium, marijuana and methamphetamine are far less than those smuggled from neighbouring countries. The drugs that are found in most tourist cities around the country are marijuana, heroin, ecstasy, ketamine, cocaine and methamphetamine. Traditional drugs like opium, marijuana, and kratom plants are prevalent in many areas of the country while volatile substances are epidemic in slums and dense communities.

Number of Drug Cases and Offenders in Thailand during 1998-2003

Year	Number of Cases	Number of Offenders
1998	193,502	212,519
1999	206,170	223,294
2000	222,498	238,153
2001	205,426	218,218
2002	179,866	189,998
2003 (Jan-Mar)	18,119	19,252

Methamphetamine is the most serious drug problem in Thailand and its become an epidemic in every region. The supply of methamphetamine, which comes from both inside and outside Thailand, has expanded intensively. Big syndicates mostly control the drug producers and traffickers because only the large and reliable wholesale traffickers can make direct contact with the manufacturers. These syndicated groups deliver methamphetamine and other drugs to medium and small-scale traffickers before distributing to retailers or users. In 2002, 95.9 million methamphetamine tablets were seized, which is the highest figure ever recorded.

The methamphetamine is mainly produced around the Golden Triangle area and smuggled through the Thai northern border as the main route. Instead of carrying the drugs through the border channels, the drug traffickers use various methods to transport the drugs i.e. drug caravans escorted by armed forces, sneak into the jungles nearby the northern border and store the drugs at villages along the Thai border as a hub before distributing it to other areas. Moreover, there is evidence that during the last two years a huge amount of drug smuggling is taking place using sea routes. The drugs originate from the producing area in the north and are transported to a bay in the central part of Myanmar before being carried in fishing

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boats to the southern part of Thailand. Another main route is along the Mekong River, which is near to the producing area, to the north and north-eastern part of Thailand. For smuggling inside the country, the land route is popularly used to smuggle methamphetamine tablets from one place to another. The producers and smugglers are mostly hill tribes including Chinese haw and Thais and some of them are found to have a connection with overseas foreigners.

Marijuana growing is found throughout the country but its concentration is mostly in the north-eastern region. Local production may be enough for domestic demand but the total production is not sufficient to supply international markets. Meanwhile, smuggled marijuana from neighbouring countries to Thailand is not only delivered to international markets but distributed in the country as well. The eastern seashore is used as a main route to transport marijuana via Thailand to other countries. Large quantities of marijuana products are gathered in the sea-connected provinces before being loaded into fishing trawlers, to be carried through the Thai gulf and reloaded onto cargo ships waiting in the open sea. For marijuana abuse, the situation during this period is stable since this drug is quite cheap and available in all regions. In addition, it is not a hard-core drug like heroin or methamphetamine.

The volatile substances epidemic tended to be less radical last year. Glue, thinner, and lacquer are still the three kinds of abused volatile substances in Thailand. People who abused these substances were the same groups; i.e., out of school youths, street kids, and some adults living in slums throughout the country. However, due to the heavy measures being taken against hard-core drugs, there is a possibility that the situation of volatile substance abuse will become more severe.

The epidemic situation of club drugs like ecstasy, ketamine, and cocaine during this period seems to be more severe than the previous period. One reason is the price of these worldwide popular drugs tends to decrease each year. For example, the retail price of ecstasy in the early period ranged between 800-1500 Baht per tablet but it recently costs between 350-600 Baht. The Thai authorities seized eight kilograms of cocaine in 2001, which was two times higher than in 2000. Ecstasy and cocaine are mainly smuggled by foreign drug traffickers from Europe and Latin America before distributing them to their drug networks in Thailand and neighbouring countries. Meanwhile, ketamine is imported from countries in South Asia and Eastern Europe. However, most ecstasy traffickers and dealers in Thailand have been recently known to distribute ketamine and cocaine at the same time. Ecstasy and ketamine are usually used together by drug abusers in entertainment places since both drugs have similar effects. Ecstasy is usually imported into the country from two sources: from overseas countries via international airports or seaports and from a neighbouring country in the south of Thailand. As ecstasy is increasingly spreading in Thailand and has a high price, some drug traffickers have tried to make ecstasy tablets in Thailand. For example, the police arrested a Canadian and his Thai wife in November 2001. They were charged with using his kitchen as a drug lab and they had a simple stamping machine to produce small quantities of ecstasy tablets. The raw materials, MDMA and precursors chemicals were smuggled from a European country. The police found 3,300 ecstasy tablets and 20 bottles of ketamine in their house during the raid. Major abusers of these club drugs were found to be youths, students, and wealthy people in big or tourist cities i.e. Bangkok, Phuket and Pattaya.

Smuggling of precursors, chemicals and equipment used in drug manufacturing has become more serious along the Thai-Myanmar border. The manufacturers are provided chemicals and equipment from Thai conspirators. The crucial exit is at a permanent checkpoint in Mae Sai and Tachileik District, Chiang Rai Province. The Thai government set up the Precursor Chemical Control Committee in 1993 to formulate a national strategy on precursors control, to supervise the precursor control and implementation and to develop cohesive efforts among concerned chemical control agencies i.e. the Food and Drug Administration, Industrial Works Department, Customs Department, Department of Internal Trade, Police Narcotics Suppression Bureau, Office of Permanent Secretary of Ministry of Interior, Foreign Trade Department, Pharmaceutical Organization and the Office of Narcotics Control Board (ONCB). Twenty-three chemicals are controlled in accordance with the 1988 UN Convention and more than seven precursors and chemicals, which are not listed in the 1988 UN Convention are also put under control.

Currently, caffeine has becomes one of the crucial substances because it is a major ingredient of methamphetamine tablets. Each tablet is generally composed of 60 mgs. of caffeine and 23 mgs. of methamphetamine and 7 mgs. of other binding substances. As a result, the government has enforced the Commodities Control Act 1952 to control the possession, transformation and transportation of caffeine throughout the countries as well as the Import and Export Act 1979 to control the import in and export of caffeine out of the country. Thai border authorities now severely control the smuggling of chemicals and equipment from Thailand to the producing sites along the border. According to the Commodities Control Act 1952, the possession, transformation and transportation of caffeine without permission is subject to imprisonment for 10 years.

Drug Seizure throughout the Country During 1998-2003

Weight: Kilograms

Year	Heroin	Meth-Amphetamine	Ecstasy	Opium	Dried Marijuana	Volatile Substances
1998	577	3,012 (33.5 Million tablets)	1 (5,920 tablets)	1,772	2,890	599
1999	404	4,518 (50.2 Million tablets)	5 (21,794 tablets)	2,046	14,684	4,141
2000	384	7,549 (83.9 Million tablets)	18 (72,182 tablets)	1,595	10,323	455
2001	474	8,459 (94.0 Million tablets)	17 (67,539 tablets)	2,289	10,921	360
2002	634	8,635 (95.9 Million tablets)	37 (149,587 tablets)	4,034	12,122	453
2003 (Jan-Mar)	138	1,942 (21.6 Million tablets)	14 (57,083 tablets)	9,721	1,111	52

Seized opium includes raw and cooked opium and opium poppy plants

B. Money Laundering Situation

After the Anti-Money Laundering Act became effective, there were evidently changes in domestic money laundering. Over-the-counter banking transactions are carried out in amounts just under the amount set forth in the law (2 Million Baht) in order to avoid the transaction being reported. Many offenders opt to carry cash from one place to another or keep it at home. They also convert the money to gold, jewellery, real estate, shares, vehicles or other property instead of depositing it in financial institutions. Some offenders set up high risk businesses such as jewellery shops, oil trading companies, tour companies, foreign exchange, real estate companies and entertainment places to launder their money.

There are many money laundering transactions along the Thai-Myanmar border in the northern region. Most of the cases are drug payments. The most popular method is cash carried across the border; nevertheless, some traffickers open a bank account in their nominees' names to receive money transmissions. In the southern region, cash is also frequently used for the payment of drugs and evaded custom products. Meanwhile, gambling is the main cause of money transactions along the Thai-Cambodia border.

In brief, offenders generally avoid the anti-money laundering law by transferring money via the

following channels:

1. Banking transmissions using a false I.D. or fraudulent papers to pay the import price or repay a loan higher than the real value.
2. Underground transmission via foreign exchange, travel businesses or gold and jewellery shops.
3. Hire a person to carry cash and deposit it in foreign bank accounts. There is a loophole in the regulations that does not require cash-carry reports. The most common destination countries are Hong Kong, Singapore and Australia.

Case Example

The police stopped and searched a pick-up truck driven by Mrs. A. They found three Million Baht cash hidden in the trunk's side compartment. Mrs. A admitted that Mr. B hired her to deliver the money in Chiang Mai province in the northern region.

The money and vehicle were seized, the police went to search Mrs. A's house and found a small amount of methamphetamine. Mrs. A was indicted for possession of drugs. She was bailed on 200,000 Baht cash, but finally she pleaded guilty. The Criminal Court rendered judgment and sentenced her to six months imprisonment and a fine of 5,000 Baht; nevertheless, the sentence was suspended for two years. The police reported the matter to the AMLO.

The AMLO officials made a preliminary examination. They found that Mrs. A had committed a drug offence (drug possession) and were convinced it related to the drug dealing. The matter fell under the predicate offences under the AML Act. The officials, therefore, reported it to the Secretary General for review and then forwarded it to the Transaction Committee.

The Committee considered that there was convincing evidence and then ordered a 90 days temporary seizure of the 3 Million Baht police-seized cash, 200,000 Baht bail money and the truck which Mrs. A drove. The AMLO took further steps by submitting the documents to the Prosecutor for filing the petition. The Prosecutor; nevertheless, required additional statements to support the evidence. After the AMLO officials finished the additional statement, the Prosecutor then filed a petition to the Civil Court for forfeiture of Mrs. A's property. The Prosecutor also filed a petition for the provisional seizure of all three properties prior to the Civil Court issuing a forfeiture order. The Civil Court granted the provisional seizure order and the property was retained by the Secretary General of the AMLO. The Civil Court set a date for a hearing and ordered a notice to be posted at the Court and have the matter published for two consecutive days in a local well known newspaper. Copies of the notice were passed to the AMLO for posting at the AMLO and the police station where the properties were seized. A copy of the notice was also mailed to Mr. C, the truck's owner according to the registration plate.

The Civil Court then commenced the hearing. Mr. C appointed a lawyer to file a petition to claim his true ownership. He claimed that the truck was hire-purchased from him and not related to the drug offence. After the hearing, the Civil Court ordered the forfeiture of two amounts of cash totalling 3.2 million Baht and returned the truck to Mr. C.

II. SPECIAL MEASURES AGAINST DRUG TRAFFICKING

A. Controlled Delivery

The Narcotics Act B.E. 2522 (1979) as amended in 2002 provides legal power to use controlled delivery channels by competent officials. Section 15 in Para I and II provide that: "No person shall produce, import, export, dispose of or possess narcotics of category I, unless the Minister permits as necessity for the use in government service. The application for the permission shall be in accordance with the rules, procedure and conditions prescribed in the Ministerial Regulations."

Since this Section was just amended at the end of 2002, there are no Ministerial Regulations issued yet. As a result, controlled delivery in Thailand is pending.

B. Communication Interception

Access to communication interception may be granted under the Narcotics Control Act B.E.2519 (1976) and the Anti-Money Laundering Act. This measure is a new part of the Narcotics Control Act 1976 as amended by the fourth revision in 2002. Section 14 four allows competent officials to intercept the communication of a suspect by the permission of the Chief Judge of the Criminal Court. The procedure begins when there is a reasonable ground that any information communicated via post, telegraph, phone, facsimile, computer, other communication instruments and electronic or other information technology communication is used or may be used for the purpose of the commission of a narcotics offence. The officials then request the approval of the Secretary-General of the ONCB and then submit a request to the Chief Judge for communication interception. The Chief Judge will consider the affect of individual rights and if he believes that there is reasonable ground that a narcotics offence has been or will be committed and the information may be received by granting the access and there is no other method more suitable and effective, the permission will be granted. The Chief Judge may permit the interception for a period not over 90 days each time and he may change the permission depending on the circumstances. The information obtained must be kept and used only for the investigation and as evidence in the prosecution case.

Since this Section has just been added to the Narcotics Control Act and the ONCB is in the process of coordinating with competent officials to comply with the regulations to utilize this method, there are few requests submitted to the Chief Judge of the Criminal Court.

The Anti-Money Laundering Act also provides the communication interception power. When there is a reasonable ground that an account at a financial institution; equipment or communication device; or any computer has been used or may be used for the commission of a money laundering offence, the competent official designated by the Secretary-General of the AMLO shall submit a petition to the Civil Court to grant access to the information of such sources. The Civil Court may grant access not longer than 90 days each time.

The provisions under the Narcotics Control Act and the AML Act are quite similar; however, there are some differences. The power to grant access under the Narcotics Control Act vests solely with the Chief Judge of the Criminal Court, while all judges of the Civil Court may use such power under the AML Act. In addition, the Narcotics Control Act clearly mentions that information obtained by the access may be used in the investigation and as evidence in the trial of narcotic cases. The AML Act does not have the same provisions.

Communication Interception under the Narcotics Control Act

Year	Amount	Method
2003*	9	Wire-tapped

Source: the Criminal Court *counted at the end of July

Communication Interception under the Anti-Money Laundering Act

Year	Amount	Method
2001	1	Wire-tapped
2002	7	Wire-tapped
2003*	5	Wire-tapped

Source: the Civil Court *counted at the end of July

C. Utilization of Informants

To suppress illicit drug trafficking effectively, information is very important. The ONCB and the AMLO generally accepts the utilization of informants. The ONCB provides rewards to informants who give information relating to narcotics according to the Prime Ministerial Office Regulation Re: Rewards in Narcotics Case B.E. 2537 (1994). The Regulation rules that the reward may be paid to an informant who informs the competent official and it leads to the arrest and seizure of the narcotics. The reward is calculated according to the weight or number of tablets seized. For example, the informant will receive 10 Baht for each gram of seized heroin or 5,000 Baht per 500 tablets of Methamphetamine (for the portion over 500 tablets, the reward is 3 Baht each). The reward will be paid from the ONCB budget.

The informant, who gives information about property related to the commission of a narcotics offence, will receive not over 10 % of the appraisal value of the forfeited property less the expenses for appraisal or auction sale. In this case, the reward will be paid from the Narcotics Control Fund.

The AMLO will reward the informant, who gives information in the predicate offence or money laundering offence, or information concerning assets related to the commission of an offence. However, there must be a proceeding against any property in such case in order to qualify the informant for a reward. The AMLO uses its annual budget to pay the reward.

D. Witness Protection

The Witness Protection in Criminal Case Act B.E. 2546 (2003) will be effective by the end of this year. This Act will provide general protection to witnesses and their relatives. The general protection is to safeguard the witness or provide a cover name, address, picture or any personal identifying information as the case may be. Moreover, in some particular cases i.e. offences related to drugs, anti-money laundering, anti-corruption, customs or organized crime, the witness may receive special protection by requesting it from the Minister of Justice. The special protection includes providing suitable shelter, an allowance, education or a change of name or any registration records. The responsibility of witness protection will vest with the Witness Protection Office, Ministry of Justice.

III. LEGAL FRAMEWORK TO COMBAT DRUGS

A. Overview of Criminal Litigation in Thailand

The main provisions of criminal procedural law are contained in the Criminal Procedure Code B.E. 2478 (1935). This Code generally applies to trials of criminal cases, including drugs cases, in all Courts of Justice. However, asset forfeiture under the Anti-Money Laundering Act B.E. 2542 (1999) will be tried in the Civil Court and subject to the Civil Procedure Code.

Usually, four types of personnel of the law are involved in criminal proceedings. They are police officers, prosecutors, lawyers, and judges. The investigation and inquiry in order to find offenders and establish their guilt is the responsibility of the police officers. In many drug cases, the police officers may be teamed up with officials of the Office of the Narcotics Control Board (ONCB) or the Anti-Money Laundering Office (AMLO). When the investigation and inquiry is finished, the file of the inquiry will be submitted to the prosecutor for consideration and the offender will be indicted if the prosecutor concludes that there is enough evidence to support a conviction. As regards criminal cases, the court in a district where an accused resides or is arrested, or where an inquiry official makes an inquiry has jurisdiction over the cases. Nevertheless, the Criminal Court, which is situated in Bangkok, has discretion either to try or adjudicate criminal cases arising outside its territorial jurisdiction brought before it or to transfer them to the court having territorial jurisdiction. At the trial, it is the burden of the prosecutor to prove beyond a reasonable doubt to the court that the defendant is guilty as charged. The court will conduct a trial by hearing evidence from both sides in open court and in the presence of the defendant. It should

also be added that the accused or defendant is entitled to full legal representation. In certain cases, it is obligatory on the part of the judge to call upon and appoint a lawyer in his/her defence.

B. Narcotics Control framework

The narcotics control laws of Thailand may be classified into three groups:

1. Laws on Designating Powers and Duties of Competent Authorities

Narcotics Control Act B.E. 2519 (1976)

This Act codified the establishment of the Narcotics Control Board (NCB), the establishment of the Office of the Narcotics Control Board (ONCB), and the empowerment of the NCB, ONCB, and competent officials.

Act on Authorizing Naval Officials for the Suppression of Some Offences Committed at Sea (No. 4) 1991

This Act authorizes naval officers to inspect, search, and force a vessel suspected of having narcotic drugs to remove cargo or things in the vessel for examination. The Act also empowers them to seize or force the vessel or conduct any actions in order to bring the vessel to a convenient place for inspection, inquiry, or prosecution. The naval official may seize the vessel until a final non-prosecution order is issued or otherwise ordered by the court in case the accused is prosecuted, and may arrest and hold in custody the accused, not exceeding seven days. After that the accused has to be released or sent to the inquiry official together with the file of inquiry.

Act on Measures for Suppression of Offenders in an Offence Relating to Narcotics B.E.2534 (1991)

This Act codifies the provisions of the three significant measures to tackle illicit drug trafficking. These are 1) forfeiture of assets 2) conspiracy, and 3) expansion of jurisdiction. These measures are effective tools to eradicate drug trafficking networks because if they do not have vast assets, they cannot continue large-scale operations.

2. Laws on Controlling Narcotics and Drugs

Psychotropic Substances Act 1975

This Act codified the control of psychotropic substances by classifying psychotropic substances into four categories (schedule I-IV). The Act directly resulted from the Convention of Psychotropic Substances 1971 of which Thailand is a Party.

Narcotics Act 1979

This Act codified the control of narcotic drugs by classifying them into five categories depending on the degree of their harmful effects in order to establish the proper punishment for offenders committing drug offences in each category.

Emergency Decree on Controlling the Use of Volatile Substances 1990

This Emergency Decree codified the control of volatile substances by establishing offences and punishment.

Commodities Control Act, 1952 (No.11 as amended in 2000)

This Act codified the control of certain commodities, which are essential chemicals and precursors likely to be used in producing narcotic drugs in 76 provinces of Thailand, e.g. caffeine.

3. Law to Rehabilitate Drug Abusers

Narcotic Addict Rehabilitation Act B.E. 2545 (2002)

In the past, Thailand had two drug addict treatment and rehabilitation systems: 1) Voluntary System for drug addicts to voluntarily apply for treatment in various treatment centres, and 2) Correctional System for drug addicts who were sentenced to be imprisoned or on probation. However, they were not effective enough. The relapse rate of the addicts was very high or nearly 100%. Therefore, the Narcotic Addict Rehabilitation Act 2002 was enacted and enforces a compulsory system to improve the effectiveness and efficiency of the drug addict's rehabilitation, or to help them stop using narcotic drugs as much as possible with two major objectives: 1) drug users or addicts are required to be treated and rehabilitated properly, and 2) if the result of the rehabilitation is satisfactory, the drug addicted offenders shall be relieved from the alleged offence and be released at liberty so that they will not have a criminal record as a drug offender and can be reintegrated into society happily. This Act codifies the establishment of the Narcotic Addict Rehabilitation committee and their power and duties, localities for identification and rehabilitation, alleged offences, the procedure for identification of alleged drug offenders, the requirement of the procedure of rehabilitation and the assessment of rehabilitation results.

C. Anti-Money Laundering Framework

Thailand promulgated the Anti-Money Laundering Act B.E. 2542 (1999) (AML Act) in March 1999 and it has been effective since August 20, 1999. This Act directly resulted from the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which Thailand become a member of through the Instruments of Accession in 2002. This Act criminalizes money laundering and related conspiracy and establishes the Anti-Money Laundering Office (AMLO) to perform functions, among many things, as the financial intelligence unit in Thailand and pursue a civil forfeiture system to confiscate assets involving the predicate offences.

The AML Act consists of seven chapters and 66 sections, which includes eight predicate offences as follows:

1. Offences under the narcotics laws.
2. Offences of trafficking in or sexual exploitation of children and women.
3. Offences of cheating and fraud on the public.
4. Offences of misappropriation or cheating and fraud under the laws governing commercial banks and financial institutions.
5. Offences of malfeasance in office or judicial office.
6. Offences of extortion or blackmail committed by criminal organizations.
7. Offences of customs evasion under the customs law.
8. Offences of terrorism (This predicate offence was added to the AML Act on 11 August 2003).

D. Money Laundering Offences

The AML Act has criminalized the money laundering actions of any persons whoever:

1. Transfers, receives a transfer or converts an asset involved in the commission of an offence for the purpose of concealing or disguising the origin or source of an asset or for the purpose of assisting another person (s) to avoid or receive a lesser penalty for the predicate offence; or
2. Acts in any manner whatsoever for the purpose of concealing or disguising the true nature of the acquisition, source, sale, transfer or ownership of an asset involved in the commission of an offence (Section 5).

The penalties are imprisonment for one to ten years or a fine of 20,000 - 200,000 Baht or both. If the defendant is a corporation, it will face a fine of up to 200,000 - 2,000,000 Baht (Sec. 60-61). Whoever undertakes the action of aiding and abetting either before or during the commission of an offence, or materially assists the offender to escape or avoid the penalty or gains a benefit from the commission of an offence shall receive the same punishment as the principal offender (Sec. 7). Any person attempting to commit the offence of money laundering is subject to the full scale of the penalty (Sec. 8).

The AML Act imported the conspiracy and extraterritorial jurisdiction principals from the Act on Measures for Suppression of Offenders in an Offence Relating to Narcotics B.E.2534 (1991). In case two or more persons conspire to commit the money laundering offence, they will each receive a half penalty. However, if the offence is committed as a result of conspiracy, the conspirators shall receive the full penalty (Sec. 9). Regarding extraterritorial jurisdiction, even when the money laundering occurs outside the Kingdom of Thailand, the case may be prosecuted in Thai courts if (i) a Thai national or resident is an offender, or (ii) an alien commits the offence with the intention of having consequence in the country, or the Government is the injured party, or (iii) when an alien committed an offence under the other state's law and he appears on Thai territory and is not yet extradited under the Extradition Act (Sec. 6).

Money Laundering Criminal Cases Filed in the Criminal Court

Year	New Cases Filed	Predicate Offence	Cases Finished
2001	4	Narcotics (3), Malfeasance in Office (1)	1
2002	-	-	2
2003 (End of July)	5	Cheating (1), Narcotics (3) and Narcotics and Customs Evasion (1)	3

E. Financial Intelligence Unit

The AMLO has performed the financial intelligence functions under the AML Act. More specifically, the law requires that:

- Banking and Financial institutions (including credit financing businesses, securities dealers, insurance companies and other legal entities in the finance business), land registration offices and investment consultants are required to report cash transactions of 2,000,000 Baht or more, or 5,000,000 Baht or more in a property transaction to the AMLO.
- A suspicious transaction of any size must also be reported. Transactions of this type are, for instance, an unusually complicated transaction or with features that are unusual or seem uneconomic on their face or seem designed to avoid reporting under the AML Act or where there is any hint it is possibly connected to a predicate offence.
- Financial institutions are required to have their customers identify themselves and record certain statements of fact regarding reportable transactions. The records must be retained for five years.

F. Cooperation of the Financial Institutions

When the AML Act first came into effect, the banks and financial institutions, which are subject to the law, were confused with their new duties. Some bank staff advised their customers to separate

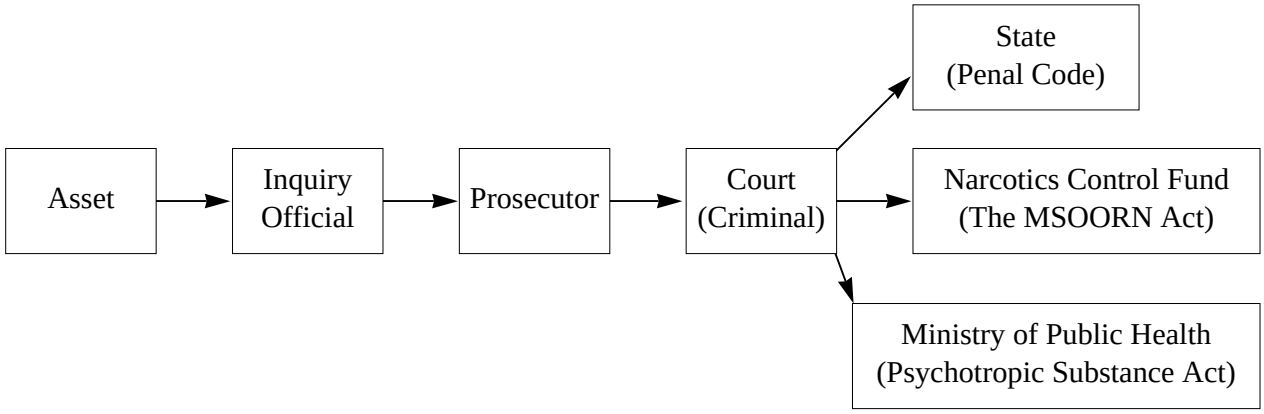
transactions into amounts less than the specific number prescribed by the law. The reason for this was to reduce the bank's responsibility to report the transactions. As time passed, the financial institutions began to understand the law and now cooperate quite well. The AMLO received 605,176 transaction reports during 27 October 2000-31 December 2001, valued at 36,633 Billion Baht. The transactions are classified into 232,013 cash transactions, 356,587 property transactions and 16,576 suspicious transactions. The AMLO also examined an additional 181 suspicious transactions reported by other intelligence agencies.

G. Assets Forfeiture

1. General Provisions

Under the Penal Code B.E. 2499 (1956) which generally applies to all criminal cases, any property as provided by the law that any person makes or possesses to commit an offence shall be forfeited (Sec. 32). In addition, the court may order forfeiture of the property, which is used or possessed for use in the commission of an offence by a person, or the property acquired by a person through the commission of an offence unless the owner of such property does not connive with the offence (Sec. 33). The property forfeited under the Penal Code shall become the property of the State.

In addition, Section 30-31 of the Act on Measures for the Suppression of Offenders in an Offence Relating to Narcotics B.E. 2534 (1991) (the MSOORN Act) and Section 116 of the Psychotropic Substances Act B.E.2518 (1975) have similar provisions and process to the Penal Code. However, when the court orders the forfeiture, the property will devolve to the Narcotics Control Fund or the Ministry of Public Health as the case may be.



2. Special Forfeiture under Narcotics Related Laws

According to the Act on Measures for the Suppression of Offenders in an Offence Relating to Narcotics B.E. 2534 (1991) (the MSOORN Act), the property connected with the commission of an offence related to narcotics may be forfeited. The Act provides a definition of narcotics offences that the production, importation, exportation, disposition or possession for disposition of narcotics, and also includes conspiracy, aiding and abetting, assisting or attempting to commit such offences. The Property Examination Committee and the Secretary-General of the ONCB have authority to issue both the property examining order and restraining or seizure orders. In case there exists a reasonable ground that the property is connected with the commission of an offence related to narcotics, the Committee or the Secretary-General will order an examination. If the owner of the property cannot adduce evidence to prove that the examined property does not relate to the offence, or he has accepted the transfer of the property in good faith and for value, or reasonably acquired

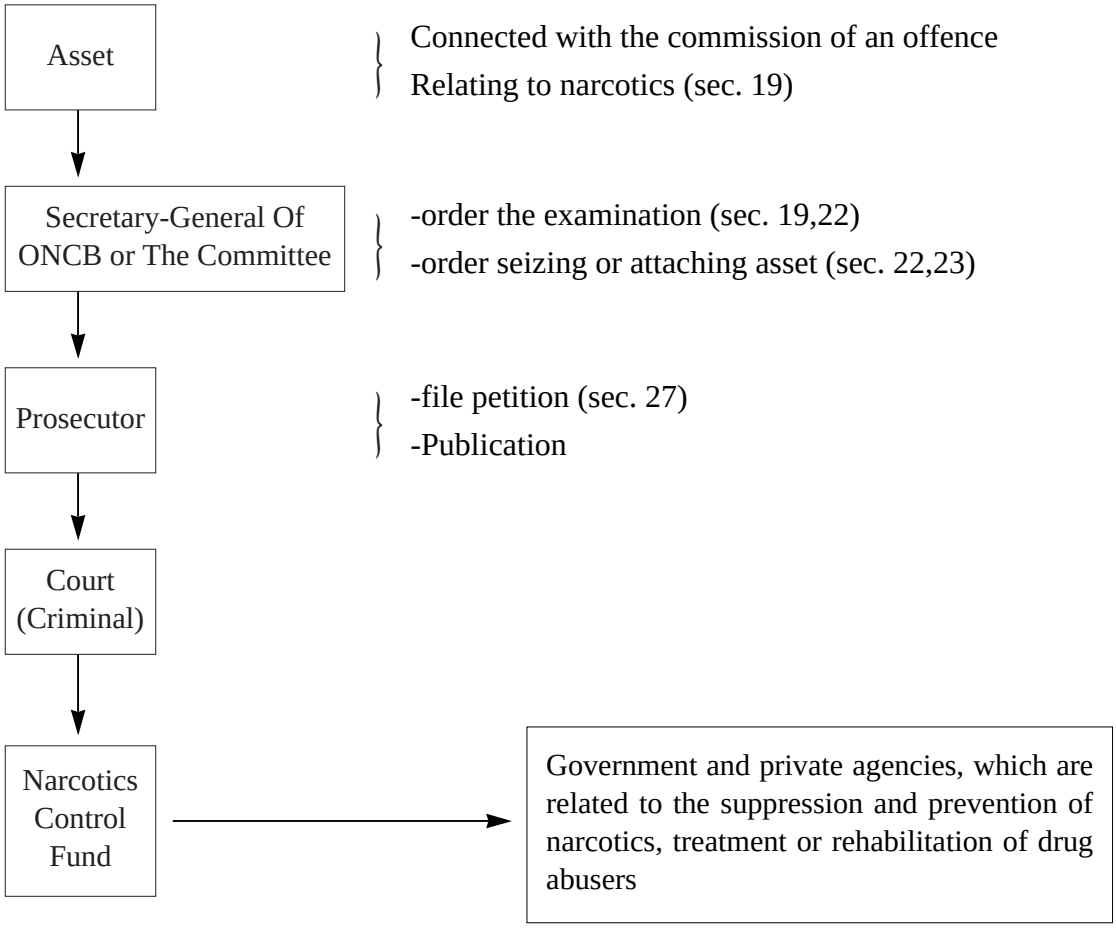
the property on account of good moral or public charity, the property will be seized or attached. The Committee may issue a provisional seizure order if there is a reasonable ground that the property will be transferred, removed or concealed during the examination. The seized property will be retained by the ONCB. In the case that the property is not suitable to retain, the Secretary-General may order an auction sale or utilize such property for official purposes. After the prosecutor has issued a prosecution order of the main narcotic case, he may file a petition to the (criminal) court to forfeit the seized property. The petition may be filed later but before the court passes the judgment. When the petition is filed, the Secretary-General of ONCB makes a petition published in a local newspaper for two consecutive days. A copy of the petition will be posted at the ONCB and police station as well. If there is evidence that shows that any person may be the owner of the property, a registered letter shall be sent to him. Such process is to ensure that a person's rights over their own property are protected. The court shall conduct the trial and the prosecutor has the advantage that prima facie the property connected to the commission of an offence related to narcotics, will be forfeited unless the person claiming to be the owner can prove his/her innocent ownership (see more details in Burden of Proof). The property forfeited under the MSOORN Act shall devolve to the Narcotics Control Fund. From 1 January 2001 to 20 March 2003, there were 2,139 cases of temporarily seized assets valued at 1,380.1 Million Baht. At present, there is a total value of 156.6 million Baht of property finally confiscated by the court and vesting to the Fund. However, this act still has some loopholes and difficulties in enforcement, as it only applies to criminal cases. If the court dismisses the criminal charge, the property will be freed too.

The Narcotics Control Fund is managed by a sub-committee comprised of many government agencies. The sub-committee has the authority to issue regulations of fund management, subject to the approval of the Narcotics Control Board. In 2000, the sub-committee issued regulations to allow government and private agencies, which are related to the suppression and prevention of narcotics, treatment or rehabilitation of drug abusers, to utilize the properties of the fund and to pay a reward to the informant and competent officials. In particular, the sub-committee may grant money payments or support properties of the fund to the government and private agencies:

1. Supporting the suppression and prevention of narcotics and the treatment or rehabilitation of drug abusers.
2. Supporting the education, training and seminars on the topic of the suppression and prevention of narcotics and the treatment or rehabilitation of drug abusers.
3. Supporting consultants, locally or abroad, to hire consultants or expertise on the training or seminars in the above clause.
4. Supporting activities or services which will be useful to the suppression and prevention of narcotics, treatment or rehabilitation of drug abusers.
5. Supporting the cooperation among relevant agencies connected with the above matters, domestically or internationally.

Therefore, the Narcotics Control Fund, in practice, has provided a channel to government agencies to share assets forfeited under the MSOORN Act.

Process to Forfeit the Asset under the MSOORN Act



Actions Undertaken under the MSOORN Act

Year	Examination (Case)	Seize/Attach (Million Baht)	Type of Asset: Million Baht			
			Cash	Deposit	Moveable Asset	Real Property
1998	284	174.3	70.7	60.1	22.2	21.3
1999	257	168.1	39.7	76.2	31.8	20.4
2000	449	240.2	44.2	99.5	50.1	46.4
2001	811	479.2	106.2	134	141.3	97.7
2002	1042	567.6	118.9	156.6	175.7	116.4

3. Forfeiture of Assets Under the AML Act

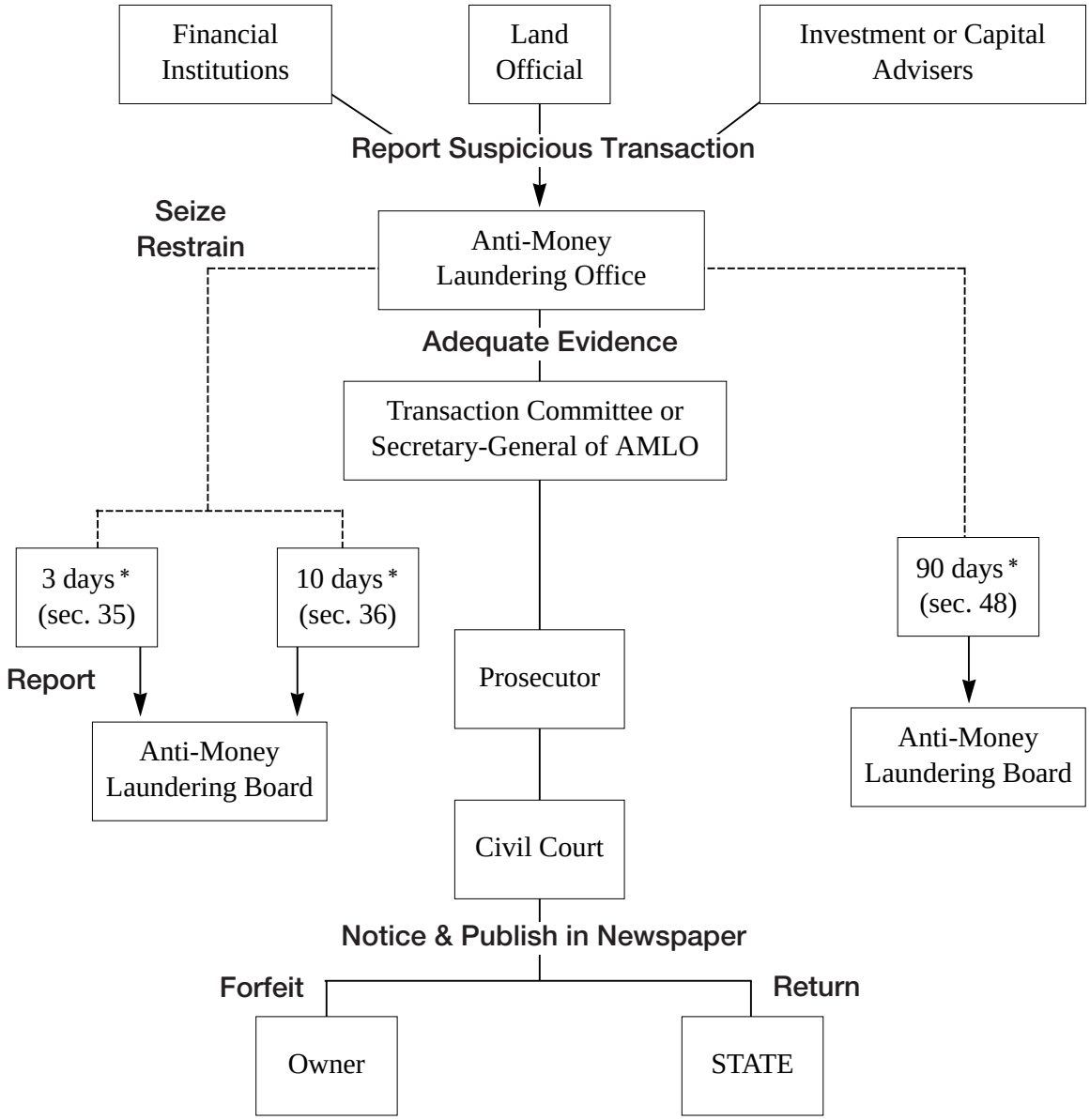
Narcotics offences are one of the eight predicate offences under the AML Act. This Act facilitates the forfeiture of drug-related assets, which may escape the loopholes under the MSOORN Act. It is easier to forfeit drug-related assets under this Act than under the MSOORN Act because it is civil forfeiture and need not be carried out along with criminal proceedings. Actually, the process is quite similar but the AMLO is responsible in this matter. When there is probable cause that any transaction is involved or may be involved in the commission of a money laundering offence, the Transaction Committee can provisionally restrain a suspicious transaction for examination three working days on "reasonable" grounds, or ten days with "convincing evidence". When there is urgency, the AMLO Secretary-General can himself use the same power with the Committee. If there is a reasonable ground that there may be a transfer, distribution, placement, layering or concealment of any asset related to the commission of a (predicate) offence during the examination, the Transaction Committee or the Secretary-General of the AMLO can order provisional seizure for up to 90 days. The public prosecutor through a civil forfeiture system may then pursue forfeiture of the assets. In the case of provisional seizure and forfeiture, the burden of proof lies with the claimant to prove the assets were legally obtained. Third parties will have one year to file a petition to claim property after the Civil Court has rendered an order. Nevertheless, the forfeited asset under this Act will devolve to the State. The asset sharing under the AML Act, consequently, is practically much more difficult than the MSOORN Act.

Asset Forfeiture Under the Anti-money Laundering Cases Filed with the Civil Court

Year	New Cases Filed	Cases Completed	Outstanding
2001	37	7	30
2002	56	15	71
2003*	47	15	103

* As at the end of July

FLOWCHART OF ASSET FORFEITURE UNDER THE ANTI-MONEY LAUNDERING ACT



* There is probable cause that transaction may involve a money laundering offence
** There is evidence to believe that transaction may involve a money laundering offence

H. Burden of Proof

The prosecutor generally has a duty to prove the offence beyond a reasonable doubt in all criminal cases. In the asset forfeiture proceedings under the MSOORN Act and the AML Act, however, the burden of proof shifts to the person who claims ownership of the seized asset. These two laws have the same principal. If there is evidence showing that the offender is involved or used to be involved in the commission of an offence relating to narcotics (predicate offences or offences of money laundering), the presumption is the asset related to an offence. The offender then has a duty to prove that he is the true owner and the asset is not related to any (narcotics or predicate) offence; or he has received the transfer of ownership honestly and with compensation or he has acquired the asset honestly and morally, or by charity.

IV. INTERNATIONAL COOPERATION

Since the narcotics epidemic is a global problem that needs a global response and international cooperation, Thailand has acceded to be party to the three United Nations Conventions on Drugs Control:

1. Single Convention on Narcotic Drugs, 1961, as amended by the 1972 Protocol
2. Convention on Psychotropic Substances, 1971
3. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988.

As a result, some narcotics control laws of Thailand were enacted in order toharmonize with these conventions, e.g. Psychotropic Substances Act B.E.2518 (1975) that was harmonized with the Convention on Psychotropic Substances 1971, and the AML Act 1999, that follows the 1988 UN Convention. However, many of the measures required by the 1988 UN Convention had already been codified in previous narcotics laws that were enacted and enforced before the establishment of the 1988 UN Convention such as communication interception was codified in the Narcotics Control Act 1976 (Section 14 fourth); or Extradition Act 1929.

A. Extradition

Extradition to a foreign state is possible under the Extradition Act B.E.2472 (1929). Those fugitives who are accused or convicted of an extraditable crime may be surrendered on the request of a foreign state made through diplomatic channels to the Ministry of Interior. The prosecutor will apply to the court for an arrest warrant. The fugitive who has been arrested will be brought before the court. The court will hear evidence adduced to ascertain that the fugitive has been accused or convicted of the alleged offence and such offence is extraditable. However, the court may refuse to surrender the fugitive if the offence is one of a political nature or the conviction is made by political motive. So far, there are ten countries that entered the treaty on extradition with Thailand, namely the United Kingdom, Belgium, Indonesia, the Philippines, United States of America, China, the Republic of Korea, Laos, Bangladesh and Cambodia. Other countries may request extradition from Thailand by reciprocal practice.

B. Mutual Legal Assistance

Realizing that the growth of transnational crime has become a severe problem, Thailand enacted the Mutual Legal Assistance in Criminal Matters Act B.E. 2535 (1992) as an important piece of legislation to combat international crime. The Attorney General will be responsible as the Central Authority, who will have the authority and function to receive requests seeking assistance and carry out any acts necessary for the success of such assistance.

The scope of mutual assistance under this Act generally are:

1. Taking testimony and statements of persons
2. Providing documents and information in the possession of Government agencies
3. Serving legal documents
4. Search and seizure of articles
5. Transferring persons in custody for testimonial purpose
6. Locating persons for the purpose of investigation, inquiry, etc.
7. Initiating criminal proceedings
8. Forfeiting of Seized properties

Thailand may provide assistance to a country that has no mutual assistance treaty but the foreign country must state clearly that it commits itself to assist Thailand in the same manner upon request. In case of the forfeiture of property, the foreign court must render final judgment to forfeit such property and it is forfeitable under Thai law.

C. Investigative Cooperation with Neighbouring Countries

Thailand regularly exchanges drug information and intelligence with many countries, particularly with its neighbouring countries; i.e., Myanmar, Laos, Cambodia, and Malaysia. The exchange of intelligence and information has been carried out by agency to agency to make this cooperation run smoothly and successfully. There are also international meetings between concerned authorities of these intelligence agencies every year. Investigative cooperation is done both through formal and informal channels. A channel of cooperation was strengthened in 2002, when five Border Liaison Offices were established near border areas around the country. Two are located at the Thai-Myanmar border; one is located at the Thai-Laos border; the other two are located at the Thai-Cambodian border. In addition, successful intelligence exchange operations with Singapore, China, and Japan have also been carried out. The First Narcotics Control Cooperation Meeting between Thailand and the People's Republic of China was held in January 2002, and both sides agreed to organize this kind of meeting every year. In addition, both countries have exchanged their drug liaison officers to work closely in exchanging drug information for over a year while Japan has stationed a liaison officer in Thailand.

D. Technical Support for Intelligence Operations

Several countries have supported Thailand's drug control agencies by providing training and knowledge on drug intelligence and suppression both inside and outside the country. Such countries are the United States, Australia, United Kingdom, Japan, and UNDCP.

REPORTS OF THE COURSE

Group 1

EFFECTIVE CRIMINAL INVESTIGATION

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I. INTRODUCTION

In the last several decades, the abuse and trafficking of drugs has created problems for society in general and for law enforcement authorities in particular. Drug traffickers have always been responsible for serious types of crime but especially those of the modern day are much wealthier, powerful and even influential, to the extent that they can pose a threat to national and international security. In some countries the drug trafficking organizations even have their own-armed personnel. Satellite systems and revolutions in computer technology support the drug mafia in such a way that sometimes law enforcers wander in the dark to look for their footprints and traces. Drug trafficking involves an entire economic activity commencing with cultivation, harvesting, transportation, distribution and sales. Enforcement efforts can be targeted against every aspect of this illicit economic system. A systematic attack at all levels of illicit activity within the network is most likely to produce successful results.

It is an internationally accepted fact that the drug business is the finest form of organized crime committed by the drug mafia- the most powerful and lethal segment of the underworld. The premier law enforcement agencies against narcotics trafficking are entrusted with the sensitive task of combating the drug menace so as to make this world "drug free".

However, a new phenomenon has gained strength over the past few years, i.e. the existence of medium and small size drug organizations, which have taken over both domestic as well as international trade. They confront no problems in the procurement of drugs originating from different countries. To tackle this mammoth problem composite and highly mobile forces should be given intensive training with a change in basic tactics from static check posts to mobile operations and from national limits to international boundaries. Drug traffickers change their modus operandi and drug routes as well. It has become easier for narcotic traffickers to operate their drug syndicates in different countries and territories. In this context, the exchange of drug related information and trends among the various countries can became a useful weapon against drug traffickers. Conferences and seminars are considered to be a better forum for the exchange of experience.

On the other hand, drug money has all the chances to be diverted towards the ills of society, which includes terrorism/corruption and posing a threat to the stability of any government, which works against the motives and interests of the drug barons. Money laundering crime is a corollary of other crimes. This crime is committed in a most organized manner and is very difficult to detect and prosecute successfully as compared to other offences. It is committed to conceal the origin of the proceeds of its predicate offences. No matter how large the profit of the drug trade, drug money is almost worthless until it can be moved into legitimate financial and commercial channels. This obsession makes drug money an evil and it causes a profound subversive effect on democratic society, legitimate economies and government institutions.

Our group would hereby like to focus on the conventional investigative techniques to combat drug trafficking and discuss how to improve them. Before going into details, we look into the current criminal situation of drug related crimes in each country.

II. THE CURRENT SITUATION OF DRUG RELATED CRIME IN THE PARTICIPATING COUNTRIES AND REGIONS

The members of the group have surveyed and gathered information from the participants of the 125th international training course regarding the situation of drug related crime in their respective countries and regions.The abridged result is described in the following sections.

A. Cannabis and Derivatives

Cannabis continues to be the most abused drug in participant countries with almost all of them reporting varying degrees of wild growth and illicit cultivation except Pakistan, Japan, Laos, Malaysia and the Maldives. Amongst producing countries India, Egypt, Estonia, Bhutan, Tanzania, Indonesia and the Philippines have reported cannabis resin trafficking to destinations like USA, Europe, Sri Lanka, Bangladesh, Kenya, Australia, Japan, Malaysia and Taiwan. Countries in South East Asia and Tanzania also face the problem of resin trafficking through their territories. Recent trends do not show a substantial change in production and trafficking.

B. Opium and Derivatives

India is the largest licit producer of opium by gumming. Some of this opium gets diverted and is locally consumed and converted into heroin for local consumption and trafficked to neighbouring countries like Sri Lanka, Maldives, and Middle East, etc.

Laos, amongst the participating countries is the largest producer of illicit opium and third in the world (estimated at 112.4 tons during CY 2002). The Laos Government has reportedly showed political will by launching a number of projects to eliminate Poppy cultivation by 2005. Poppy cultivation is also reported in Egypt (South Sinai), and Estonia (generally individual enterprise).

Opium abuse is generally limited to producing countries and neighbouring ones. Heroin is abused in participating countries mainly in India, Pakistan, the Maldives, Laos and to a varying degree in other countries. India and Pakistan have raised concern with the increasing number of intravenous drug abusers. Indonesia and Tanzania have also reported an increase in heroin abuse while Estonia has reported fentanyl abuse too.

Estonia, India, Laos, Pakistan, Tanzania and Thailand are also the conduit countries for trafficking. Pakistan, in specific, has reported substantial trafficking of heroin produced in Afghanistan through its territories.

C. Amphetamine Type Stimulants (ATS)

Indonesia, the Philippines and Thailand and to a certain extent Estonia have reported production of Amphetamine Type Stimulant (ATS) including MDMA. Most of these clandestine laboratories in the Philippines are being run by Chinese nationals.

ATS abuse has generally seen a rise in all participating countries. Producing countries however, have all classes of society consuming ATS, locally known as "Yaba" or "Shabu". ATS production and consumption is the main concern among South East Asian countries. Japan has reported ATS as the primary drug of choice among abusers and involvement of foreign nationals in trafficking and retailing.

ATS trafficking has been observed from producing countries like Burma, China, North Korea via South East Asia to Australia, Belgium, Guam, Indonesia and Japan, and Estonia have reported ATS trafficking produced in Europe. Japan has reported MDMA trafficking originating from Europe as well. Similarly, India has reported smuggling of Ephedrine to Myanmar for production of ATS.

D. Cocaine

India, Indonesia, and Egypt have reported that cocaine is being abused in their country. It is reportedly imported in large amounts from South America through the parcel system, airports and seaports. Tanzania also reported that cocaine comes from South America transiting to South Africa and Europe. Considering its high price, only the affluent members of society are the usual victims.

E. Other Drugs

Methaqualone produced in India is trafficked to mid-west Asian countries and East and South Africa. Tanzania has reported incipient methaqualone production and trafficking towards South Africa.

Tanzania has reported trafficking and abuse of "Khat" (a kind of stimulant). Japan and Bhutan additionally has the problem of solvents sniffing. Estonia has reported Gamma Hydroxybutyrate (GHB, a sedative-hypnotic, and was originally developed as a sleep-aid) abuse.

Some detailed data of India and Japan are shown at the end of this paper. Also, one can get other countries' statistics provided by the United Nations Office of Drug and Crime (UNODC) on the website (http//www.unodc.org/unodc/en/global_illicit_drug_trends).

III. COLLECTION OF INFORMATION

The collection of information is an indispensable activity to investigations. Here, our group would like to focus on the ways of gathering information leading to the initiation of further individual investigations. The group identified the following eleven items as important sources of information: namely, informants, undercover operations, electronic/telephonic/postal sources, electronic surveillance, wiretaps, custodial investigations, news media (publication and broadcast), other investigations, database, domestic and international information exchange and preliminary profiling.

A. Informants

Informant denotes any person who divulges information on the regular commission or conspiracy of drug related offences and/or persons involved in them. This is an important part of human intelligence

and has certain advantages over technical intelligence. Informant handling requires a personal touch and is equally fraught with drawbacks associated with such "double agents". In ideal circumstances, a combination of this human intelligence with technical intelligence should give optimum results.

1. Problems Encountered

The handling of informants may present certain practical difficulties. A general member of public has a cynical attitude towards providing information to law - enforcers. Reasons vary from general apathy to fear of reprisal from the person being reported. They are also not willing to act as witnesses later. Certain societies may also have a stigmatized attitude towards informants as reported by Bhutan and India. In the absence of immunity, co-accused are less willing to cooperate as informants. Above all, it is possible that an informant may just be trying to frame-up somebody. Unreliable and suspicious informants continue to trouble investigators. Inexperience of handling informants and mixing professional and personal relationships need to be avoided.

2. Countermeasures

Winning cooperation of the public to act as informants can be achieved through education and confidence building measures. Providing incentives [pre- seizure] and rewards [post seizure depending on purity and quantity of the contraband] can rope in good informants. Background checks on informants and online checks such as monitoring their communications to guard against a red herring or sell-out are proven methods in India and Pakistan. Japan also maintains a database for such background checks. Non-disclosure of the identity of informants can counter their fear of exposure and reprisal. An added advantage will be a Witness Protection Programme [as in the Philippines]. India and Philippines also provide for immunity thus paving way for cooperation from co-accused. Criminalization of providing false information is a suitable deterrent provided by statute in India, Pakistan and Bhutan. In the Philippines, informants are informally favoured by remaining within the purview of the legal jurisdictions. It makes the informant friendlier and builds up confidence on both sides.

B. Direct Information (Undercover Operations)

Investigators can go out in the field and gather information by themselves without disclosing their status. This method can be called "direct information gathering" or more directly "undercover operations". Undercover operations can be a powerful method of information collection. In some jurisdictions, it is even considered indispensable. On the other hand, however, there are some ambivalent attitudes toward such activities.

1. Problems Encountered

When an officer is directly dealing with the bad guys the chances are high of exposure to high risk and compromising the identity of the officer. On the other hand, sometimes, the same officer has to appear before the court as a State Witness, which gives ample chances to accused persons to identify him and resultantly some harmful act can be done.

2. Countermeasures

It is suggested that when an officer is at a high risk of exposure, there must be the provision of back-up teams. Firstly the undercover officer may avoid appearing before the court and if inevitable, video teleconferencing or screens in the courtroom should be used to avoid the disclosure of the identity of the officer to the defendant or public. If disclosure of the identity of the officer is not avoided then he should be allowed to disguise his/her identity and be posted or transferred out of that particular jurisdiction of work.

C. Electronic/ Telephonic/ Postal Sources

Enforcement agencies often receive information through institutionalized channels such as through letters etc. This modus has over time extended to sophisticated websites wherein informants can interact. Similarly, 24 hours control rooms facilitate information through telephones. Complainants thus have the benefit of being anonymous.

1. Problems Encountered

Though useful, such source of information is anonymous and requires to be verified. Anonymity, at times, encourages criminals to mislead the law enforcement agency and exaggerate activities of rival gangs. The utility of such information as weighed against its volume may be minimal, and its processing is time consuming. Mischievous messages and attempts to tamper with websites are to be guarded against. Different languages may be a handicap. Maintaining 24 hour control rooms may be a drain on manpower resources. Though receipt of information is centralized it may require action over distant places. An absence of adequate response in such cases may lead to apathy on the part of the general public.

2. Countermeasures

The general public can be encouraged to be more interactive by providing them with feedback on the information provided by them as far as it does not affect any inquiry/ investigation being undertaken. Experienced control room managers can elicit useful information over the phone without compromising the identity of their informant. Outsourcing the processing of information/managing control rooms can be considered at the primary level. Built-in language translation software and OCRs can be put to use to partly overcome the language barrier. Websites should have strong firewalls and regularly updated to avoid tampering. Building up the credibility of an agency, a timely response and a good reputation go a long way in encouraging the right type of people to come forth.

D. Electronic Surveillance

Electronic surveillance here refers to pro-active efforts of enforcement agencies in utilizing audio, video, the Global Positioning System (GPS), satellite imaging and internet traffic management, etc. to collect information and profile drug abuse and trafficking patterns. Such surveillance generally refers to public domain. Wiretapping being more intrusive has been dealt with in the subsequent section. The point to be borne in mind is the difference in legislation and issue of privacy, which differs from country to country.

1. Problems Encountered

The issue of privacy is quite important as it infringes upon the private life of citizens, the liberty generally guaranteed as a basic right in all modern societies. Thus such enforcement surveillance should only be in public domain. Even in the public domain too, it is debatable whether such surveillance be covert or public. Such equipment may be costly and require training for handling the same. Modern criminals, being well aware of such techniques, may deliberately mislead investigators and use high-tech technology to detect this type of surveillance. If located, such equipment may be easy to tamper with. Criminals can put sophisticated equipment to equal use for counter-surveillance. Electronic surveillance also suffers from handicaps such as the requirement of a power supply, availability of suitable range and frequency in case of wireless transmission etc. Loss of equipment, at times, is possible as in the case of GPS trackers. It is also easy to avoid detection of illicit cultivation by remote sensing if a canopy is used or on mountainous slopes mixed with other plantations.

2. Countermeasures

Public opinion should be built to support surveillance in the public domain as an effective

countermeasure against criminals. Sufficient checks and balances can be built into such systems, such as compulsory disclosure after a certain period of time. This disclosure can be in one way allowed by giving the public free access to information on such surveillance conducted. Legislation, wherever permissible, to admit such information as evidence shall also lead to transparency. Officers should be sufficiently and selectively trained to handle such equipment and to act effectively against counter- surveillance. In-house research, over a period of time, can be undertaken to overcome technical difficulties such as range, frequency and camouflage etc. It is important to interweave the human intelligence with this type of surveillance to affect maximum gain.

E. Wire Tapping

Wiretaps, in terms of this discussion, basically covers telephonic voice and data interception. It may be an efficient method to discover precursor information of criminal organizations and/or criminals. On the other hand, it implies the risk to a higher invasion of privacy of individuals as it may contain information relating to personal and business aspects of an individual. The advent of mobile telephony with international roaming and Internet require monitoring the same by enforcement agencies but with sufficient checks and balances provided for by the laws and rules. Provisions for wiretapping at the pre-investigation stage may vary from country to country. In Japan wiretapping is a limited investigative weapon to a specific case: whereas in India, Pakistan and Bhutan it is frequently used as an important method of collecting information by law enforcement agencies.

1. Problems Encountered

Invasion of privacy is a matter of rising concern throughout the world. In the absence of supportive legislation and public understanding, wiretapping may not be possible. Even in the case of provisions, wiretapping is highly technical and service provider specific. Mobile telephony interception may require adequate coverage of data such as short messaging system [SMS] and mobile messaging system [MMS] to be effective. The absence of satellite phone providers in a territory may pose a problem of effective liaison. Individual encryption/ scrambling may delay decoding of interceptions. A strict framework of laws and rules, though necessary, sometimes take a lot of time [e.g. exact transcription] and this is used by criminals to their advantage [e.g. limited timeframe]. Too much reliance on wiretapping without adequate field back up may lead to warped priorities.

2. Countermeasures

Wiretapping should be resorted to as the last measure of collecting information. Checks and balances within and without the hierarchy of the agency should be in place, such as in India. Custom-made software may be used to obviate difficulties faced due to different hardware and interconnectivity of service providers. Coordination and liaison with service providers is a must before the introduction of new technologies. Sufficient supervision should be in place to avoid indiscriminate wiretapping and an adequate mix with field intelligence.

F. Custodial Investigation

Sometimes a suspect conspicuously avoids vital information during custodial investigation and police questioning thus it is hard to get such appropriate information. It depends a lot on the officer who interrogates the suspect to squeeze and grasp the information from the suspect's version.

1. Problems Encountered

The problem that stands out is the limited time period before producing the suspect before the court. Limited information about the suspect's background and past history causes stumbling blocks in a smooth investigation. Similarly lack of coordination between different investigation agencies is also observed.

2. Countermeasures

Each law enforcement agency should be equipped with highly talented and seasoned investigation officers. During custodial investigation such police officers should be deputed to carry out the investigation keeping in mind the limited timeframe or lack of information. The other way to tackle this impediment is to recommend a change in the legal framework on the part of policy makers to increase the custodial investigation period with sufficient safeguards. Presence of an apex coordination agency can be the solution to get rid of a lack of cooperation/coordination between the law enforcement agencies. These agencies may develop a database, which should be shared on a need-to-know basis.

G. Media

At the present time, the media covers almost all aspects of social life; therefore, it may discover the crime through its own sources ahead of the law enforcement agencies. On the other hand, the law enforcement agencies can distil information related to the crime that is not written in the article. The situation of the dark society and/or the crime trend may be estimated through articles on economic conditions, social events or the general social situation. Furthermore, if there is a campaign by the media against a high-profile case, it can support the activities of the law enforcement agency to carry out an investigation smoothly against political pressure. Therefore, the media, such as newspapers, television, and magazines etc. can be important information resources for law enforcement agencies.

1. Problems Encountered

The media sometimes exaggerates facts in order to arouse the curiosity of the general public. The tendency is strong in the "yellow journalism". In such a case, investigators should select articles which contain correct information. The media protecting the secrecy of their information source can be a stumbling block for an investigative agency. When the media coverage is published, it is sometimes too late to start an investigation. Some criminal organizations and drug barons have influence on the media. They might even publish their own newspaper and criticize a law enforcement agency. Moreover, human and budgetary resources are necessary to follow large amounts of information that the various media produce.

2. Countermeasures

Law enforcement agencies must evaluate information carefully. In order to verify information, continuous collection and analysis of information is necessary. The efforts of an agency to cope with the media is also necessary. It is also important to maintain a good relationship with the media through press conferences about the criminal investigations and through periodical information exchange. It may also be useful to clip articles for future analysis. Use of an internet clipping service makes analysis more efficient.

H. Other Investigations

Investigators can obtain information about criminal groups which engage in illicit drug trafficking, about the route of drug trafficking and price of drugs through other kinds of investigation. For example, a foreigner who was arrested for smuggling might have information concerning other illicit drug smuggling routes. A suspect or a convict arrested for a completely different crime such as extortion may have important information relating to drug trafficking or criminal organizations that are involved in drugs.

1. Problems Encountered

It is very difficult to obtain statements about illicit drug smuggling routes or criminal groups from the suspects of other criminal cases. He/she might be scared of the retaliation from the criminal group. In case of the suspect arrested for drug trafficking, he would not disclose his/her involvement in an

organized criminal group because it could lead him/her to an even heavier penalty. In such cases, it is also very difficult to get information. Even when they make statements they may not tell the truth; it is very difficult and time consuming to verify the statements. Strict time limitation for investigators to produce the suspect before the court prevents him/her from probing additional information that seems irrelevant from the current case in question.

2. Countermeasures

For the suspect or the convict who is scared of retaliation from criminal groups, investigators usually need to persuade them to overcome the fear and tell the truth. Provision of protection may lead to disclosing of information more easily. When the suspect is afraid that his/her penalty will be heavier, provision of an immunity system can be one of the solutions. With regard to this point, a participant from India stated that the Indian Narcotic Drugs and Psychotropic Substances (NDPS) Act provides for strong immunity. If a suspect of any crime discloses information concerning drug crime, he/she would be exempted from both the drug crime and the original crime, even if the original crime is a very serious one, such as murder.[1] In the Philippines, the suspect will be exempted from responsibility for only the drug crime in a similar case. Investigators should utilize additional information in verifying the statements of such suspects.

I. Database

A database is a vital information bank for law enforcement agencies from which they can get information about a criminal, his bio-data, associate details, vehicle registration, criminal records, bank accounts and so on. This information can be used for an on-going investigation or for follow up actions or as reference. The importance of a database as a source of information is unanimously accepted, but it has its drawbacks/problems.

1. Problems Encountered

One of the foremost problems of a database is the huge quantity or volume of data it contains. Maintenance of such a huge database requires additional resources. Outdated information because of the absence of necessary personnel to update them is useless. Sometimes different agencies create individual databases that contain similar information without any link to an existing one. In such a case, to sort out which database has what information becomes extremely time consuming. Secondly, when an adequate search procedure or subroutine is not established, it is difficult to get the right information in a given time frame. On the other hand, if there is no database at the law enforcement agency, it takes a long time to create a useful database.

2. Countermeasures

The solution to counter the first problem would be differentiation between the intelligence database and criminal investigation database. It was suggested that the creation of a huge database only by the law enforcement agency might not necessary because investigators can always consult other agencies for necessary information. However, there are other opinions that a comprehensive database should be maintained by the law enforcement agency in order to be effective. In either case, necessary resources should be allocated in order to maintain an updated database. This would enable the police to access the right information in an appropriate time. To cope with the second problem, there should be a user-friendly search procedure for any database. It is recommended that an adequate manual should be maintained.

J. Domestic and International Information Exchange

Today, in a very complicated society, information exchange is indispensable and becomes more

[1] Section 64, NDPS Act. Although the legal provision states this, it is not applied since the promulgation of the act in 1985.

important in order to expose the crime especially committed by organized criminal groups such as Mafia. Because such organized criminal groups try to commit drug trafficking using the latest communication equipment like the Internet backed by their abundant funds, and the modus operandi of such crimes is getting more and more sophisticated.

1. Problems Encountered

First, as far as domestic information exchange is concerned, investigative agencies tend to withhold information and are reluctant to exchange information with other agencies because of sectionalism, distrust and jealousy among different law enforcement agencies. On the other hand, there are some agencies, such as hospitals, that should not disclose the information easily from the view point of the protection of privacy.

Second, as far as international information exchange is concerned, routes can be mainly divided into three ways, namely, the diplomatic channel, Interpol and inter-agency. Quick gathering of information is vital to the practical investigation. However, the diplomatic channel is not frequently utilized because it is time-consuming. Interpol is quite useful, but a requested country for information exchange is not obliged to respond to such request. Informal information exchange among the respective countries law enforcement agencies can be seen, but does not seem to be smoothly taking place.

Third, differences of legal system and languages among countries make information exchange further troublesome.

2. Countermeasures

By establishing regular meetings (every six months or on a quarterly basis) among law enforcement agencies, we can build up mutual trust and share information.

So as to have a faster and smooth exchange of information among international law enforcement agencies, it is recommended that each competent agency have a memorandum of understanding (MOU) as much as possible.

The group is of the opinion that each investigative agency should establish a common framework so that they can exchange information smoothly. Establishing a common database can be envisaged. In order to overcome the differences of legal system and languages, continuous efforts in exchanging information is necessary. Very sensitive information might be exchanged among high ranking officials of respective agencies.

K. Preliminary Profiling

Preliminary profiling is necessary to serve as a reference in cases for future operations. However this method of collecting information is considered a tedious task since it covers a wide variety of fields and needs to be constantly updated. Like for example, in socio-economic profiling, there is a need to consider the economic activity of a certain area to analyze the changing economic status of a certain individual subject in question. Other areas to be considered, but not limited to these areas, are mail and parcel profiling, air passenger profiling and baggage profiling. If we are able to organize centralized preliminary profiling data where all the required necessary information is stored and analyzed regularly, then it will be a good source of information that can help law enforcement agencies in their day-to-day operations.

1. Problems Encountered

Preliminary profiling takes an enormous amount of time and resources considering that it needs a considerable period of time in storing all the data necessary before an analysis can be made. Failure in

storing the right data may result in a wrong analysis that may mislead the investigative agency in the conduct of their operation, or even if you have stored the right data but you were not able to make the interpretation and analysis properly, then it will still affect the planning for such future operations. The Majority of the participant countries admitted lacking expert personnel to do the job and also the technical equipment needed to keep-up with the advancement of technology the criminals are capable of employing.

2. Countermeasures

Considering the wide variety of information necessary, there is a need to strengthen cooperation among the different organizations, private or public, to share all the data available. It is considered that the establishment of a special organization/task force be maintained to collect and analyze all the information. Trained and expert personnel should man these organizations to ensure that all the collected information will be properly used for the maximum advantage of all investigating agencies.

III. MAJOR DIFFICULTIES IN THE COURSE OF INVESTIGATION

In the course of the actual investigation of drug crime, there will be a number of problems. The members of the group agreed to discuss their major problem areas in the investigation. Identified issues are interrogation, bottom up investigation, search and seizures and financial investigation.

A. Interrogation

The interrogation/ questioning of the accused/suspect is to establish their extent of involvement in crime, modus operandi, associates, financial transactions, communication channels, safe houses, habitudes, previous transactions and recovery of contraband. Custodial interrogation is within a framework of limited time and provisions of laws safeguarding self-incrimination. Investigators in Bhutan, Pakistan and India get 24 hours before mandatory production to court or release. In the Philippines, this limit varies from 12 to 36 hours depending on the type of offence. Japan allows 48 hours for the investigator's and a subsequent 24 hours prosecutor's questioning limitation followed by a further 20 days [10 +10] possible custody on discretion of the court, Indian enforcement agencies also have the provision of police custody at the court's discretion for a maximum period of 14 days.

1. Problems Encountered

Limitation of time becomes a serious handicap in case of difficulties in getting online/quick response from other agencies for cross- checking/ verification of a suspect's statement. Capital seizures involving large numbers of accused, locations and quantity of contraband coupled with manpower constraints may affect interrogation. Handling a suspect bent on misleading or non- cooperation requires certain experience and expertise. Such lack of expertise may also lead to missing certain important information due to oversight. Odd timings and locations may not offer ideal infrastructure for interrogation e.g. a one-way glass panel. Important and multilateral cases may require involvement of multiple agencies. Lack of willingness to allow joint interrogation for want of sharing credit or reward is quite possible. Difficulty in interpretation of a foreign language or interference by facilitators may slow down interrogation. Overlooking their psychological status/ profile misleads the investigator. Similarly, social status or security concerns for a suspect may warp priorities of interrogation. Such situations are sometimes faced during the interrogation of kingpins. Failure to properly consolidate and reduce their observations/statements in writing is sometimes noticeable, even amongst experienced investigators.

Above all, these psychological profile techniques of interrogation are very important. Similarly, inappropriate handling by supervisors due to a communication gap with investigators or attention to/ from

media may affect the process of interrogation.

2. Countermeasures

Training of investigators in techniques of interrogation [hot and cold, rapid fire, confrontation, etc.] shall obviate the problems of wastage of time in getting down to business. Prosecutors and the court should be liaised with in case of an additional time requirement. Apart from training, choosing appropriate personnel for the job is necessary. This may require personality profiling of personnel as well. Checklists and questionnaires should aid the investigator. The questionnaires should be able to bring out the personal and financial profile of suspect. Use of techniques like polygraph tests can be taken where permissible. Depending on the seriousness of the case, the level of interrogation [rank of officers] can be adjusted and team interrogation facilitated with video recording etc. Team interrogation basically refers to the same agency/case and can be conducted on a one-to-one basis with later sharing or simultaneously by more than one officer. Video recording [e.g. in India] is used for internal evaluation and analysis of interrogation. Certain countries may have provisions of access by the defence in case of such video recordings. Stand by teams for simultaneous raids, arrests, search, coordination and security should be a primary concern of supervisors. Background checks and use of available databases should be made to reduce time wasted on cross verifications. For joint interrogation/ coordination, proper guidelines should be laid out. The regular review of cases and follow ups to check the same by higher-level officers can remedy this. Agencies should strive to improve infrastructure facilities at select locations/ use facilities of other agencies. The task of liaising with the press should rest with a public relations officer [PRO] and investigators should not be troubled with it.

B. Bottom-Up Investigation

Most illicit drug trafficking is conducted by organized criminal groups. The ringleaders of such drug trafficking usually occupy high status within the organized criminal groups. Following their instructions, illicit acts such as production, transportation, trafficking and laundering of proceeds of drug trafficking are systematically committed. Moreover, in recent years, worldwide criminal organizations collaborate with one another and share the illegal tasks and proceeds of crime amongst themselves.

These criminal organizations always try to impede investigations. The Modus operandi of their crime is becoming more and more sophisticated year after year. For example, the ringleader who occupies a high status in the organization manoeuvres behind the crime scenes but never comes to light.

However, illicit drugs trafficking causes a problem of global expansion of drug abuse. Profit from illicit drug trafficking is used as a source of funds of these criminal organizations, and there is concern that some of the funds are being diverted to finance terrorist activities. Moreover, money laundering is said to cause serious damage to the world economy. On this account, it is necessary to eradicate it with thorough regulations and an uncompromising attitude. For that purpose, apprehension of end drug abusers is not enough: exposure of the whole criminal organizations including arrest of the original ringleader is indispensable.

From the above reason, this group hereby decided to examine an effective bottom-up investigative method which initiates investigation from the level of an end drug user or an end dealer of the criminal organization and leads to the level of a ringleader of the drug trafficking.

1. Problems Encountered

It is very difficult to convince the arrest end member to divulge information about the criminal organization. They keep silent in fear of retaliation by their criminal organization against him/her and their family members.

If the information is cut off at the level of an end member of the criminal organization, this poses a problem to the investigators. The criminal organization usually gives the least information to the end member in order not to be traced by the investigative agencies. The end member sometimes does not know even the real name of the superior who gave instructions and sometimes does not have any information about routes used for the drug trafficking, etc.

It is very difficult to arrest the top person of an organized criminal group if the investigator fails to get a whole picture about the group from the end member by way of a bottom-up approach. Senior members of the criminal organization never touch the drug directly. Consequently, there are only two ways to convict them: (1) to prove conspiracy between the top and the end member and (2) to prove the existence of proceeds from the drug trafficking. Testimony of end members is necessary to prove those facts.

In case of ethnic hierarchical organized criminal groups, it is more difficult to get information, because the relationship between members is extremely strong and they use a different language.

On the other hand, for example, in a small town, organized criminal groups can easily identify each investigator so that they sometimes put investigators under their surveillance. The investigation can be interfered in various ways such as destruction of evidence. In most cases, such interference by the organized criminal group sometimes starts as soon as the arrest of an end member.

Monetary support by senior members to end members may become a hindrance to acquire full information of the criminal organization. Sometimes the end members become non-cooperative and refuse to testify to upset the investigation. In some countries, the politicians who have close connections with the organized criminal groups can put pressure on an investigation. Shortage of budget, human resources and lack of proper training also become a hindrance to investigative agencies. Investigative agencies now face a problem of their jurisdiction in the course of their criminal investigation compared with the current borderless trafficking committed by organized criminal groups. For example, extradition of the suspect requires a complicated procedure.

Another problem of the bottom-up approach is that it takes too much time to arrest drug barons. In other words, criminal organizations will have enough time to destroy evidence while law enforcement agencies make efforts to trace the root of the drug trafficking.

2. Countermeasures

After due consideration of the above-mentioned problems, this group pointed out the necessity of knowing the background of organized criminal groups as a prerequisite to the bottom-up approach. In such case, utilizing informants and undercover operations are effective. In order to get honest statements from the end members who are afraid of retaliation from their criminal groups, the interview technique of the law enforcers plays an important role. It is important to create a friendly atmosphere for the end member to give his/her honest statement willingly. Moreover, the introduction of a witness protection programme (WPP) including supply of a new house as a refuge or financial support is suggested. A WPP can be more effective if it encompasses alteration of the witness' identity.

Conducting various investigative techniques concurrently in order to conquer the difficulties of proving the conspiracy of the top person of the drug trafficking groups is likely to prove effective. For example, analysis of telephone records, communication interception, electric surveillance, financial investigation and so on, should be incorporated. Above all, covert investigation is important in order for an investigative agency to prevent the criminal organization from destroying evidence just after the end member has been arrested. A comprehensive database that contains such information is useful for

investigation.

Sufficient budget and human resources should be appropriately allocated; especially, the establishment of a task force comprised of trained investigators may be effective to counter organized drug crimes. In case of borderless trafficking, law enforcement agencies should actively cooperate.

In India, there is a preventive detention system that entitles law enforcement officers to detain a person for a maximum period of two years when there is probable cause that the detainee will commit some illegal acts. This system contributes toward the tracing of the roots of the drug trafficking syndicates.

Even though the bottom-up approach may be a basic and steady investigative method to reach the top persons of the organized criminal groups, it may be considered tedious in some countries facing serious problem such as large-scale cultivation or export of large amounts of drugs. Such countries need to simultaneously focus on the root of the drug trafficking, that is, cultivation of drugs, utilizing such means as satellite photography.

C. Search and Seizure

Investigations into drug crimes invariably involve conducting searches and seizures affected to gain material evidence. This material evidence is important to prove actus reas like wilful possession etc. Such searches are conducted subsequent to obtaining a warrant from a jurisdictional court and standard operating procedures define the method of execution and follow up e.g. making a list of seized articles and handing over a copy of the same to the owner of the premises/suspect. The extent to which enforcement agencies are permitted to carry out a search without a warrant in emergent circumstances vary from country to country.

1. Problems Encountered

The aim of a search shall be defeated if it does not yield maximum advantage to the investigators. This basically means that not choosing the appropriate timing for a search may not result in maximizing the culpability of the accused. A typical example is striking before the accused has opened a package of drugs delivered to him and then leaving the defence with the plea of ignorance. Avoiding searches at night and at places where customs inhibit the same may also have to be taken into consideration. Searches bring investigators into direct contact and conflict with traffickers and physical harm. In Pakistan there is frequent resistance by traffickers as the quantity of drugs transacted is substantial. This resistance can be armed and dangerous. Lack of experience and time constraints can at times lead to improper/ insufficient collection of evidence. Allegations by affected parties are not uncommon in countries like Bhutan accusing the search parties of misconduct or misappropriation. This can be very demoralizing if further exacerbated by the press. Searches, at times, may require an operation extended over a large area and bring more than one agency into play. With the source of information being handled by one agency, coordination may be a problem. Lack of coordination may lead to leakage of information, compromising the source of information and failed operations.

One of the interesting aspects that came up was the provision of laws relating to the execution of warrants in case of emergent circumstances like the incidental presence of drugs not mentioned in the warrant. The Japanese participants elaborated that there is an issue relating to the strict interpretation of the contents of a search warrant as stipulated in Article 35 of the Constitution of Japan and Article 107 of the Code of Criminal Procedure. For example, when an investigator obtains a search warrant for stimulants and finds cannabis during the search, it is not possible to seize this cannabis with the warrant in hand. If there is a suspect who actually possesses the cannabis, of course, that person can be arrested on

the spot and the cannabis can be seized. Also, the investigator can retain the cannabis through voluntary submission by the witness and the owner of the premises during the search even though the suspect is not present. However, it is not possible when the suspect is not present and when the witness/ owner of premises does not cooperate. In such a case, investigators in Japan have to ask for another warrant from the court. Practices in other countries vary to the extent that under such emergent circumstances, seizure can be affected in the presence of independent witnesses and the court informed appropriately.

2. Countermeasures

Selecting the appropriate time for the search should be part of the plan. This, however, has to be backed with sufficient information and in/controlled deliveries can be backed with technical gadgets like light sensors indicating the time the packages are opened etc. Advance planning, such as including women officers in search parties when raiding, should obviate problems of customs in India and Pakistan. Special task forces may be constituted in case of armed resistance and the services of specialists such as commandos can be requisitioned. Investigators should be trained to carry checklists with them to avoid committing procedural lapses. A mix of experience will avoid stress on young investigators during a search. Leakage of information leading to failed search operations is another sensitive issue and can be overcome by working on a'need to know' basis and pacing effective internal intelligence within the agency to identify black sheep. Coordination is a difficult issue but can be tackled by suitable advance planning. Sharing the proceeds and credit can be an incentive for coordination and cooperation amongst agencies. Debriefing at higher levels is also recommended. Suitable policy guidelines may also be laid for such compulsory cooperation among agencies.

With relation to the problem of strict regulation on search and seizure in Japan, one argument is that in the case of drug offences, the seizure of drugs not listed on a search warrant should be permitted with necessary restrictions imposed on the law enforcement agency by employing the rule of "plain view" as in the United States. However, there also exist concerns that the above argument may negate the role of a search warrant and result in the violation of human rights because it may give the law enforcement agency too much discretionary power to determine the items to be seized. It may be interesting to note here relevant provisions in India. Search even without warrant is allowed in emergent circumstances in the presence of independent witnesses after making a record of reasons for such an emergency in writing. This extends to search with warrant where the searching party may come across other incriminating evidence.

D. Financial Investigation

Drug trafficking has long been a source of revenue for crime groups, because the gap between the manufacture/source price and the street price is enormously wide generating huge profit. It is important to deprive traffickers of their illegal profit, in order to make a forceful impact against organized drug crimes. At the same time, since drug crimes are global in nature, international cooperation is indispensable.

1. Problems Encountered

Financial investigations involve document examination, analyzing banks/financial institutions/land records and tracking the money flow etc., making it time consuming. Absence of clear provisions in laws may make financial institutions reluctant to maintain and provide such information. This is important in view of certain countries yet to experiment with anti- money laundering provisions. This also calls for certain relevant expertise and experience like analyzing suspicious transaction reports and similar proactive measures etc, to which investigators may not be exposed. ARS [alternative remittance systems] pose challenges in tracing money flow because of a lack of institutional records and their ethnic and transnational nature. Drug proceeds over a period of time are transacted multiple times and thus come under the jurisdiction of other agencies like the internal revenue etc., a lack of understanding among these

agencies may lead to their working at cross purposes. Simultaneously bottle-neck/institutional weakness of one of these may hamper or delay investigation e.g. lack of computerization of land records or "benami" [non-existent parties] transactions in real estate. Even when proceeds are well tracked, the difficulty in distinguishing clean from dirty money and their extent may pose problems e.g. in joint ownership of companies/real estate/investments. Liquid assets require quick reactions as high mobility makes them liable to be tempered within a very short time. Lack of international cooperation has encouraged traffickers to go global and park their proceeds, away from the scene of the crime, and in safe havens.

2. Countermeasures

Enactment of provisions compelling financial institutions to maintain records, report suspicious transactions and provide information on request is a prerequisite. Investigators should be trained in analyzing and chasing useful information. This can also be achieved by hiring experts, an appropriate deputation mix and the creation of financial intelligence units [FIUs]. The core of ARS should be struck at by long-term surveillance and sustained investigation-enabling the tracking of the transfer of the corpus of the money. ARS can be further weakened by promoting institutional banking and encouraging non-tainted money [e.g. repatriation of earnings] transfer through it. Plugging loopholes in procedures like land registration and strengthening these institutions [e.g. computerization of records, stricter provisions regarding power of attorney] shall go a long way in making it difficult to disguise dirty money. Cooperation amongst domestic agencies should be improved by regular minuted meetings [e.g. regional economic intelligence committees in India] and by appropriate bilateral/multilateral international agreements. The burden of proof in the case of financial investigation assumes considerable significance due to the history of difficulty in tracking and chafing ill-gotten wealth from clean money. Once the money is tracked, it is desirable that the burden of proof explaining its source rest with the accused. Participants from Japan expressed support for such a provision as provided by the laws in India and other participating countries.

IV. FOLLOW-UP
(Can continue even if the case is already filed in court)

The job of the investigator does not end when the case is already filled in court. It is always the responsibility of the investigator until justice has been served; therefore, he/she must maintain close coordination with the prosecutor to ensure that all the necessary evidence is provided, including that of the witnesses. These are very important things to consider in order for the prosecution to successfully convict the accused.

Follow-up also means that, information and evidence gathered as a result of the investigation conducted on the accused, needs to be properly stored and analyzed. For example, the purity and impurity of the drug seized should be analyzed over a period of time to contribute to profiling.

There are also cases where the offender after having served his sentence, can still be a good source of information. He might divulge information about his criminal association and organization. Therefore, it is advisable that the police investigator maintains contact with such persons.

Drug routes, the flow of money, telephone records, drug prices, modus operandi, link chart analysis, association matrix and ethnic profiling should be properly analyzed and such analysis should be used for internal circulation, feedback and database update for future operations.

All gathered and analyzed information should be disseminated with other investigating agencies and, if necessary, should be discussed periodically at a workshop because the information and analysis of one agency might be different from that of another agency. During the workshop, such differences should be settled after the exchanging of notes and thorough comparison/analysis of all the available information.

In combating an organized crime group, there is difficulty in neutralizing/arresting all the members of the group, including their leader, all at once. Most often it is always the ordinary member that is caught and arrested or even if the leader is arrested, some of the members manage to elude arrest. These criminals can always recruit new members and will continue with their criminal activities. However, their modus operandi in many cases will still be the same. In such case, the police investigator will not have difficulty in going after this organized group if follow up is maintained properly. All the available information stored and analyzed as a result of the follow-up will point to this group. The police investigator can identify drug routes and the flow of money, etc. and can prepare a good plan for future police action against this criminal group.

Information gathered will also show recent developments in the trend of activity of the criminal group and it is therefore necessary for the investigating agency to consider if there is a need for changes in legal provisions/bilateral agreements. It is a known fact that criminals, particularly organized transnational groups, are taking advantage of the fast changing technology and the investigators are sometimes left behind because of restrictions in the provisions of the law. In the case of bilateral agreements that were entered into some years ago they may no longer be applicable because of new developments in technology.

For these reasons, but not limited to these reasons, follow-up must always be maintained in order to keep track of the criminals; it is a continuous and unending process.

V. METHODS TO IMPROVE INVESTIGATION

Criminals nowadays are becoming more sophisticated and can easily get away scot-free from the law enforcement officer. In this regard, the group discussed the need to improve conventional investigation methods that can be adopted in order to ensure the criminals will be arrested and be brought to the bar of justice.

Several measures were mentioned in our discussions and thus can be categorized into the following three areas; intra-agency measures, inter-agency measures (domestic), and international forum.

A. Intra-Agency

Expert investigators with vast of experiences in the field of investigation should conduct on-the-job training for those who are rookie investigators. For example, in the case of custodial investigation, investigators must be trained in behaviour analysis and be able to decipher the body language of the suspect under question to determine whether he/she is telling the truth or otherwise. It is also necessary that the police investigators should maintain a checklist/booklet wherein he/she can easily refer to the standard operating procedures that must be followed.

Analysis of failed operations in the respective agency is also necessary in order to determine the cause and reason why such operations were not successful. Debriefing after every operation is therefore a must so that those failures and weaknesses will form the basis for corrections and improvement in the planning and actual conduct of future operations.

Similarly, a combination of human and technical intelligence is also necessary to improve the methods of conventional investigation since the criminals are highly technical. The use of such technical intelligence is to assist the investigator in the conduct of their investigation where only the use of such technical equipment can address the solution of a particular case.

B. Inter-Agency (Domestic)

If the individual investigation agencies try to keep the information to themselves because they do not want to share the credit, that is not effective. By sharing the information with others, the information held by the individual agency will also become updated. In order to share the information, conducting a liaison committee meeting among investigation agencies involved in drug offences will be effective. By conducting such a meeting regularly not only can we share the information but also we can become acquainted with other investigation agency personnel and thus create a closer working relationship. Sharing of information can also be done through the deputation of personnel among agencies.

On the other hand, an interactive feedback loop between prosecutors and investigators should be maintained in order to maintain a constant and regular follow-up on the status of a certain case before it is filed in court for trial and during the duration of the trial to ensure that all the necessary witnesses and evidence are properly presented for the conviction of the accused.

C. International Forums

There are three forms of international investigations: through mutual legal assistance [MLA], memorandum of understandings [MOUs], and Interpol. In either case in order to conduct a smooth investigation, several additional features are necessary. Firstly, it is desirable to have a working level meeting among involved nations. At this meeting, an information exchange regarding specific cases and agreement/confirmation regarding detailed procedures for international investigation should be discussed. This may make it possible to decrease the response time when actual cooperation is requested. Moreover, by repeatedly having such meetings, it might result in simplified procedures.

Secondly, placing personnel at embassies etc., as a liaison officer from the investigation agency, is very effective because the liaison officer can help iron out the administrative process of an actual mutual assistance case. Additionally, such liaison officers can share informal information and perform some informal coordination with the investigative agencies in that country.

Thirdly, it is important to actively participate in various international training courses and forums that are held by the UN and other international organizations. Through this participation, the global trend regarding drug trafficking and money laundering and the latest information regarding international measures can be acquired. It will widen the investigators' perspectives in combating the menace of drug trafficking.

Moreover, to overcome the barriers of entering mutual assistance with other countries, participation in the above meetings will allow each country to settle the conflict of each local judicial and legal framework because the latest precise information will be acquired.

Lastly, database sharing or creating mutual link measures will be effective among countries maintaining close cooperation/and or bilateral cooperation, etc.

VI. CONCLUSION

Our discussion has been focused on the conventional investigative techniques to combat drug trafficking. However, besides the improvement of conventional investigative methods, we need to be equipped with the latest techniques and weapons, as the criminals always tend to be one step ahead of law enforcement agencies. We would like hereby to conclude our paper hoping for a peaceful world without any place for criminals.

APPENDIX A

National Drug Law Enforcement Statistics
As Reported up to June 30, 2003 (India)

Year		1999	2000	2001	2002	2003
1. Seizures of Various Drugs in Kg. with No. of Cases						
Opium	Seizures	1635	2684	2533	1867	643
	Cases	927	1257	1205	1167	301
Morphine	Seizures	36	39	26	66	18
	Cases	125	142	146	148	85
Heroin	Seizures	861	1240	889	884	300
	Cases	2937	2841	3891	4328	1546
Ganja	Seizures	40113	100056	86929	88137	23418
	Cases	6518	6073	7613	3687	1900
Hashish	Seizures	3391	5041	5664	3300	911
	Cases	2500	2078	2117	2121	661
Cocaine	Seizures	1	0.350	2	2	1
	Cases	4	5	10	5	4
Methaqualone	Seizures	474	1095	2024	11130	
	Cases	8	31	8	7	
Ephedrine	Seizures	-	426	930	126	2234
	Cases	-	8	5	4	5
L.S.D.	Seizures	240	0	0	0	
(Sq. paper)	Cases	3	8	0	0	
Acetic Anhydride	Seizures	2963	1337	8589	3288	4
(in ltrs)	Cases	7	14	8	4	1
Amphetamine	Seizures		3	0	0	
	Cases		11	0	0	

Year		1999	2000	2001	2002	2003
2. Persons Arrested						
a) No. of person arrested including foreigners		13490	15065	16315	12318	4974
b) No. of foreigners arrested		92	92	133	172	40
3. Action Taken against Persons Involved in Drug Trafficking						
a) No. of persons prosecuted		10841	19162	12358	12496	2237
b) No. of persons convicted		2891	4447	3419	5310	797
c) No. of persons acquitted		4632	5416	4712	5089	818
4. Action Taken Under PITNDPS* (Ndps) Act, 1988						
No. of detention orders issued under PITNDPS Act		56	73	61	65	8
Nos. detained		44	73	46	63	8
5. Destruction Of Narcotics Drug Yielding Plants (with reported Potential Yield)						
a) Poppy Plants						
Area (in acres)		729	379	44	539	
Potential Yield (in kg.)		13125	6817	512	6468	
b) Cannabis Plants						
Area (in acres)		66	50	124		
Potential Yield (in kg.)		73144	65324	174818		
6. Destruction of Manufacturing Facilities						
a) Facilities detected and quantity of finished drugs seized in kg.						
Heroin		36	1	5	28	1
Facilities detected		3	5	6	7	1
Hashish		-	-	-	-	
Facilities detected		-	-	-	-	0
Methaqualone		197	0	0	442	
Facilities detected		2	0	0	1	0
Morphine		0	2	0	5	1
Facilities detected		0	4	1	1	1
b) Nos. of persons arrested		10	9	11	13	1

Year	1999	2000	2001	2002	2003
c) Incriminating material seized in kg.					
Acetic Anhydride	73	2	1	1466	4
Acetyl Anthranillic Acid (ltrs.)	-	-	-	-	
Acetyl Anthranillic Powder	-	-	-	-	
Acetyl Chloride	0	1	0	4	20
Ammonium Chloride	0	8	1	5	1
Diethyl Ether	0	0	0	0	
Methenol	-	-	-	-	
Opium	0	2	2	7	
Opium Solution (ltrs)	0	23	36	34	
Sodium Carbonate	402	5	1	99	7
7. Disposal of Seized Narcotic Drugs and Psychotropic Substances					
Opium	25	11	20	1	66
Morphine	-	-	-	-	
Heroin	39	1	2	5	2
Ganja	4558	2081	88	8718	588
Hashish	48	55	22	77	38
Cocaine	-	-	-	-	
Methaqualone	8	0	0	0	
Ephedrine	-	-	-	48	
L.S.D (Sq. paper)	-	-	-	-	
Acetic Anhydride (ltrs)	-	-	-	-	
Amphetamine					
8. Forfeiture Of Property					
a) Value of property forfeited (Rs.)	6155051	13246464	1626630	23636425	
No. of cases	1	3	1	10	
b) Value of property frozen (Rs.)	7456247	5370283	2092803	523300	
No. of cases	7	4			

* PITNDPS- Prevention of Illegal Trafficking in Narcotic Drugs & Psychotropic Substances

APPENDIX B

National Drug Law Enforcement Situation as of October 2002 (Japan)

Number Arrested for Violation of the Opium Law in Japan, by Year

	1993	1994	1995	1996	1997	1998	1999	2000	2001
Total	132	222	172	141	161	134	128	67	49
Illegal Cultivation	62	128	111	102	95	95	85	48	20
Ratio	47.0 %	57.7 %	64.5 %	72 %	59 %	71 %	66.4 %	72 %	40.80 %

Data obtained from the Ministry of Health, Labour and Welfare, the National Police Agency, and the Japan Coast Guard.

Progression of Arrested Cannabis Related Criminals and Volume of Seizure in Japan

		1993	1994	1995	1996	1997	1998	1999	2000	2001
Number of arrested cases		2,871	2,675	2,314	2,098	1,874	2,111	1,764	1,815	2,321
Number of arrested criminals		2,055	2,103	1,555	1,306	1,175	1,316	1,224	1,224	1,525
Volume of seizure	Dried cannabis (including cannabis tobacco)	612.0kg	290.1kg	208.1kg	172.7kg	155.1kg	120.9kg	565.9kg	310.3kg	844.0kg
	Cannabis resin	29.7kg	97kg	130.7kg	145.1kg	107.4kg	214.6kg	200.3kg	185.4kg	73.5kg

Data obtained from the Ministry of Health, Labour and Welfare, the National Police Agency, the Ministry of Finance, and the Japan Coast Guard.

Number of Stimulant Drug Offences and Amount of Drugs Seized in Japan, by year

	1993	1994	1995	1996	1997	1998	1999	2000	2001
Cases	21,671	20,056	23,731	26,959	27,152	22,753	24,419	26,227	25,060
Number Arrested	15,495	14,896	17,364	19,666	19,937	17,084	18,491	19,156	18,110
Amount of Drug Seized	96.8kg	313.8kg	88.4kg	652.2kg	172.9kg	549.7kg	1,994.5kg	1,030.5kg	419.2kg

Number Arrested among Violators of the Narcotics and Psychotropics Control Law in Japan, by Year and by Drug

	1993		1994		1995		1996		1997		1998		1999		2000		2001	
	N.A.	%	N.A.	%	N.A.	%	N.A.	%	N.A.	%	N.A.	%	N.A.	%	N.A.	%	N.A.	%
Heroin	111	31.4	79	23.0	82	24.6	38	13.8	49	20.6	65	23.5	52	18.2	48	19	36	13.3
Cocaine	126	35.7	136	31.7	129	38.6	94	34.2	64	26.9	98	35.4	87	304	63	25	58	21.4
Psychotropics	84	23.8	91	26.5	64	1.2	78	28.4	63	26.5	44	159	57	199	35	14	42	15.5
Others	32	9.1	37	10.8	59	17.7	65	23.6	62	26.1	70	25.3	90	315	108	42.5	135	41.8
Total	353	100.0	343	100.0	344	100.0	275	100.0	238	100.0	277	100.0	286	100.0	254	100.0	271	100.0

Drug Seizures Relating to Narcotics Offences Classified by the Type of Drug in Japan

Item	**Total Number**		Compared with Previous Year
	2000	2001	
Heroin	7.0kg	4.5kg	－ 2.5kg
Cocaine	15.6kg	23.7kg	＋ 8.1kg
LSD	Equivalent to 53,087 tablets	Equivalent to 644 tablets	Equivalent to － 52,443 tablets
MDMA	78,006 tablets	112,742 tablets	＋ 34,736 tablets
Raw Opium	9.0kg	11.4kg	＋ 2.4kg
Cannabis Fiber	185.4kg	73.5kg	－ 111.9kg
Dried Cannabis (including cannabis tobacco)	310.3kg	844.0kg	＋ 533.7kg

Changes in the Number of Violations of the Law on Special Provisions for Narcotics in Japan

	1992	**1993**	**1994**	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**	**2001**
Violation of Article 5 (Illegal import, etc. as business)	1	3	2	4	24	26	24	19	32	11
Violation of Article 6 (Concealment of illegal profit, etc.)		1		2	2		2	1		3
Violation (Reception of illegal profit, etc.)			1							

Source: "The General Situation of Administrative Measures against Narcotic Drugs and Stimulants Abuse" Compliance And Narcotic Division, Pharmaceutical and Food Safety Bureau, Ministry of Health, Labour and Welfare, Tokyo, Japan. October 2002.

Group 2

COUNTERMEASURES AGAINST ORGANIZED CRIME

Chairperson	Mr Aro Siinmaa	(Estonia)
Co-Chairperson	Ms Diah Ayu Hartati	(Indonesia)
Rapporteur	Mr Krirkkiat Budhasathi	(Thailand)
Co-Rapporteur	Mr Masato Nakauchi	(Japan)
Members	Mr Mohamed Gamal El Miggbbir	(Egypt)
	Mr Hussain Rasheed Yoosuf	(Maldives)
	Mr Toshihiro Suzuki	(Japan)
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	Prof. Kenji Teramura	(Japan)

I. INTRODUCTION

Organized crime is profit orientated and thus drug trafficking has become one of the fundamental sources of income for a large number of criminal organizations. At the same time criminals are interested in being able to enjoy their illegal proceeds without interference from law enforcement agencies, so the issue of money laundering is also increasingly becoming an international concern. Competent authorities of most countries have recognized that in order to cope with these global threats a new level of international cooperation has to be reached, but different legal systems based on different cultural and historical backgrounds have made this task difficult to accomplish. In order to coordinate international efforts to battle organized crime the United Nations passed the Convention against Transnational Organized Crime (hereinafter referred to as "UN TOC Convention") in the year 2000. Besides other suggestions this convention also encourages countries to allow the appropriate use of special investigative techniques as controlled delivery, electronic and other forms of surveillance and undercover operations. The UN TOC Convention also requires criminalization of participation in an organized criminal group and obstruction of justice as well as points out the necessity for transfer of criminal proceedings, protection of witnesses or victims and the possibility of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence covered by the Convention. It can be said that the UN TOC Convention manifests the bare fact of reality that conventional investigative tools are not sufficient to dismantle powerful criminal syndicates that have a strong infrastructure and effectively enforced rules of their own.

This report tries to approach the problem of transnational organized crime in the guiding light of the UN TOC Convention by at first collecting and analyzing information on the nature of organized crime in participating countries and after that researching the possibilities to use special investigative techniques under the conditions prescribed by each country's domestic law. The paper mainly focuses on the aspect of following proper procedure to secure admissibility of evidence in court. It is vital to acknowledge that joint efforts of different law enforcement agencies both domestically and internationally and especially close cooperation between investigators and prosecutors are inevitable in order to convict organized criminals. Every sub-topic of the report also addresses the issue of balance between the fundamental rights such as privacy of individuals and the efforts of law enforcement to protect the society against the

menace of organized crime. Unfortunately the utilization of special investigative techniques introduces a higher level of risk for law enforcement officers, but as criminals constantly take risks in their operations, counter operations must also involve taking calculated risks in order to achieve satisfactory results. While tackling organized crime investigators and prosecutors have to maximize their personal commitment and creativity and not merely follow the law but explore every possibility to interpret the boundaries of the law to the limit in order to match the attempts of the criminals to use the rules of legal procedure as a protective shield.

II. SITUATION OF ORGANIZED CRIME IN PARTICIPATING COUNTRIES

We have surveyed and gathered information from the participants in this training course regarding the situation of organized crime in their countries. The result shows that each country has a different experience facing the organized crime groups as follows:

Bhutan, Malaysia and Maldives

They have no information about organized crime or transnational crime.

Egypt

Organized crimes in their traditional form are unknown in Egypt. Crime in Egypt is mainly of an individual nature, or is in a form of gangs consisting of several members formed to commit a crime or crimes, which subsequently disperse.

Estonia

The Estonian Penal Code, which codifies all criminal offences, has a special provision for organized crime that makes membership in, or the forming of criminal organizations or recruiting members thereto or leading such organizations or parts thereof punishable. Unfortunately during its period of validity there has been only one case when a leader and members of an organized criminal group were actually convicted by virtue of this provision. That particular group was engaged in organized car theft and smuggling of stolen cars to Estonia. So from a strictly legal point of view the involvement of organized criminal groups in drug trafficking and money laundering has not been officially detected. On the other hand the information provided by agencies that deal with analysis of criminal intelligence indicates that drug trafficking is almost completely controlled by criminal organizations. One reason for the lack of actual criminal cases is that due to the small size and population of the country the use of several effective investigative methods is seriously handicapped. The structure and methods of organized criminal groups in Estonia are similar to those of the so-called Russian mafia because many leaders and members of criminal organizations are of Russian or other former soviet republics' origin, some of the groups have strong ties with Russian organized crime. Estonian organized crime is also expanding its turf to Finland, Scandinavia and Germany. The so called "white collar" trend in organized crime has become more obvious during the last few years and according to The Estonian Central Criminal Police criminal organizations are currently seeking new possibilities to invest their illegally acquired money into legal business. Unfortunately to this day not a single scheme of laundering drug money has been actually detected and nobody has been indicted for such a crime.

India

The organized crime scenario has not been studied in depth so far. A typical hierarchical structure or syndicate of large scale has not come to notice as far as drug trafficking is concerned. Crime involving real estate operators has to a certain extent been influenced by organized gangs in its facilitation. Organized gangs in the real estate sector and extortion in the movie making industry do generate

sufficient money which requires laundering. The real estate sector and the movie industry can at times border on criminal activity if extortion or threats come into play otherwise they are mainly cases of tax evasion. However, there is no clear link established between these crimes and drug trafficking.

Indonesia

Organized crime groups of West African origin are heavily involved in drug trafficking into Indonesia. In many instances, these traffickers use female Indonesians as couriers. The presence of Nigerian crime enterprises, considered one of the international drug syndicates, has seemingly influenced a number of local communities in Jakarta to support their drug trafficking activities as a means of livelihood. The geographical location of Indonesia, the porous borders, inadequate customs personnel and other forms of law enforcement make it an attractive business location for drug traffickers.

Japan

Japan is a demand country for methamphetamines from the South East Asia region and has not recognized the existence of clandestine laboratories yet. In this situation, Japan has "organized criminal groups" involved in drug trafficking and smuggling. These groups can be categorized as some local criminal groups called *Boryokudan* and some foreign criminal groups such as "Iranian traffickers groups", "Chinese traffickers groups", "Nepalese traffickers groups" and so on. In fact, both types of criminal groups certainly create network links in the process of drug distribution. For example, Chinese traffickers groups distribute stimulants to Iranian traffickers groups via *Boryokudan* groups and Nepalese traffickers groups distribute cannabis resin to Iranian traffickers groups. Moreover, there was a case of a *Boryokudan* group that knowingly received drug offence proceeds from an Iranian trafficker group. In addition, the connection between these groups might be more complicated because of the establishment of a network among some groups in the global market.

Laos

Laos has no information about classical structure organized crime groups but group commission of crime does exist.

Pakistan

Pakistan is a victim country being used as a transit route for drug trafficking from Afghanistan to the European markets. The drug trafficking organized crime groups exist in Pakistan: however, they do not have a clear identity like in some countries.

Philippines

In recent years, domestic production of methamphetamine has become a growing problem, but most of the supply is smuggled into the Philippines from surrounding countries, primarily the Peoples Republic of China as well as the origin of the precursor chemical. The Philippines also serves as a transhipment point to further export methamphetamine to Japan, Australia, South Korea, the U.S., Guam, and Saipan.

Based on the results of the Intelligence Workshop conducted by the Philippine Drug Enforcement Agency (PDEA) in 2002, 11 transnational drug syndicates were identified to operate in the country while the number of local organized drug groups was pegged at 215.

Tanzania

There are organized criminal groups committing major frauds, illegal firearms dealings, poaching, corruption, violent crimes, financial and economic crimes, illicit drug trafficking, money laundering and terrorism. They are defined as being involved in a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences in order to obtain, directly or indirectly, a financial or other material benefit. Before 1985, organized

criminal groups operated locally. But now the scene has changed. They are becoming more sophisticated and international especially in illicit drug trafficking, frauds and terrorism.

Thailand

Due to its location close to the golden triangle, where large supplies of drugs are made for the world market, organized groups of drug producers and smugglers are dominant and have network links to many countries. In addition, since the country has a policy of welcoming tourists in order to help their economy, many international criminal groups use such channels to enter into Thailand and spread over the country. Bangkok has become a hub for global organized crime syndicates, which use the city to transport drugs, people and firearms, and to set up international prostitution rings. Related crimes such as false documents, fraud and money laundering increase their volumes consequently. In the tourist areas, for example, Pattaya, Russians and Japanese criminal networks are established and link to groups in their own countries. Human traffickers from China also use Thailand as the transit place to get false documents for their customers before transporting them to a third country.

III. SITUATION AND PROBLEMS OF NEW INVESTIGATION TECHNIQUES

A. Controlled Delivery

1. Definitions and Essence of Controlled Delivery

Controlled delivery is commonly recognized as the technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or more states, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of persons involved in the commission of the offence. (See Article 2 (i) of the UN TOC Convention.)

The UN TOC Convention requires State Parties to use the necessary techniques to allow for the appropriate use of controlled delivery, if permitted by the basic principle of its domestic legal system (paragraph 1 of Article 20).

The goals of controlled delivery are:

(i) To broaden the investigation to higher levels of the criminal organizations
(ii) To get additional evidence in cases concerning organized smuggling
(iii) To get proof that the violations of law are intentional
(iv) To discover storage places for smuggled goods and seize additional contraband
(v) To detect the final destination of smuggled goods

The controlled delivery method could be utilized inside one country's jurisdiction or it could be conducted with international cooperation by allowing controlled transportation of smuggled goods over the borders of one or more countries.

Controlled delivery could be carried out by:

(i) Recruiting a cooperative suspect after initial recovery of the contraband
(ii) Using a "blind courier", by covert surveillance of the smuggled goods without the cooperation of the suspect, in which case the suspect does not know, that the contraband was discovered by customs officials or the contraband is smuggled by a courier company that has not been informed of the controlled delivery
(iii) Using the cooperation of the courier company for conducting the controlled delivery operation

2. Current Situation

Several participating countries of the 125th UNAFEI International Training Course have utilized controlled delivery successfully, bringing to justice the leaders of criminal groups rather than merely arresting couriers or seizing drugs which unknown persons own. Controlled delivery has been used, not

only domestically but also internationally, in cases where the consignments aere delivered to other countries. However, each country has somewhat different laws and approaches in this matter. For example, there are two types of controlled delivery, namely live controlled delivery that allows the original contraband to be moved to its final destination under control of law enforcement officers and clean controlled delivery, in which case law enforcement agencies remove and substitute drugs with a harmless substance before allowing the consignments to be delivered. In this connection, some countries such as Egypt, Malaysia and Indonesia will allow only the live controlled delivery operations while some, such as Japan and Estonia, can accept clean and live operations. Thailand, which is in the front line in the fight against drug crimes, has just had controlled delivery provisions incorporated into her laws last year and is in the process of using this method. Also, the scope of controlled delivery is different from one country to another. In some countries, beyond drug trafficking, this technique is used to investigate other types of crimes such as illegal firearms trafficking and money laundering. When the controlled delivery technique is employed for money laundering investigations, it appears that, in some cases, a money remittance is allowed under the supervision of the authorities. The purpose is to get a clear picture of the final destination of the money and the crime network.

3. Common Issues, Problems and Solutions

(i) Live operations and clean operations

As mentioned above, the members of the group recognized that controlled delivery is one of the good methods for arresting suspects and seizing illicit drugs. We also discussed the differences between the use of live and clean controlled delivery operations. In other words, we sought to determine which operation would be more effective. With regard to both operations, we analyzed the advantages and disadvantages as follows:

Advantages for live controlled delivery operations

- Possibility of obtaining indefensible evidence that the suspects have conducted drug smuggling, in particular the chance of disclosing the transaction of drug trafficking and of annihilating organized criminal groups
- Reduction of the risk of controlled delivery operations being exposed by the suspects, especially in cases in which the final destination of the delivery was unclearDisadvantages for live controlled delivery operations
- Burden of carrying out the surveillance
- Hazardous aspect of the disappearance of the drugs and the suspects Advantage for clean controlled delivery operations
- Prevention of the disappearance of the drugs or other smuggled itemsDisadvantage for clean controlled delivery operations
- Risk of disclosing the controlled delivery operation
- Risk of losing the evidence of the fact that the suspect is conducting drug smuggling

As a result, it is always necessary to consider the checks and balances before law enforcement agencies decide to launch controlled delivery operations. In addition, before performance of such operations, it will be necessary to collect and evaluate all available information on whether the delivery situation is part of a systematic smuggling operation, if the recipient is a member of a criminal group and whether he has a prior criminal record. Utilization of informants should also be considered. Before arresting or approaching the offender, law enforcement agencies should analyze information about him/her including their, contacts, means of communication and address to evaluate the possibility of recruiting the suspect after arrest. At this point it is to be decided, if the offender can be recruited for the controlled delivery or the controlled delivery should be carried out by covert surveillance of the offender to the final destination of the smuggled goods.

(ii) How to use the results of controlled delivery as admissible evidence in the trial stage

Controlled delivery is mostly conducted in the investigative stage of a criminal case for assembling information to reach the criminal networks. Nevertheless, the officers who employ this technique must carefully plan and prepare the operation in order to guarantee the success of the seizure and arrest and ensure the evidence can be used at the trial stage. When law enforcement officers detect contraband, it is essential to mark the evidence, packages, containers, etc. to be able to identify them after seizure at the final destination. The contraband should be tested, weighed and evaluated by credible experts. The parcel or container should be photographed or videotaped before and after the search and after its preparation for controlled delivery. Each respective countries procedural law should be applied in order to guarantee the admissibility of the evidence. In this phase of planning of the operation the customs- or police officers should consult prosecutors to avoid misinterpretation of legal details and conduct the controlled delivery in a way such that it can be used as admissible evidence in court. All necessary warrants to conduct electronic surveillance or searches and seizures etc. should be obtained before carrying out the actual operation.

(iii) The cooperation of concerned law enforcement agencies at the international level and national level

Controlled delivery may be conducted within only the country where the drugs are detected or with the cooperation of countries from where the drugs are originated, transited and where they are delivered to the receiver. The major concern is that in order to get good results the controlled delivery should often be done promptly and without any delay to prevent the awareness of targeted offenders. Therefore cooperation of all concerned authorities is required. On the international level, the cooperation may be achieved through bilateral or multilateral agreements between countries, good contacts between law enforcement agencies and by regular information exchange. It should be pointed out that in order to conduct successful controlled delivery, the concerned countries should have already established good relations before starting the process. It would be useful to have mutual understanding treaties or guidelines beforehand for smooth cooperation among the concerned countries. The same approach can be applied to domestic operations as well. Many authorities may be involved in conducting a controlled delivery operation i.e. police, customs office, narcotics office, border guard, port officers, courier services, telecommunication companies. Therefore, these authorities will have to cooperate with each other. One way to organize smooth operations is to set up fundamental guideline for the concerned authorities to be followed in a controlled delivery situation.

(iv) Utilization of cooperative offenders for controlled delivery

The cooperation of an offender to carry and deliver the detected drugs to his criminal network under supervision of law enforcement officials is also recognized as one method of controlled delivery. However, comprehensive prior arrangements among competent authorities will be needed before starting this process. One of the difficulties in employing this technique is to negotiate with the offender for their cooperation. Some countries may provide an immunity system subject to their laws to facilitate such cooperation. On the other hand, many countries do not have such a system and officers have to rely on the so-called "gentleman's agreement" in negotiations with the offender. Usually the operating officers may not be able to give any promises to the offender. In this case it is essential for investigators to cooperate with prosecutors, who have first hand knowledge of the sentencing system and who can influence the sentencing at the trial stage. If the respective country has a plea bargain system, the prosecutors could directly inform the offender of the difference in imposed penalties in case of refusing or accepting cooperation. In the absence of a plea bargain system the prosecutors may still indirectly influence the court proceedings.If the offender agrees to cooperate, investigators have to evaluate his/her characteristics as to his/her ability to carry out orders and whether his/her unusual behaviour could jeopardize the operation. Law enforcement officials should undertake this kind of an operation only in cases that they

are confident of the offender's reliability, because otherwise there is a significant risk of losing track of the offender as well as of the controlled item. This is one reason why investigators often prefer clean controlled delivery.

(v) Combination of controlled delivery with other investigation techniques

Besides being an independently recognized investigative method controlled delivery is actually conducted with a combination of different investigative and surveillance methods that are utilized to control the movement of the item in question. The process of controlled delivery may be initiated on the information provided by the informants. The informants or undercover agents may also be used to accompany the delivered item or the cooperating offender. Physical covert surveillance of the delivered item or the criminal is often used. Electronic surveillance should also be an essential part of the delivery. For example, if an electronic device attached to the delivered item could be used to position the location of the item or notify the investigators of the disclosure of the item, it would make the controlled delivery almost perfect. In such case the officials would know the appropriate time to enter the offender's house, office or other respective location and arrest him with the evidence. However in most of the countries regular investigators are not qualified to operate electronic surveillance equipment and therefore experts or special units should participate in carrying out the operation.

(vi) Appropriate timing to enter the targeted house/location

The most difficult point of controlled delivery operations is to decide on the appropriate time to arrest the offender along with the controlled item in order to create strong evidence. If the law enforcement agency enters into the targeted house/location before the parcel is opened, the offender may raise an excuse that the parcel is delivered as a mistake and he/she has an intention to return it to the courier service. In addition, early arrest may cut off the offender from the criminal network or alert the higher levels of his/her organizations, which the operation is intended to reach by employing controlled delivery. On the other hand, the delay of arrest will increase the probability of the criminal's escape or losing track of the offender and the controlled item. Appropriate timing of entering the house/location to make arrest or seizure, therefore, is of utmost importance. Nevertheless, officers should not enter the suspect's house/location before he/she has completely opened the parcel. When the parcel has already been opened, he/she cannot decline being the recipient. As aforementioned, law enforcement agencies may have to rely on an advanced electronic device to inform them of the right time to enter the offender's house/location and arrest him with the incriminating evidence.

(vii) Limitations on the usage of the controlled delivery method

Controlled delivery, especially live CD, is an investigative method involving a high level of risk and requiring vast professional skill and knowledge on the part of the investigator. When controlled delivery is employed, we should consider the cost-effectiveness and the time frame constraints for this method compared to other investigative techniques in advance. Nevertheless, we recognize it ought to be a beneficial technique to establish a link between the illicit drugs exposed and high-level criminals to achieve the goal of combating organized crime. In order to operate controlled delivery effectively, we need to combine it with other appropriate techniques such as utilization of the informant, the undercover agent and an electronic indicator for a parcel opened, and to fully conduct the follow-up investigation to gain the evidence which can identify it as an organized crime. It is also critical to conduct the skill-up training with sharing the best practice before launching the operation and to establish a close relationship with the related authorities for the realization of a speedy and smooth operation.

B. Electronic Surveillance and Communication Interception

1. Introduction

There is no concrete definition of this investigative technique. However, it is recognized that some

types of electronic devices such as audio recording, visual recording or wiretapping, will be employed in the investigation. Utilization of electronic surveillance and communication interception are very useful measures for obtaining information of the existing criminal activities and also being able to identify future offences. It is one of the best methods of collecting critical evidence with low risk since the operator and investigator can monitor from a remote distance. The evidence will be admissible and reliable for the prosecution and trial. On the other hand, the application of these methods is a very sensitive issue due to the concern with abusing individual privacy rights.

The goals of electronic surveillance are:

(i) To gather strong and precise evidence with low risk.

(ii) To expose the nature of a criminal offence (organizational structure, network, process, activity and so on).

2. Current Situation

All countries of our group members cover electronic surveillance and communication interception as an investigative technique within their legal framework. Nevertheless, every country, except Egypt, has few cases of conducting wiretapping. One reason may be the safeguard of privacy rights so strict conditions are applied. In concrete terms, all countries are able to use this technique but subject to various conditions. For example, electronic surveillance in a private place such as a residence in the Maldives and Japan is disallowed. However, Egypt, Estonia and Thailand allow it upon permission from a judge while in Indonesia the investigator in a drug case may conduct the surveillance and then submit a report to a court for approval later. In public places, Indonesia, the Maldives, Thailand and Japan do not require prior permission, but Egypt and Estonia require a warrant by a judge.

Beside the legal issues, another general constraint that every country is now facing is the infrastructure and technology issues. Even though electronic surveillance is very effective, the government has to invest a lot of money in order to employ high technology devices. In addition, new communication technologies are introduced to the world market many times a year, particularly multi-function wireless phones, which are used by the organized crime groups. The cyber world and Internet makes money movement easily and can facilitate money laundering as well. The interception of international electronic mail carriers such as Hotmail and Yahoo will need extra cooperation at the international level. Therefore, it is difficult for law enforcement agencies to keep up with the criminals due to lack of expertise and a shortage of budget.

3. Common Issues, Problems and Solutions

(i) Prior approval

In order to protect the rights of privacy of people, it is absolutely essential that permission is obtained from a judge before starting the process of communication interception. In this case, Indonesia has a special provision that grants the Chief of the National Police or the Prosecutor General to issue such permission. In addition, for the drug cases the investigators can wiretap telephones without warrant for a maximum of 30 days and then submit a request to court for approval. In general, the request of an investigator to use this method will be strictly scrutinized by a judge or other authority before granting permission. In most cases, the interception of either a mobile or fixed-line phone shall be equally subject to the prior approval criteria. With regard to the interception of electronic communication like e-mail or website tracing, prior permission is also required. However, in Estonia and Maldives this method is unavailable because of the infrastructural issue. On the other hand, Thailand has faced a technical problem regarding interception of pre-paid phones since there is no ownership registration for such phones.

There are some different approaches among countries regarding electronic surveillance with the consent of persons, such as an audio recorder or wireless microphone attached to an informant or undercover agent, who will participate in the communication with an offender. Indonesia, Thailand and

Japan do not require a prior warrant to do it in public places while Egypt and Estonia always need a warrant issued by a judge regardless of the location.

(ii) Scope of criminal offence

As mentioned, electronic surveillance and communication interception does affect privacy rights, this method should be executed when necessary. In other words, it should be conducted in critical criminal investigations such as when other investigation techniques have not worked or appear unlikely to succeed or would be too dangerous to try. In addition, it shall be applied to investigations in only serious crimes or offences related to organized crime groups. Japanese law provides a clear framework of applicable crimes in which this method can be used such as offences relating to drugs, firearms, human smuggling and organized homicide. Thailand currently can only use this method for offences under the narcotic control law and the anti-money laundering act. Indonesia applies this method to only serious crime cases (imprisonment over 5 years) and drugs cases.

(iii) Duration

The available period for conducting electronic surveillance and communication interception varies from country to country. We found the range from ten days at the first stage in Japan up to a maximum of 90 days in Thailand. Mostly, the average available period is not over 30 days. In a particular case where electronic surveillance is conducted in a public place and no prior permission is required there would be no time limit.

(iv) Approach to non-relevant information

When carrying out communication interception, it is very important to analysis the information received as to whether it is useful and can be used as evidence or not. On the other hand, there will be a lot of non-relevant information in the case i.e. social talk or private discussions. This information should be deleted or cut off since it is generally not admissible in court. The disclosure of such information, even not related to the case, is prohibited to protect privacy rights. However, during electronic surveillance and communication interception, if the investigator unexpectedly found information involving other crimes or a plan to commit imminent crimes outside the scope of the permission, for example, to commit some serious crimes such as murder or firearms trafficking. In this situation, there will be a hard decision for the investigators to make. The official may opt to interfere to safeguard a person's life but this may tip-off the suspect and make him aware of the communication interception. On the other hand, such information gathered under the permission of one case may be not be admissible in another case subject to the law of each country. The best solution in such a situation may be to establish a legal framework or guidelines which the investigators can follow. However, it will depend on case-by-case situation.

(v) Post-interception requirement

The process of post-interception is very complicated. In addition to sorting out the non-relevant information, harmonizing the relevant information and making records, there are still some points of concern. We categorize them as follows:

Preservation of evidence

For keeping the eternal evidence, it should be required:- Wiretapping

- Creation of a transcript and a summary report
  (Thailand and Japan - submitting a transcript to the court after that; Egypt - submitting a summary report to the court after that)
- Sealing the record
  - Other devices (audio recording, visual recording)

- Creation of a report and submission to a court
  - Wiretapping and other devices
- Identification by voice analysis

Analysis of the record

Regarding the evidence acquired by those activities, officials should take the necessity action to facilitate its use in a trial. The following action should be taken:

- Translation of foreign languages (Introducing a system to secure competent translators)
- Analysis of slang expressions by appropriate experts
- Analysis of encryptions by appropriate experts

(vi) Cooperation of communication carriers

Unless the provisions of laws clearly specify, the communication carriers such as Telephone Companies or Webmasters will be reluctant to cooperate with the law enforcement. The carriers always try to avoid access to their customers since they are afraid of probable litigation and losing customers. The cooperation of the carriers will help reduce the time it takes to connect the intercepting device to the phone operating device. In Japan, particularly, an observer from the phone company is required to attend the wiretapping with the investigator all the time. In the case of international electronic message carriers e.g. hotmail or yahoo, cooperation may be sought from the local providers who subsidize the service from such carriers.

(vii) Further action

From our discussion, we recognize that electronic surveillance and communication interception is an important tool for law enforcement to get reliable information and evidence to combat serious crime. With the different situations in each country, it is indispensable to explore such tools for further effective use and each country may broaden the scope of their legal framework to facilitate such techniques while paying heed to privacy rights. From a technical point of view, the government should consider allocating a sufficient budget to employ any useful electronic devices to keep up with the criminal groups. Investigators and relevant officials should also learn and be trained in these high technology techniques. Additionally, officials who are engaged in wiretapping should be respectful of human rights, no matter when, where and what he/she does.

C. Undercover Operations

1. Definitions and Essence of Undercover Operations

Undercover operations are the actions that are undertaken by law enforcement to infiltrate criminal organizations, to disclose the mystery of the crime, and to arrest criminals by disguising themselves in civilian clothes, using fake IDs and engaging in criminal activities.

There are various types of undercover operations; for example, one of the simple undercover operations is where an officer pretends to be a customer and buys drugs from pushers or drug traffickers, and accordingly arrests them with search and seizure powers. Of course, there is a type of deep involvement case, where undercover officers infiltrate criminal groups and become a member of the group in a more sophisticated manner and for an extended period, and gather information and evidence. This type of operation enables the police to obtain information even about future criminal activities.

Undercover operations cover a wide range of the investigation area from intelligence-gathering to evidence-collecting.

The initial targets of this investigative technique are usually the “big dealers or criminals”. Then, the officer(s) usually start going after the “small” fries, accumulating suspects and case materials as they go. The police supervisor, and sometimes, prosecutors make a decision early on about whether enough “big” cases will likely be revealed.

One of the main purposes of undercover operations is to gather enough information to enable a successful prosecution. This technique is useful to obtain physical evidence (by purchasing drugs or other contraband). However, it is believed that undercover operations are effective in combating crime especially committed by members of organized criminal groups who conspire in secret. Therefore, Article 20 Para 1 of UN TOC Convention encourages State Party to use undercover operations. In such cases, without cooperation of the conspirator or insider, it is difficult to prove the clandestine criminal activities.

2. Current Situation

Most countries have recently experienced a significant expansion in the use of undercover police tactics as well as technological means of surveillance, especially in drug trafficking cases.

The variety of undercover operations is diverse. For example, in Egypt, the usual pattern is to bring the undercover officer in as the girlfriend or boyfriend of an informant. Once it is clear to all the parties involved that the officer is single again, another undercover officer is brought in the same manner. The undercover officers use false names, false identifications, false household registration certificates and other false identification documents.

Most of the participating countries of the 125th UNAFEI Course use undercover operations. However, as far as the countries of Group two are concerned, such a deep involvement of undercover officers has not been experienced. One of the reasons is that such involvement is risky and dangerous for officers. Another reason is the difficulty in proving the legality of the operation in case of such involvement.

In Japan, in general, organized criminal groups called *Boryokudan* are tightly structured based on personal trust, and therefore it is extremely difficult for undercover officers to infiltrate such strongly united organizations.

Regarding money laundering investigation, storefront operations have been successfully conducted in some countries. In those cases, the undercover officers act on behalf of the criminals in placing or layering the dirty cash, usually by collecting the cash from the suspects and moving it through the undercover channels to the bank account or other destination designated by the criminal. Even in sting operations, the agencies set up a fake bank or firm, and they send money to destinations designated by the criminal, until they finally determine the money laundering scheme and the location of the proceeds of crime.

3. Common Issues, Problems and Solutions

(i) Legal issues

It is a common understanding that undercover officers are prohibited from inducing any plan to commit a crime. The violation of this rule constitutes an entrapment defence.

The Supreme Court in the U.S. in 1992 held that law enforcement officers "...may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the government may prosecute". Therefore, there are two questions: the first one is whether undercover officers induced the defendant to commit the crime. The second one is, assuming the government improperly induced the defendant to commit the crime, whether the defendant nevertheless was predisposed to commit the criminal act prior to first being approached by government agents. In the U.S., inducement focuses on the government conduct, while predisposition focuses on the defendant's actions and statements. Therefore, the mere presentation of the opportunity to commit the crime does not constitute entrapment. Inducement now requires more than merely establishing that an officer approached and requested a defendant to engage in criminal conduct. The defendant must prove he/she was unduly persuaded, threatened, coerced, harassed or offered pleas based on sympathy or friendship by the police.

On the other hand, the liability of undercover officers is also an issue. However, irrespective of the

reasons, undercover officers should not be liable for their conduct, provided that the conduct is permitted under the rules or regulations. If necessary, it is a must to give undercover officers immunity from civil and criminal liability for actions undertaken in the course of undercover operations.

(ii) How to ensure appropriate operations

Although undercover operations can lead to a successful prosecution, there are various risks and heavy demands on officers. Undercover operations are one of the most notable exceptions to uniformed duty and the most problematic area of law enforcement. There is always a risk that the officer's identity will be disclosed. Of course, he/she may face unexpected situations at any time; for example, he/she may be placed in a situation where they are compelled to break laws, even kill someone, by the demands of the criminals. Especially in the case where the undercover officer is deeply involved in a criminal group for a long period of time, he/she has to manage the numerous stresses inherent in this sensitive task.

Undercover operations require the officers to obtain special skills and experiences. In addition to that, careful and well-organized planning and preparation is indispensable for ensuring successful operations. In this context, it is essential to establish an appropriate guidelines for the use of undercover operations, like the Attorney General's Guidelines on Federal Bureau of Investigation Undercover Operations. What is allowed and what is not allowed for them should be instructed precisely, including the use of government money. For example, in a situation where an officer needs to maintain his/her credibility and covert identity, he/she may be justified in participating in certain categories of criminal activities, although the scope of such justification differs among countries. Needless to say, all situations cannot be predicted; nevertheless, guidelines are still valuable for undercover officers by highlighting various situations.

The authorization to initiate undercover operations is an important issue. In some countries, certain types of sensitive undercover operations are required to obtain high level or even the highest level approval of the Justice Department, or the approval of a judge in advance.

It is also imperative that the undercover operations are closely monitored by the head of the agencies and prosecutors to prevent any possible risks and problems. At the same time, it is the most crucial factor to ensure the safety of the undercover officers. The other supporting officers always have to assist them and to be ready for action. The agent may reincarnate as a criminal or eventually become a double agent if he/she is long and deeply involved in undercover operations. It is often pointed out that it may be difficult to reintegrate the undercover officers into the law enforcement agency because his/her lifestyle has been totally changed.

Appropriate care should be provided not only during the operations but also after the operations. Adequate training should be provided to undercover officers. This could give them the necessary skills, as well as advice, to cope with highly stressful situations.

Recruitment is one of the major challenges. In some cases, the authorities need someone bold and a new recruit may fit the bill. Recruits from out of town are sometimes preferred, as are ethnic-looking recruits with foreign language skills and attractive females. The reason why new and inexperienced officers are used is that someone who thinks, looks and acts like a police officer is not suitable.

It is important to consult with prosecutors and relevant agencies before stating undercover operations in order to accomplish their mission.

In the U.S. any complex undercover operations are subject to review by an Undercover Review Committee, which is a good tool to screen and monitor the undercover operations from both the legal and practical point of view.

(iii) Combination of other techniques

The use of reliable informants in collaboration with undercover operations to reveal and to identify criminal activities is very useful. In addition, the attachment of a listening device, a transmitter or any other form of electronic surveillance, where it is not possible to be identified by the offender during

undercover operations can be useful. Such recording devices can demonstrate not only strong evidence to prove the fact but also legality of the operation itself.

D. Immunity System

1. Definition and Goals

The concept of immunity deals with an agreement binding prosecutors/competent authorities to terminate a present prosecution or to undertake not to conduct a future prosecution in respect of a specified offence or offences, in return for giving testimony in court. This system compels a person to testify in return for the promise that he/she may not be prosecuted in the future. There are a variety of types of immunity: in some countries such as the U.S., cooperation agreements between prosecutors and suspects is available, in which if the suspect agrees to plead guilty, to truthfully cooperate with the prosecution and to testify in court, the court will reduce the sentence based on a request by the prosecutors.[1]

Immunity is one of the successful tools to enhance the potential of witness cooperation for combating organized crime, including drug trafficking and money laundering. Without the testimony of witnesses, we cannot always convict a person in court proceedings. If we obtain the cooperation of key witnesses in return for granting immunity, we can then identify other criminals, and even reach persons of greater culpability in organized criminal groups. When a co-accused is willing to cooperate and testify, it will significantly contribute to reveal the whole story of the crime committed. Since the motivation for cooperation by a criminal is, in reality, to get lenient punishment or non-prosecution for his/her crime, a grant of immunity can facilitate the cooperation.

2. Current Situation

Some participating countries of the 125th UNAFEI Course such as Indonesia, Egypt, India, Pakistan, Philippines and Thailand, have an Immunity System.

As for Indonesia, Law No. 15/2002 - Section 43 stipulates that the government has to guarantee that a reporter who reported the money laundering crimes cannot be prosecuted because of their reports or their testimony.

Regarding India, NDPS Act 1985 section 64 (1) provides that the Central Government or the State Government may, if it is of the opinion that with a view to obtaining evidence of any person appearing to have been directly or indirectly concerned in or privy to the contravention of any of the provisions of this act or of any rule or order made there under it is necessary or expedient to do so, tender to such person immunity from prosecution for any offence under this act or under the Indian Penal Code condition of his making a full and true disclosure of the whole circumstances relating to such contravention.

In the U.S., immunity is often utilized. In the U.S., there are two types of immunity: one is "transactional immunity" which protects a person from subsequent prosecution for any offence involved. Another is "use and derivative use immunity" which provides that a person's testimony shall not be used against him/her; however, he/she may be prosecuted for any crime based on other evidence. In the case of use and derivative use immunity, it is required that the evidence that the prosecution proposes to use is derived from a legitimate source wholly independent of the compelled testimony. As far as federal criminal procedure is concerned, it is required to seek a court order to compel testimony when immunity is granted. In the U.S., the immunity system has proved to be effective in detecting organized criminal groups.

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[1] Article 26 Para 3 of UN TOC Convention suggests "Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence covered by this Convention".

Immunity from liability for crimes committed is not available in the Republic of Estonia. This rule does not apply only to crimes that have been committed on the basis of the permission issued by the court to imitate a crime. Imitation of a crime is an investigative tool provided by the Surveillance Act and is utilized mainly as a legal basis for undercover operations or controlled delivery. Prior to September 1, 2002 section 501 of the Criminal Code applied in which prosecutors could apply to the court for the release of a convicted offender from punishment if important evidence provided by him/her resulted in the discovery of the truth and the conviction in a criminal case or cases of another person/persons. This provision can still be used, if the offender provided important evidence before September 1, 2002. One possible measure to secure cooperation of offenders is the utilization of the plea agreement system provided by the Estonian law of criminal procedure. Namely prosecutors can take into consideration the offender's cooperation while proposing a sentence during the process of plea bargain negotiations or to reach a plea agreement with one offender and afterwards summon that offender as a witness at the trial of other perpetrators of the same crime.

On the other hand, some countries such as Japan and the Maldives, have no immunity system or any other similar system. For example, in Japan, according to the precedent, a confession is not admissible if it was induced by a promise offered by the police officers or prosecutors that they would not be prosecuted, and therefore an immunity system is deemed inconsistent with this rule.

3. Common Issues, Problems and Solutions

Although an immunity system could be utilized to effectively tackle organized crime, there are still some concerns for the introduction of immunity.

(i) Principle of equality

Under an immunity system, real criminals are actually immune from prosecution and punishment in some cases. This may raise an issue of whether this is unfair or not, or this is acceptable or not from the standpoint of realizing justice.

(ii) Public perception

With an immunity system it is recognized that the state makes a deal with criminals. In countries where plea-bargaining is not available, such kinds of deals may not be acceptable for the citizens. Since criminal justice systems are different from one country to another because of each country's history, culture and concepts, any particular system should be consistent with their citizens' attitude toward crime and punishment.

(iii) Possibility of abuse of the power

If prosecutors are careless or rely too much on immunity, people may lose confidence in the criminal justice system and dilute the deterrent effects which criminal laws have.

Even though immunity is introduced or utilized, it is important to carefully review whether public interests of justice derived from granting immunity to a person outweigh the mere prosecution of such a person or not. The major factors to be considered in measuring the relevant interests should be as follows; (a) the seriousness of the offence, (b) the importance of the evidence or assistance, (c) the culpability of the person seeking immunity and his/her criminal history, (d) the credibility of the testimony of the person seeking immunity, (e) whether protection of the public generally would be better achieved by the proffered assistance or by prosecuting the person seeking immunity, (f) whether the person seeking immunity is an accomplice who will be obliged to testify while charges against him/her are pending, and (g) the perceived interests of any victims.

In this connection, it could be also better to establish clear guidelines and regulations for granting immunity in order to ensure its fair and appropriate application, like the United States Attorney Manual.

In addition to immunity, Article 26 Para 2 of the UN TOC Convention states that each state party shall

consider providing for the possibility of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence covered by this Convention. Even though immunity or a cooperation agreement is not used, due consideration to such substantial cooperation is of course fair and encouraged, and it will be beneficial to secure cooperating witnesses as well.

E. Witness Protection Programme

1. Introduction

It is recognized that a witness is an essential factor to severely punish the members of an organized criminal group. As a result of the successful proof of the facts by a witness's testimony in court, it could positively eradicate them. Therefore, witness protection is indispensable to protect a witness in the process of criminal investigation and trial.

For example, there are many types of threats against witnesses: threatening letters sent by the organized criminal group, stalking around his/her house, and drive-by shooting at the witness's house. Ultimately the group may try to murder the witness.

It is therefore, necessary to completely protect the witness and his/her family from fear of reprisal at the hands of the organized criminal group.

The style of witness protection is different between each country. We recognize that in some countries witness protection programmes are provided for all crimes and in other countries it is available only for specified serious crimes.

2. The Existing Picture of Witness Protection Programmes

There are various types of witness protection programme. The typical measures of witness protection are as follows:

- Concealing identity
- Changing identity
- Relocation
- Escort and protection by police
- Social psychological and medical assistance
- Providing suitable shelter
- Financial aid, support and assistance
- Helping the witness find a job

The measures in the trial stage are as follows:

- Witness attendants
- Screen to make witnesses invisible to defendant and spectators
- Video link system

Each measure has some advantages and disadvantages. For example, concealing identity may be an effective measure to prevent threats and violence to the witness, but it may be unfair to the rights of the defence. The important point to note is to balance the necessity of witness protection and the rights of the defence. Some countries make use of changing identity and relocation as proficient methods of witness protection, but it cannot be utilized in small communities or if the witness doesn't want to do so. For example, in some countries like Thailand, people have strong family and community bonds and most witnesses may not wish to relocate to another area. Some measures such as relocation are expensive and a police escort requires manpower. With regard to financial support, it might happen that a witness will give false testimony to enjoy the benefits of protection. So we need to consider whether or not the case is worth taking such measures and how long assistance should be given.

Another significant aspect of witness protection is whether or not it should be extended to the witness's family members or persons in a close relationship with the witness.

3. Current Situation

(i) Thailand

In Thailand, the Witness Protection in Criminal Case Act will be effective by the end of 2003. Under this Act, the responsibility of witness protection will be vested in the Witness Protection Office, Ministry of Justice (pending establishment). This Act will provide general and special measures for witness protection. In general cases, the investigator, prosecutor, court or the Witness Protection Office, at the request of a witness or related person that they may not be safe, will provide suitable protection to such persons. The protection includes police escort and other measures. Moreover, in some specific cases i.e. (1) offences relating to drugs, anti-money laundering, anti-corruption, customs, (2) offences against state security, (3) offences relating to sexual exploitation, (4) offences relating to organized criminal groups, (5) offences which have an imprisonment term of at least ten years or more and (6) any case which the Witness Protection Office deems fit, a witness may receive special protection. The Minister of Justice may order the use of special measures for witness protection. The measures include relocation of a witness' residence, changing the witness' identity and record, providing living allowances for up to one year and may be extended but for no longer than two years, and job training or education. An important point to note in this Act is that both general and special measures can be extended to the witness's spouse, parents, children and persons in a close relationship with such witness, subject to their consent.

(ii) Estonia

In Estonia, with its small area and population, it is almost impossible to implement a classical model of witness protection where a key witness is given a new identity, relocated and provided with a new job inside the country. With relocation to other countries the language issue could become an obstacle. Currently negotiations are being held with neighbouring countries to set up a joint witness protection system or provide possibilities for relocating witnesses on a bilateral basis. Also a law is being drafted to provide the necessary legal framework for witness protection. Estonian law does not currently include special provisions for physical police protection of witnesses, safe houses or any other forms of supporting witnesses. In practice it is left up to the goodwill and creativity of law enforcement agencies and officers, as to how they can guarantee the safety of people whose testimony is essential for successful prosecution. In this respect it is vital for police officers and prosecutors to work together and decide which precautions are necessary to take. It is becoming more and more usual for police officers to accompany important witnesses to trial, to drive them to the courthouse and back in case of a possible threat to their safety. Often plain clothes policemen just casually watch the court proceedings as common spectators or move around in the lobby of the court building where witnesses are waiting to be called to testify, to detect and prevent any attempts on the part of criminals and their associates to approach and influence the witnesses before giving their testimony. Police safe houses and apartments also exist in reality and 24- hour physical protection is possible but not often applied because of the lack of manpower and financial resources. More commonly witnesses are advised to stay with their friends or relatives before trial and are instructed to contact investigators or prosecutors immediately in case of any suspicious activities.

The most useful tool of witness protection in Estonia is the provision that allows a witness to remain anonymous if he/she has a justified reason to be afraid for him/herself or the well being of his/her relatives. The interrogation record (witness statement given at the preliminary investigation) of an anonymous witness is enclosed in the criminal file under a fictitious name and does not bare the signature of the witness. A sealed envelope with information concerning the name and contact information of the witness declared anonymous is safely located in the vault of the investigator and later in that of the court. In practice the envelope also contains the original interrogation record that is signed by the witness, so the court can make sure that the statement enclosed in the case file has actually been given by the witness and has not been manipulated by the police. Interrogation of an anonymous witness in the court is conducted separately, in the presence of only the panel of the court. This usually takes place on a different date than

the main court session and often not even in the court building. Defence attorneys and prosecutors may question the anonymous witness in writing through the court. The court has the right to refuse to ask the witness any questions that might reveal his/her identity. After the new Code of Criminal Procedure enters into force on July 1, 2004 the questioning of anonymous witnesses at trial will be done by telephone by the court and the competing parties will still have to submit their questions to the court for evaluation and selection. There have been several problems implementing the anonymous witness system and currently higher courts are trying to limit the exploitation of anonymous witnesses relying on the precedents of the European Court of Human Rights. The basic limitation is that a guilty verdict cannot be based exclusively on statements of anonymous witnesses. The courts have also made it clear that even in the interest of protecting the witness the police cannot create several anonymous witnesses out of one person, also it is prohibited for a witness to give different statements under his/her own name and as an anonymous witness.

(iii) Other Countries

Egypt does not have specific laws including provisions for a witness protection programme and guidelines on how to utilize and coordinate witness protection, but in practice witness protection has been carried out, for example, the witness' home has been watched, they have been escorted to the court by police and the Ministry of Social Affairs has helped them find a job and so on. However, changing someone's identity cannot be used even in the interest of witness protection.

In Indonesia, they have witness protection programmes concerning terrorism crime and human rights crime. Protection is given to witnesses, victims, investigators, prosecutors and judges, and also can be extended to their families. The protection includes protection of life and property, securing their identity and mental care if necessary[2]. Under Law No. 15/2002 Sec. 42 concerning Money Laundering crimes, protection will also be given to witnesses.

In Japan, the Code of Criminal Procedure was amended in 2000 to employ a new witness protection programme at the trial stage. The aim of the amendment is to reduce the mental burden of a witness. The outline of the amendment is below.

a) An attendant of the witness may be allowed in the course of examination (Art.157-2).
b) The setting up of a screen between a witness and an accused or/and between a witness and spectators may be allowed in the course of examination (Art. 157-3).
c) A video linked method of examination, where the witness (being out of the courtroom) testifies to the questioner (being in the courtroom) through a video link, may be allowed in the course of examination (Art. 157-4).

In the Maldives, there is no special provision for witness protection, and actually there are few cases in which witness protection is needed. But the Maldives is now exploring witness protection programmes in order to make provisions for the future.

4. Conclusion

Witness protection covers a wide range of arrangements from formal witness protection programme to informal or temporary assistance such as police escort to and from trial. The methods of protection will depend on the degree of the fear and apprehension of witnesses as well as the level of the possibility of any types of violence or threat against them in each case. In addition, situations in this regard are different among countries.

It is necessary to make guidelines for witness protection including the scope of the persons to be protected and the methods available, because the issue of unfairness may arise without such guidelines.

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[2] PERPU NO.1/2002 Sec.33-34 concerning terrorism crime and under Government Regulation No.2/2002 Sec. 2-7 concerning protection of victim and witness method in Human Rights Crime.

In addition, it may be necessary to establish a committee that decides who should be protected and which kinds of methods should be taken, and then checks the procedure. This system will also be useful in terms of preventing the abuse of power.

Since witness protection is crucial to addressing organized crime, it should be carried out as much as possible in accordance with the needs of each witness, taking into account the above-mentioned factors. It should be noted that close communications with the witnesses are essential not only in ascertaining their needs but also in obtaining and maintaining their cooperation.

F. Shifting the Burden of Proof

1. Introduction

There are two interpretations regarding the burden of proof in general: one is the legal burden of proof, which means the legal obligation of a party to meet the requirement of a rule of law that a particular fact must be proved either by a preponderance of the evidence or beyond reasonable doubt. This burden is known as the burden of persuasion in which a party must persuade a judge or jury that the alleged fact occurred. Another is the evidential burden, which means the actual obligation to produce some evidence to support an argument in relation to the existence or non-existence of a particular fact. The evidential burden may shift back and forth between the parties as the trial progresses; however, such a shift does not affect the legal burden of proof. We here focus our discussions on the shift of the legal burden of proof.

Even, as for the legal burden of proof, the shift of the burden of proof covers various kinds of rules [3]. One example is a rule that the burden of proof concerning a particular element (i.e., mens rea) constituting an offence is placed on the defendant by law. Another example relating to such a shift is a rebuttable presumption that shifts the burden of proof, in which in case the basic fact is proved, the other relevant fact is then presumed by law and this presumption imposes on the party against whom it operates the burden of proof as to the non-existence of the presumed fact. In this context, article 5 para. 7 of Vienna Convention of 1988 requires State Parties to consider the possibility that the onus of proof is reversed regarding the lawful origin of alleged proceeds liable to confiscation, to the extent that such action is consistent with the principles of its domestic law. The UN TOC Convention Article 12 Para 7 also provides similar content.

2. Current Situation

The fundamental principle in the constitution of many countries underlines the right of a suspect or defendant to be presumed innocent unless he/she is proved guilty. Among the participating countries in our group, the Maldives is the only one country that does not have such a presumption in its laws. When the prosecutor indicts the defendant in the Maldives, the prosecutor will submit all the evidence to the court and then leave it to the court to conduct a hearing from the defendant, who has to prove his innocence. In other countries, the due process of law makes the burden of proof in criminal cases vest on the public prosecutor. Nevertheless, some countries have a provision of shifting the burden of proof in particular criminal cases to the defendant. For example, in Estonia, judges in court proceedings concerning tax fraud offences have been of the opinion that in certain cases the burden of proof lies with the accused at trial. Indonesia has similar provisions (Section 35 Law No. 15/2002 concerning money laundering crimes and Section 74-75 Law No. 22/1997 concerning narcotics crimes). India also has provisions in some laws to shift the burden of proof [4]. In Japan, it is exceptionally permitted by the laws

[3] According to Black's Law Dictionary, the shifting of the burden of proof means transferring it from one party to the other, or from one side of the case to the other, when he upon whom it rested originally has made out a prima facie case or defence by evidence, of such a character that it then becomes incumbent upon the other to rebut it by contradictory or defensive evidence.

to shift the burden of proof onto the defendant only if there is a reasonable ground to do so. Article 14 of the Special Narcotics Law provides for a presumption where any property obtained during a period of drug trafficking or smuggling conducted repeatedly and continuously shall be presumed to be illicit proceeds if the value of such property is deemed to be unreasonably large in the light of the offender's occupation or the offender's receipt of any benefit under any law or regulation during such period. Prosecutors have to prove that the defendant was repeatedly and continuously involved in drug trafficking over a certain period, the particular property was obtained during that period, the amount of his/her legitimate income during that period and such property is unreasonably large from the viewpoint of his/her working situation; the defendant then has to prove that such property was derived from legitimate origins. There is a reasonable ground to presume that such unreasonably expensive property obtained during such period is derived from drug trafficking and therefore this rule does not put too heavy a burden on the defendant because he/she can easily explain the origin of his/her own property. This rule is applicable to the offence of money laundering.

3. Common Issues, Problems and Solutions

(i) Unconstitutional controversy

Shifting the burden of proof to the defendant is still a highly controversial subject. We have discussed and found that, in the main criminal cases where the punishment is imprisonment or more severe, shifting the burden of proof is nearly impossible except in the unique systems in some countries, as mentioned above. However, in the case of criminal or civil forfeiture of proceeds of crimes derived from drug offences or transnational organized crime, it is possible to apply this concept as the Vienna Convention 1988 and the Palermo Convention 2000 have recommended. This concept has been transferred into the domestic laws of many countries such as India (Section 68-J of the Narcotic Drugs and Psychotropic Substances Act 1985), Thailand (Section 29 of the Act on Measures Against Narcotics Offence), and Japan (Article 14 of Special Narcotics Law).

(ii) Level of Proof

Generally the standard of proof in criminal cases must be beyond reasonable doubt. Unless the burden of proof is shifted, the prosecutor will have to prove the criminal case for the purpose of punishing the defendant and confiscating the proceeds of crime up to the same level. When the laws accept the shifting burden of proof in the case of the confiscation of the proceeds of crime to the defendant, the prosecutor will be relieved to some extent; however, he still needs to prove a *prima facie* case.

G. Conclusion

The current paper mainly emphasizes and explores the utilization of special investigative techniques in the battle against organized crime. These techniques, if used in a calculated and professional manner, could prove to be very successful in order to broaden the investigations to higher levels of criminal organizations. On the other hand no judicial decision can be based on only a single piece of evidence. Therefore it is important to realize that one successful operation of controlled delivery, electronic surveillance etc., might not be sufficient to secure the conviction of the offenders. Special investigative

[4] - Narcotic Drugs & Psychotropic Substances Act 1985, Sec.35 "In any prosecution for an offence under this Act, which requires a culpable mental state of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.
-The Prevention of Money-Laundering Act 2002, Sec. 24 "when a person is accused of having committed the offence under Section 3 (money laundering), the burden of proving that proceeds of crime are untainted property shall be on the accused".

techniques should always be supported by effective utilization of conventional investigative tools. It is also obvious that the scope of special investigative techniques covered by this paper is not final and the arsenal of law enforcers must always be creatively supplemented by new methods in accordance with the trends and developments of the criminal world.

Group 3

EFFECTIVELY TRACING THE PROCEEDS OF CRIME, FOCUSING ON COUNTERMEASURES AGAINST MONEY LAUNDERING

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I. SITUATION ON MONEY LAUNDERING

The group examined the situation of money laundering in the thirteen participating countries, based on the fact sheets prepared by the group and filled in by the participants of the 125th International Training Course.

Out of thirteen participating countries, eleven countries have legislation criminalizing money-laundering activities. In most cases, the predicate offences included drug offences and serious offences listed in the legislation. The number of serious offences listed as predicate offences varied from around ten to more than one hundred. In one country, all criminal offences are predicate offences for money laundering.

Some countries have dealt with about sixty money laundering cases since the enactment of their anti-money laundering laws. But in many states, concrete statistics on money laundering cases are yet to be established, because their money laundering legislation is quite new. However, although not formally charged, many participants stated that money laundering activities were found in their respective countries, including those countries where money laundering is not yet a criminal offence. Some participants pointed out that most money movements are made not through financial institutions like banks, but via more informal channels or by cash couriers, and thus it is very difficult to obtain information on money laundering activities.

Some countries reported that their money laundering legislation is under review to more effectively fight against it. Countries who have not yet criminalized money laundering are now working to introduce new legislation or decrees, in order to criminalize money laundering and establish a Financial Intelligence Unit (FIU).

II. PROBLEMS IN RELATION TO CRIMINAL INVESTIGATION OF TRACING MONEY, AND ITS SOLUTION, INCLUDING COOPERATION WITH FINANCIAL INSTITUTIONS

A. Problems

The group identified the following issues as problems in the criminal investigation of tracing money.

1. Procedures in Accessing Bank Data and the Issue of Bank Secrecy

It was observed that in some countries law enforcement officers are facing difficulties in obtaining the cooperation from banks and other financial institutions because these institutions decline to cooperate, invoking bank secrecy. In obtaining bank records for the purpose of criminal investigation, some countries have procedural requirements that could be a burden to law enforcement authorities, such as the consent of the central bank, or long time and high degree of evidence needed to obtain a court order for the production of bank records. Some participants stated that in practice it is not difficult to obtain the consent from the central bank, but some participants pointed out that in some cases the requirement of the consent or the court order would be a burden for law enforcement authorities dealing with transnational organized criminals, who make the best use of advanced technology and move money frequently and quickly.

2. Lack of Confidentiality among some Members of the Financial Institutions and Law Enforcement Agencies

Even if there are legal frameworks to ensure the cooperation of the financial institutions, the fact that the investigation on a certain bank account is going on could be leaked to the person holding the account. This can be done intentionally by corrupt bank officials or law enforcement officers, or inadvertently by an inappropriate processing by banks of the inquiry from investigators. For example, if a bank manager sends a copy of the investigative inquiry to its all branch offices via facsimile without any security measures, this inquiry can be seen by any employee and the risk of information leak would be very high.

3. Discretion of some Financial Institutions to Report Suspicious Transaction to FIUs

It was pointed out that if the rules governing the Suspicious Transaction Reports (STR) is not clear enough, there is a danger that this could be abused by the financial institutions. Bank officials might decide not to report a suspicious transaction by their clients by inappropriately interpreting the rules on STRs.

4. Lack of Authority to Apply New Investigative Techniques

Investigative techniques such as the interception of electronic communication, undercover operations and surveillance are very effective tools in the fight against money laundering. However, many countries lack sufficient legal provisions authorizing law enforcement agencies to conduct these measures.

5. Lack of Special Skills in Accountancy or Information Technology among Law Enforcement Agencies or FIUs

In analyzing financial documents such as bank records and accounting books of corporations, special knowledge and skills in accountancy are essential. Many participants stated that the law enforcement agencies and FIUs in their countries do not have enough staff members who have these skills. The same can be said concerning the knowledge and skills in information technology, which is also essential in dealing with sophisticated criminals.

6. Non-Bank Financial Institutions, Alternative Remittance System (ARS) and Cash Transactions

It was noted that some countries do not have appropriate regulations to control non bank financial institutions. Furthermore, the group agreed that there are many methods used to move money other than using the financial institutions, such as by using professionals (lawyers, notaries public, accountants etc.), resorting to ARS including "hawala," "hundi" or other types of underground banks, or simply moving cash by cash couriers. This is eminent in countries without developed financial systems, but it is also popular in countries which have a sophisticated network of financial institutions.

7. Absence of Anti Money Laundering Laws or FIUs

Above all, it was noted that some countries do not have FIUs and/or anti-money laundering laws, although they are the essential tools in the fight against money laundering. Lack of political will was identified as one of the reasons.

B. Solutions

The group discussed how to solve the above mentioned problems and came to a conclusion that the following measures should be considered by countries to effectively cope with money laundering. It should be noted that these measures are closely related, depending on each other.

1. Introduction of New Laws or Revision of the Existing Laws

First of all, countries without anti-money laundering laws should take steps to enact such laws as soon as possible, and countries which do not have FIUs should have laws or regulations establishing them (problem (g)).

Countries which already have anti-money laundering laws and FIUs should consider introducing or revising laws with a view to:

(i) expanding the scope of the predicate offences (general);
(ii) introducing new offences, criminalizing such conduct as the leakage of information or dishonest STR reporting by bank officials (problem (b) and (c)), or illegal ARS (problem (f)) ;
(iii) providing a legal framework for the cooperation between agencies and financial institutions related to anti-money laundering activities (general);
(iv) introducing clear standards for STRs (problem (c))
(v) providing a legal basis which allows law enforcement officials to utilize new investigative techniques (problem (d))
(vi) establishing supervisory systems for non-banking financial institutions, professionals, legal ARS and cash transactions (problem (f))
(vii) providing fair and effective measures for investigation authorities to obtain bank records promptly (problem (a))

2. Awareness Raising

In order to have the necessary laws or regulations mentioned in (a) above approved by the legislature, it is essential to obtain understanding of ministers and high ranking officials, law makers, interested groups such as lawyers and financial communities, and public in general. Thus it is very important to launch an active awareness raising campaign to promote the common understanding that anti-money laundering measures are necessary (related to solution (a))The understanding of the public and the financial institutions will also be essential to enhance the cooperation of the financial institutions to the law enforcement authorities, as well as efficient STRs (problem (b), (c)).

3. Capacity Building

Training of law enforcement and judicial officers and staff of FIUs to provide them with skills and knowledge in the investigation of money laundering, accounting and information technology is very

important to enhance their capacity. Measures should also be taken to provide them with sufficient equipment, especially Information Technology (IT) tools (problem (e)).

4. Establishment of a Regime for Cooperation and Coordination between Law Enforcement Officials and Other Relevant Agencies, Including the Financial Institutions

Having laws on paper is not enough to ensure the cooperation and coordination of activities in the fight against money laundering, including the investigation to trace the money. An effective regime to enhance the cooperation and coordination between law enforcement officials and other relevant agencies, including the financial institutions, should be established. This could be realized, for example, by establishing a coordination committee of agencies concerned.

5. Ratification of the UN Conventions

The United Nations Conventions, especially the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Convention) and 2000 United Nations Convention Against Transnational Organized Crime (the Palermo Convention), are very useful instruments in combating money laundering. In order to ratify these Conventions, countries have to enact laws to implement their obligations. They will serve as guidelines in drafting laws (solution (a)), and can be used in awareness raising campaigns to enlighten the public, officials, lawmakers and interested groups that these Conventions are adopted by the General Assembly, thus the de facto global consensus (solution (b)).

III. ESTABLISHMENT OF LEGAL FRAMEWORKS (IMPLEMENTATION OF THE RELEVANT UN CONVENTIONS AND OTHER INTERNATIONAL STANDARDS) AND ITS PROBLEMS AND SOLUTIONS

A. Expansion of Predicate Offences for Money Laundering

1. Four Approaches to Define Predicate Offences

On this item the group deliberated on what are the predicate offences. As per the Palermo Convention the term is defined as follows:

Predicate offences shall mean any offences as a result of which proceeds have been generated may become the subject of an offence as defined in article 6 of this Convention[1].

The Convention further defines and obligates States Parties to the convention to criminalize laundering of proceeds of crime[2]. The offences are extended to criminalization of participation in an organized criminal group[3], corruption[4] and obstruction of justice[5] respectively, and also to all serious crime which conduct constitute an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty[6]. Transnationality or involvement of an organized criminal group must not be made elements of these offences in domestic laws[7].

1 Article 2 (h) the Palermo Convention.
2 Article 6, ibid.
3 Article 4, ibid.
4 Article 8, ibid.
5 Article 23, ibid.
6 Article 2 (b), ibid.
7 Article 34 (2), ibid.

The group in their discussion came to the conclusion that there are four approaches which states apply as far as predicate offences are concerned namely:

(i) All crimes Approach
(ii) List Approach
(iii) Threshold Approach
(iv) Mixed Approach meaning both list and threshold approaches

On the other hand the FATF 40 Recommendations (Financial Action Task Force Recommendations) [8] on the scope of the criminal offences of Money Laundering stipulate that:

- Countries should criminalize money laundering on the basis of the Vienna Convention and the Palermo Convention.

- Countries should apply the crime of money laundering to all serious offences with a view to including the widest range of predicate offences. Predicate offences may be described by reference to all offences or to a threshold linked either to a category of serious offences or to a penalty of imprisonment applicable to the predicate offence (threshold approach) or to a list of predicate offences or a combination of these approaches.

- Where countries apply a threshold approach, predicate offences should at a minimum comprise all offences that fall within the category of serious offences under their national law or should include offences which are punishable by a maximum penalty of more than one years imprisonment or for those countries that have a minimum threshold for offences in their legal system, predicate offences should comprise all offences, which are punishable by a minimum penalty of more than six months imprisonment.

- Whichever approach is adopted, each country should at a minimum include a range of offences within each of the designated category of offences[9]. Predicate offences for money laundering should extend to conduct that occurred in another countries, which constitute an offence in that country, and which would have constituted a predicate offence had it occurred domestically. Countries may provide that the only prerequisite is that the conduct would have constituted a predicate offence had it occurred domestically.

- Countries may provide that the offence of money laundering does not apply to a person who committed the predicate offence where this is required by domestic law[10].

Afterwards the discussion geared on the difficulties and the group earmarked the following:

The list approach seems to be more practical, since it is limited in scope hence making it easier for the legislature to approve the bill.

On the threshold approach it was noted that if the minimum period of the deprivation of liberty is low, this might cause difficulties for the legislature to approve the bill.

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[8] All FATF recommendations quoted in this paper are those which were revised in June 2003.

[9] Designated categories of offences are listed in the Glossary to the newly revised FATF 40 Recommendations.

[10] Last paragraph of FATF 40 Recommendation 1.

Theoretically, both the all crime approach and threshold approach have some questions, i.e., there are other offences such as infanticide, rape, grievous harm, which don't generate profit. There is a possibility of public concern that authorities abuse their powers, leading to some criticism from the pressure groups. In addition, it might increase the workload of law enforcement agencies and judicial officials as well; hence the need for more personnel and equipment, especially in countries where the legality principle is applied.

2. Degree of Mens Rea Required in Money Laundering Offences

The group noted that this is also one of the difficulties. This notion has a different interpretation and penalty as far as states are concerned. In some countries, such as the USA, where they use the list approach, they have a special provision in law which mitigates the burden of proof of the mental element of the launderer: the prosecution is required to prove that the defendant knew the proceeds came from a felony, but not from a specific offence. Indonesia also has provisions on the mitigation of mens rea. In Japan, there is no such special provision and the issue of the mental element is dealt with by the interpretation of the general provisions on mens rea in the Penal Code.

3. Proof of the Predicate Offences

In some countries prosecutors have to prove predicate offences beyond a reasonable doubt, and in some other countries a lower degree of proof is enough, such as a balance of probabilities. In some countries the conviction of the predicate offence must precede the indictment of the money laundering case. On the contrary in other countries such as Japan and Indonesia conviction for a predicate offence is not a pre-condition for instituting a money laundering case.

4. Measures to Solve the Difficulties

One component is the revision of the law but since the concept of money laundering is technical, we need to train legal drafters overseas. Also law enforcement, judicial and financial institution personnel need capacity building assistance.

In order to speed up the adoption of the bill in parliament, the awareness raising campaign, or some enlightenment activities targeting lawmakers, interested groups such as human rights activists or financial institutions, and members of the public would be needed to obtain their understanding on the urgency in taking anti- money laundering measures. In this context, the existence of international instruments such as UN Conventions can present a good argument in adopting relevant legislation.In addition to the expansion of the predicate offence, the new law could also deal with the mitigation of the degree of proof, which was mentioned above.

B. Confiscation, Freezing, Collection of the Value of the Proceeds of Crime, and Asset Sharing

At the outset, the group reviewed the relevant provisions in the Palermo Convention (Article 2 (g) and Article 12), and in the Vienna Convention (Article 5), as well as recommendation 3 of the FATF 40 Recommendations.

The group discussed the scope of the proceeds of crime. It was introduced that Japan needed new legislation to implement the confiscation provisions of the Vienna Convention and the Palermo Convention, because the existing Article 19 did not sufficiently cover the scope of obligations under these Conventions. Thus, in ratifying the Conventions other countries may need a thorough comparison of these Convention provisions and the confiscation provisions in their respective domestic laws.

Also, there was a discussion whether the confiscation should be mandatory, or judges should have discretion on this matter, and there was a general agreement that in drug offences and serious offences involving organized criminal groups, the confiscation should be mandatory.

The meeting also discussed the difference between "confiscation" and "forfeiture", since in Article 2(g) of the Palermo Convention and Article 1 (f) of the Vienna Convention, which states that "'Confiscation', which includes forfeiture where applicable, means the permanent deprivation of property by order of a court or other competent authority". The group noted that the Commentary on the Vienna Convention, prepared by the United Nations, has an explanation on this issue, stating that the reference to "forfeiture" is made in order to meet the needs of some national legal systems, in which this was a more appropriate term than "confiscation" and that the French and Spanish versions do not have the phrase "which includes forfeiture where applicable", since the term "confiscation" in French or "decosimo" in Spanish were deemed to be the only appropriate ones.[11]

The group noted that the shifting of the burden of proof concerning the legitimate origin of assets, dealt with by Group II, also needs attention.

The meeting also discussed the issue of civil and administrative forfeiture. It recalled the explanation made by the visiting expert from the United States, as well as recommendation 3 of the FATF 40 Recommendations, which stipulates that states "may consider adopting" civil forfeiture.

Some participants expressed concern that this process (especially administrative forfeiture) could be abused to evade the criminal procedure, which requires proof beyond a reasonable doubt, but other participants considered that civil forfeiture is an effective way to control the proceeds of crime, especially when the offender cannot be convicted due to certain reasons, such as his/her absconding or death.

All participants of the group said that their countries have provisions on freezing of proceeds of crime (and as for the participants of the 125th course, only Bhutan and the Maldives do not have the freezing provisions). It was noted that there are two possibilities in initiating the freeze procedure: one system may only accept court orders as a basis for freezing, and the other system may authorize prosecutors or law enforcement officers of a certain level to issue a freeze order.

As for the asset sharing, attention of the group was drawn to Article 5 paragraph 5 (b)(ii) of the Vienna Convention and Article 14 paragraph 3(b) of the Palermo Convention which states "may give special consideration to concluding agreements" concerning asset sharing. Views were expressed that asset sharing was a very useful tool in the fight against transnational crime, which generate a large amount of proceeds, helping to enhance cooperation between investigative agencies of the states concerned, and providing a fair compensation to the effort made by each agency. Some participants quoted a saying that "money makes enemies", and expressed views that a fight for money could deteriorate a once friendly relationship between the agencies concerned. However, the meeting agreed that the adoption of a legal framework to allow asset sharing merits serious consideration so as to enhance international cooperation.

[11] Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, p30 (United Nations publication Sales No. E.98 XI.5, E/CN.7/590).

C. Suspicious Transaction Reporting (STR) System and Financial Intelligence Unit (FIU)

The group reviewed the legal framework on STRs and FIUs in the international instruments, such as FATF 40 recommendations and its adoption by the FATF Style Regional Bodies (FSRB), as well as paragraphs 1(b) and 3 of Article 7 of the Palermo Convention.

It was confirmed that the minimum requirement for the FIU is for "receiving, [...],analysis and dissemination of STRs and other information regarding potential money laundering or terrorist financing"[12].

The group also reviewed three options concerning the scope of the STRs. One approach is a generic approach, where financial institutions are required to report all transactions, which they suspect or have reasonable grounds to suspect that the funds are the proceeds of criminal activities. The second approach is a threshold approach, where reports should be made on transactions exceeding a certain amount of money. The third approach is a combination of these two.

As for the generic approach, it could increase the workload of the financial institutions, as they have to make judgments in each transaction whether it is suspicious or not. This judgment is not of a nature to be clearly stipulated in law. By each case, the customer's nationality, vocation, past transactions, transaction value, transaction form, and other factors should be comprehensively considered. However, it is essential to establish certain guidelines for the financial institutions to help them in making a decision to ensure the smooth operation of this system. In Japan, through FIU, Japan Financial Intelligence Office (JAFIO), "Reference of STR" is distributed, and revisions are made when necessary.

The threshold approach is easier for the banks to apply. However, there is a danger that the criminals may evade the STR by dividing their transactions to several transfers below the threshold. That means, if the transaction exceeding US$ 10,000 is subject to report, criminals may divide their transactions into small lots such as US$ 9,900. In countries, which adopt the mixed type system such as Thailand, they may not face these issues, but this will be a concern to countries which adopt the threshold approach. There could also be a problem that the FIUs would be flooded by many reports.

The meeting discussed whether the FIUs should be equipped with any authorities concerning investigation and confiscation. It was noted that if the FIU is to have investigative authority, there should be many personnel who have sufficient experience in the investigation field. Some participants suggested that law enforcement authorities, with many experienced staff members, are more suitable for conducting investigation based on the STR from the FIUs. It was also noted that even the mandate of the Anti-Money Laundering Office (AMLO) of Thailand, which have an investigative authority, is limited to a list of offences, and they transfer the case involving other offences not listed to appropriate investigative agencies.

On the other hand, in case the FIU does not have investigative authority, such as Japan, it is important to enhance function to collect and analyze adequate information, and to manage collaboration among investigative agencies well. Especially, in case of the latter, we must say that the effectiveness of the FIU function is poor, if the information the investigative agencies consider important is totally different from the information sent from the FIU. To address these issues, a framework for the enhancement of cooperation and coordination among FIUs and other investigative agencies should be established, for example by holding periodical meetings, so as to promote a common understanding of the problems related to the information sharing.

[12] FATF Recommendation 26.

This issue is also related to where the FIU should be located whether under the central bank, or ministry of finance, or ministry of justice or interior, or it should be an independent body. It was observed that as far as the FIUs are vested with the minimum authorities mentioned above, countries may choose any of the above options, depending on their policies.

To ensure the effectiveness and comprehensiveness of STRs, there should be some sanctions in case the financial institutions do not abide by the STR rules.

We are seeing an increasing number of cases in which legal professions such as lawyers, certified accountants and real estate agencies lend hand to money laundering by offering consultancy on financial matters. This is the so called "Gatekeeper" issue and is becoming apparent, so measures should be put in place as per Recommendation 12 of FATF 40 Recommendations.

It will be beneficial to oblige the legal professional to report to the FIU to some extent, but on the other hand, trust between the customer is crucial for the lawyer to execute his/her duty.

Unlike Financial Institutions that deal in a large number of transactions, lawyers provide service on an individual basis. Thus it is relatively easy for the source of information to be revealed. There are some countries that oblige lawyers to make a report, but sufficient safeguards will be important.

On the co-operation of FIUs, the group observed that where they exist they should be encouraged to exchange information between each other and they should develop procedures to that effect. Where they do not exist informal channels such as Interpol, should be used.

Also, the capacity building of relevant bodies, such as training of the FIU officials and the employees of financial institutions, judicial personnel, as well as law enforcement officials, is of great importance in order to maximize the STR system.

D. Customer Due Diligence (CDD) and other Measures Required by the FATF 40 Recommendations

1. Issues Faced

On this aspect the group centred their discussion on Recommendation 12 of the FATF which stipulates: the CDD and the record keeping set out in Recommendation 5, 6 and 8 to apply to designated non-financial businesses and professions such as casinos, real estate agents, dealers in precious metals and precious stones, lawyers, notaries, other independent legal professionals, accountants and trust and company service providers.

Some participants observed that the issues of CDD measures such as financial institutions identify and verify the identities of the customers[13] normally annoys customers who may decide to go to other banks where the conditions on this aspect are less stringent.

The Group noted that it is especially difficult to identify customers when they conceal the person to whom the transactions actually effects, making use of another person appearing as "an owner". Identification of this issue of "beneficial owners" is one of the most challenging tasks in CDD.

On the professionals such as lawyers and accountants the group recalled the presentation of one expert at the Ministry of Foreign Affairs Seminar on counter-terrorism Conventions for the purpose of encouraging the accession to the Conventions by Southeast Asian countries, where he said lawyers in his

[13] FATF Recommendation 5.

country have gone to court to file for injunctions against the STR obligation by the legal professions.

All participants were of the view that in preparing a bill to require these professionals to exercise STRs, they might face the same problems faced by the country of the expert above, especially challenges from the professional associations.

2. Measures to Address the Situations

On the issue of verifying the identities of customers by financial institutions, participants observed that the regulatory bodies especially central or reserve banks should enforce compliance to all financial institutions by making sure they maintain the same standard and procedures. For those who default sanction should be put in place to reprimand them. Also regulatory bodies should sensitize public that the issue has to be adhered to by customers hence they have to cooperate with financial institutions in their business transactions by giving correct details of their identities and documentation.

On identifying beneficial owners the group was of the view that special forms should be used with comprehensive details and face to face business relationships or transactions should be used.

The group on professionals to report STRs, was of the view that they have to be encouraged to do it. To start with their association should be asked to include the compliance in their regulations. Further they should be enlightened that they are supposed to report their suspicious transactions but not relevant information obtained in circumstances whereby it is subject to professional secrecy or legal professional privileges [14].

IV. PROMOTION OF INTERNATIONAL COOPERATION

A. Mutual Legal Assistance and Extradition

The group agreed that the measures were essential tools in fighting transnational organized crime. It was agreed that articles 6 and 7 of the Vienna Convention, article 18 and 19 of the Palermo Convention, Recommendation 35-40 of FATF 40 Recommendations should be the basis of the International cooperation on these aspects.

Participants noted that they were implementing the measures but some countries when asked to extradite criminals they invoke principle of dual criminality as provided in article 18 paragraph 9 of the Palermo Convention. Some countries exercise strict application of dual criminality while others are flexible in applying it by taking into account the overall conduct of an offender, rather than simply comparing the text of laws. Again there are other countries, which don't require dual criminality aspects in non-coercive measures.

Some participants observed that the mutual legal assistance requests are costly and time consuming to the requested countries and sometimes there is lack of trust and confidence. There is no room for dual criminality in the Vienna Convention and the 1999 Suppression of Financing of Terrorism Convention. But in the Palermo Convention, which covers a wide range of offences there can be room for a country to invoke the dual criminality requirement, especially for serious crime.

[14] FATF Recommendation 16.

Political offences, capital punishment and the integrity of some central authorities were mentioned by some participants as a stumbling block to extradition. Experiences were mentioned by Japan, Laos, Indonesia and Tanzania, where they failed to obtain extradition of defendants or offenders. The meeting noted the aut dedere aut judicare principle adopted by several UN Conventions under which the requested country has to prosecute the person for whom extradition is sought if it refuses extradition solely on the ground that the person sought is its national. Despite the problems participants agreed that states should encourage to ratify the UN Conventions, especially the Vienna Convention, the Palermo Convention and adopt the FATF 40 Recommendations and join the body. Countries should enact domestic laws, which will be an indicator of political will on the state concerned. The advantages of ratifying the conventions and enacting domestic laws is that the states can benefit from the international technical assistance programmes like training and equipment.

B. Exchange of Information among Law Enforcement Agencies

On this item, the group was in consensus that this is the most effective way of combating transnational organized crime because criminals have no geographical boundaries. So law enforcement agencies should cooperate in exchanging information with one another, consistent with their respective domestic legal and administrative systems as stipulated in article 27 of the Palermo Convention. States should use the following fora as established channels of communication:

(i) Interpol through the National Central Bureaux (NCBs)
(ii) WCO through Regional Intelligence Liaison Offices (RILOs)
(iii) Egmont Group through the Financial Intelligence Units (FIUs)
(iv) Universal Postal Union through National Post Agencies

The group noted that the informal forum was faster than the diplomatic channels, which take a long time. However, for the judicial trial formal channels have to be pursued for admissibility of evidence in a court of law.

Japan gave an example of a case where the exchange of information with the law enforcement agencies in the United States, followed by a prompt mutual legal assistance request, led to a successful prosecution of a drug trafficking case.

Tanzania also cited three cases whereby an exchange of information was carried out among three Anti-Narcotic Units in East Africa through the auspices of the East African Operational Meetings on Drugs for the Directors of Criminal Investigation and the Heads of the Anti-Narcotic Units and big seizures of heroine where recorded.

On the other hand, inter-agency cooperation of law enforcement agencies at the state level should be encouraged to boost international cooperation. However, some countries pointed out the exchange of information is hampered by lack of equipment and training.

C. Joint Investigation and Border Control

This issue was deliberated in depth and the group unanimously agreed that this is a very useful measure to tackle cross-border crimes on condition that there should be bilateral, multilateral agreements or arrangement in matters of investigation, prosecution and judicial proceedings in one or more states. Sometimes it can be conducted on a case by case basis. This is stipulated in article 19 of the Palermo Convention.

It was introduced that Indonesia had a successful joint investigation with USA. And Laos also had a joint investigation with Thailand especially along the borders. Tanzania via Southern Africa Regional Police Chiefs Conference Organization (SARPCCO) and Eastern African Police Chiefs Conference Organization (EAPCCO) has also conducted very successful joint investigations and operations.

The Group noted that the experience of Tanzania merits attention, where foreign investigators are invited to participate in the joint operations and investigations as observers, South Africa offering equipment with wide database especially on stolen motor vehicles. The participant of Tanzania introduced that these joint operations and investigations are conducted on the basis of the various protocols. He also noted that in the negotiation of certain protocols, it was difficult to reach consensus on certain articles.

PART TWO

Work Product of the Sixth International Training Course on Corruption Control in Criminal Justice

UNAFEI

VISITING EXPERTS

THE ROLE OF OMBUDSMAN AND ITS CONNECTION WITH THE CONTROL OF CORRUPTION

Judge Anand Satyanand *

I. INTRODUCTION

New Zealand is a country which applies a number of tools of modern governance in its operation. New Zealand's population is small (four million) and its Parliament comprises a single House of Representatives without any written constitution. In its 160 year modern history it has followed a British Westminster kind of government, but in the last 50 years has undertaken a number of adaptations to that. For example, ten years ago, it changed to a mixed member proportional representation system of elections, similar to Germany - where there are some members elected by citizens and others appointed by political parties. Some 40 years ago in 1962 it became the first English speaking country to adopt Ombudsman legislation calling for an independent officer of Parliament being able to inquire into citizens' complaints against the Government bureaucracy. Twenty years later in 1982 New Zealand enacted Freedom of Information legislation which now covers Government Ministries and Departments and State-owned Enterprises as well as Local Government entities. In 2000 New Zealand passed "Whistle Blowing" legislation to enable people to make disclosures about serious wrongdoing without becoming endangered personally, in terms of their employment or otherwise.

So far as government administration is concerned, New Zealand has adopted modern means of public sector management with a number of mechanisms available for redress of wrongs - the courts, recourse to Ombudsmen for maladministration, freedom of information, and otherwise. New Zealand rates consistently as among the least corrupt countries in the world. Each of the mechanisms referred to has relevance in combating corruption.

II. DEFINITION OF TERM "OMBUDSMAN"

The term "Ombudsman" is Scandinavian, meaning something in the nature of "entrusted person" or "grievance representative". The part word "man" is taken directly from the Swedish (the old Norse word was "umbodhsmadr") and does not connote any necessity that the holder be of the male gender. Indeed, if one was to survey the present Ombudsman community worldwide, it would be seen that there are many women Ombudsman. My tracing of the office will start with the Scandinavian "grievance person" since this model is said to set a standard. I do acknowledge, however, that there are several precedents from Asian (and other) settings of people, in former times, undertaking office to provide relief and redress to citizens adversely affected by government action.

In earlier times it is also recorded that the Romans installed an officer called the "tribune" to protect the interests and rights of the plebeians from the patricians. There are also writings in both China and India, which suggest that three thousand and more years ago, special officials were designated to function in the manner of Ombudsmen. In China during the Yu and Sun dynasties it was the duty of the incumbent, who was called the "control yuan", to "report the voice of the people to the Emperor and to announce the Emperor's decrees to the people". In India today there are Ombudsmen appointed in twelve

* New Zealand Ombudsman.

of the Indian states, though not at Federal level. The term for them is "Lokayukta", an ancient word revived so as to make it meaningful in a local sense in that country.

In 1809 Sweden appointed an official entitled the "justitieombudsman" to enquire into actions of the government administration, including the military, and the courts. The establishment of this office was said to be a reaction to state absolutism and an assertion of individual rights and dignities of the citizen. Nearly 100 years later, Finland appointed a similar person and Denmark followed likewise in 1954.

A. Essential Constituents of the Term "Ombudsman"

The Ombudsman Committee of the International Bar Association has described the office thus:

> "*An Office provided for by the Constitution or by action of the Legislature or Parliament and headed by an independent, high-level public official, who is responsible to the Legislature or Parliament, who receives complaints from aggrieved persons against Government agencies, officials and employees, or who acts on [his] own motion, and who has the power to investigate, recommend corrective action, and issue reports.*" [1]

This contemporary definition of the term "Ombudsman" is not agreed to universally, but it does serve as a starting point in defining the role.

B. Development of Concept

In the 1950s there was considerable discussion in many countries outside Scandinavia about establishing a process to examine things undertaken by governmental administration. This was to be alongside and beyond the formal means of redress available through the courts or Parliament, or a free Press. The welfare state models in many countries had produced very large government bureaucracies. There was concern in many quarters that a simple independent means of redress needed to be provided for the individual citizen. The matter was neatly put in the following way by Professor D C Rowat in an article suggesting an Ombudsman Institution in Canada [2] :-

> "*It is quite possible nowadays for a citizen's right to be accidentally crushed by the vast juggernaut of the government's administrative machine. In this age of the welfare state, thousands of administrative decisions are made each year by governments or their agencies, many of them by lowly officials; and if some of these decisions are arbitrary or unjustified, there is no easy way for the ordinary citizen to gain redress.*"

In that country, and elsewhere, it was simply no longer possible to say that every person adversely affected in an unfair manner by action of a governmental official, would have the resources or means to engage a lawyer. Court procedures could be both lengthy and expensive. The right of a person to consult their individual Parliamentary representative, write to the newspaper, organise a petition or raise a deputation to see a Government Official or Minister, may have been no more effective. In England in the 1950s, a committee of the International Commission of Jurists, chaired by Lord Whyatt (a former Chief Justice of Hong Kong) had suggested the establishment for the United Kingdom of some kind of parliamentary commissioner.

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[1] International Bar Association.

[2] DC Rowat, "An Ombudsman Scheme for Canada" journal of Economic and Political Science 1962 Vol. 28 No. 4 p. 543.

In New Zealand, a similar debate was under way in a number of quarters - political, academic and among those with the task of formulating policy. The debate quickened after the abolition of the Upper House of Parliament in 1950. Consideration was being given to such things as an Administrative Court. New Zealand observed with interest the establishment in 1954 of an Ombudsman responsible to the Danish Parliament or "Folketing".

In 1962, New Zealand became the first English speaking Commonwealth (and indeed common-law) country to enact this kind of legislation, although there were a number of other jurisdictions in which Bills had been introduced, or where the matter had been canvassed. The succeeding 35 years have seen Ombudsmen installed in a great many countries. The international Ombudsman community now numbers over 200 in about 100 countries or jurisdictions. As may be known, the office has been created at both federal and provincial levels and it functions in a variety of constitutional settings.

C. Constitutional Position of the Ombudsman

To map the position of New Zealand's Ombudsmen in a constitutional sense, the New Zealand Ombudsmen are Officers of Parliament. They are appointed by the Governor-General on the recommendation of Parliament. Although it is not provided for in the law, there is a long standing convention that all Members of Parliament (that is from all parties in the House) must agree unanimously to the appointment. As a further mark of independence funding for the office is provided directly through Parliament. The Speaker of the House of Representatives is the person through whom the Ombudsmen are accountable to Parliament. This independent accountability and financing arrangement ensures that the office has complete independence and cannot be pressured by any government department or Minister of the Crown.

When the office was first established, the Ombudsman's jurisdiction was limited to the investigation of complaints from citizens about central government departments and organisations. In 1968 the jurisdiction was extended to education and hospital boards. In 1975, the legislation was amended and consolidated into the Ombudsmen Act 1975. Under that Act, with effect from 1 April 1976, the jurisdiction of the Ombudsmen was extended to territorial local authorities (city, county and borough councils) as well as to a variety of statutory boards (for example, catchment boards and electric power boards). Additional offices to that in the capital city were established. The Ombudsmen Act 1975 also contained provision for the appointment of more than one Ombudsman, one of whom would be appointed Chief Ombudsman, with responsibility for the overall administration of the office and allocation of the work as between the Ombudsmen.

Professor Philip Joseph, in his textbook "Constitutional and Administrative Law in New Zealand" 2 ed 2002 Thomson has described the Ombudsman role as being that of a "generalist" with a disinclination to intervene in specialist matters involving professional departmental judgment. When a policy is found wanting, an Ombudsman may recommend departmental reconsideration or that a specific alternative policy be adopted. But as he points out, Ombudsmen are, in general reluctant to "second-guess" actual departmental decisions.

A descriptive passage from "Bridled Power" Oxford University Press 2 ed 1997 Oxford University Press - authors Sir Geoffrey Palmer and Dr Matthew Palmer (the former a Prime Minister of New Zealand in the late 1980s and the latter a Law Professor) sets out the following regarding Ombudsman powers:

"*The Ombudsmen may reach the conclusion that a decision was unfair on a number of grounds. It could be:*

- contrary to law;
- unreasonable, unjust, oppressive, or improperly discriminatory;
- made under an act, regulation or by-law that was unreasonable, unjust, oppressive or discriminatory;
- based on mistake of fact or law;
- made in the exercise of a discretionary power used for improper or irrelevant purpose;
- simply 'wrong'.

Where the Ombudsmen reach an unfavourable view of a decision they can say that:

- the matter should be further considered by the appropriate authority;
- the omission should be rectified;
- the decision should be cancelled or varied;
- the practice on which the decision was based should be altered;
- the act, regulation or by-law on which the decision was based should be reconsidered;
- reasons should have been given for the decision; and
- other steps should be taken."

D. Jurisdiction of the Ombudsmen

When describing the jurisdiction conferred upon the individual Ombudsman, the term "Ombudsman" may itself be misleading in a comparative sense. Different countries give to the Ombudsman different functions and procedures. For example, in many jurisdictions, including the United Kingdom, the citizen may not approach the Ombudsman directly. In Australia and New Zealand however direct contact is the norm. In the United Kingdom and Northern Ireland, a citizen approaches the local Member of Parliament, who in turn makes a case to the Ombudsman. In some jurisdictions, the Ombudsman is responsible for redressing breaches of human rights. This is so in several Latin American countries such as Mexico, whereas in New Zealand that function has been undertaken by a separate Human Rights Commission. In a number of other countries (for example, Ghana and Papua New Guinea), the Ombudsman may be charged with a specific responsibility of inquiring into allegations of corruption.

Differences also arise regarding appointment and tenure. A New Zealand Ombudsman is appointed by Parliament and receives funding from that source, but in other jurisdictions the appointment may be by the erstwhile governing party and funding may become dependent upon a determination of the Government of the day. In unicameral States such as New Zealand, the Ombudsmen may be responsible to Parliament, and in bicameral States such as the United Kingdom, they may be responsible to the Lower House of Parliament (for example to the House of Commons in the United Kingdom).

From the classic state-Ombudsman role as just described, there have also developed, in many places, different kinds of "Ombudsmen", some of whom use similar investigative methodology, but whose role may be limited by circumstances or area. If the essence of the Ombudsman role is defending citizens against the unfair administrative actions of the State, Human Rights Commissioners can be seen as undertaking a kind of Ombudsman role, but are restricted to investigating alleged breaches of human rights. There are also specialist offices such as Commissioners for Children, Health and Disability and Police Complaints Authorities who may be undertaking Ombudsman-like work, but whose work is confined within a specific area.

The role of the Ombudsman, as a person who investigates complaints, has also led to the development of "industry Ombudsmen", for example in banking and insurance. An Ombudsman for Northern Ireland in the 1990s, Dr Maurice Hayes, observed that the Ombudsman concept is "one of the few to have passed from the public sector to the private sector at a time when the tide of ideas is flowing in the opposite direction". There has also developed, the notion of "organisation Ombudsmen". In some countries, such as the United States, if one has a dispute with a department store, university or a local authority, the person designated to deal with that complaint, may be termed an "Ombudsman".

Even that brief summary is not complete, because there may be other anomalies. In Australia, for example, some Ombudsmen may deal with complaints about behaviour of the Police and others not because of there being in place a separate stand-alone Police Complaints Authority. In Sweden and Finland, complaints about the conduct of the courts are dealt with by Ombudsmen, whilst in most countries where there is a separation of powers - legislative, executive and judicial - the Ombudsman has jurisdiction only over actions of the executive.

Owing to the threat of proliferation in New Zealand, it was thought important that the term "Ombudsman" should not be seen to lose its currency. Legislation was passed in 1993 restricting use of the term "Ombudsman" unless the particular industry which uses the term gains the approval of the erstwhile Chief Ombudsman and is able to guarantee certain kinds of delivery of service.

E. Relationship of Ombudsman Role to Courts and Ordinary Legal Processes

By undertaking a task which affects rights and involves examinations of organisations' powers and responsibilities, a question arises as to whether the Ombudsman office itself should be subject to judicial scrutiny if its investigation and recommendation breaches appropriate procedural or jurisdictional limits. In most jurisdictions the answer is "yes". This susceptibility of the Ombudsmen to judicial review, which some would say is a discipline of its own, has led to a number of contemporary statements about the nature and efficacy of the role. The following examples suffice.

In 1984 in Canada, Justice Dickson delivering the unanimous decision of the Supreme Court of Canada in British Columbia Development Corporation and another v Friedmann [1984] 2RCS 447 at 460,463. There he said:

> "*The limitations of Courts are also well known. Litigation can be costly and slow. Only the most serious cases of administrative abuse are therefore likely to find their way into the courts. More importantly, there is simply no remedy at law available in a great many cases...*
>
> *Read as a whole, the Ombudsmen Act of British Columbia provides an efficient procedure through which complaints may be investigated, bureaucratic errors and abuses brought to light and corrective action initiated. It represents the paradigm of remedial legislation. It should therefore receive a broad purposive interpretation consistent with the unique role the Ombudsman is intended to fulfil.*"

The judgment is also authority on the meaning and application of the phrase "matter of administration". This phrase frames the Ombudsman's area of jurisdiction, is to be construed widely "encompassing everything done by governmental authorities in the implementation of government policy". The Court held that only the activities of the legislature and the Courts should be excluded from the Ombudsman's scrutiny.

The role of the Ombudsman in that country was also challenged in Re Ombudsman Act, decided in 1970 (1970) 72 WWR 176. The Chief Justice of Alberta stated:

> "*... the basic purpose of an Ombudsman is provision of a 'watchdog' designed to look into the entire workings of administrative cases. ...[He] can bring the lamp of scrutiny to otherwise dark places even over the resistance of those who would draw the blinds. If [his] scrutiny and reservations are well founded, corrective measure can be taken in due democratic process, if not no harm can be done in looking at that which is good.*"

In Australia, the judgment of the Federal Court Aboriginal and Torres Strait Islander Commission v Commonwealth Ombudsman (1995) 134 ALR 238 undertook a thorough review of the actions of the Ombudsman and contains a number of statements distinguishing between the judicial function and the Ombudsman function. The former was for making determinations on identified issues, the latter for "investigating, reporting and making suggestions". Several other Australian authorities have also delineated the Ombudsman role. In Ainsworth v Ombudsman (1988) 17 NSWLR 276 at 283 Justice Enderby of the New South Wales Supreme Court said:

> "*It has always been considered that the efficacy of the [the Ombudsman] Office and function comes largely from the light [he] is able to throw on areas where there is alleged to be administrative injustice and where other remedies of the Courts and the good offices of Members of Parliament have proved inadequate. Goodwill is essential. When intervention by an Ombudsman is successful, remedial steps are taken, not because orders are made that they may be taken, but because the weight of its findings and the prestige of the office demands that they be taken.*"

In Botany Council v The Ombudsman (1995) 37 NSWLR 357 at 363, the then President of the New South Wales Court of Appeal, Justice Michael Kirby also traversed the difference between judicial and Ombudsman function:

> "*[The] Ombudsman lacks the powers to make orders as a Court may do. But the sanction of the provision of a report to the responsible minister and to Parliament and the requirement upon the Minister to respond promptly to any such report also affords significant sanctions. These have proved effective in all jurisdictions in which the Office of the Ombudsman has been created, to obtain reconsideration of administrative action found by the Ombudsman to be unlawful, unreasonable, mistaken or wrong...*"

The Ombudsman's authority has also been challenged in Courts in other countries, including New Zealand, although principally in recent times in regard to the freedom of information legislation jurisdiction.

F. Official Information Act Role of Ombudsmen

The Official Information Act was added to the Ombudsman role in 1982. This second aspect is responsible for much of the comment about the role in contemporary politics and in contemporary Press coverage. Often one sees in the newspaper or in electronic media the words "obtained under the Official Information Act". This is a shorthand reference to a number of procedures which might have been actioned before publication has taken place.

New Zealand is one of many countries where Parliament has determined that there should in general be freedom of access to information so that people can play an informed role in the democracy. This

means, from a legal standpoint, that information is to be made available unless there is some withholding ground able to be invoked. It is the Ombudsmen who determine whether the withholding tests have been met. The position was different prior to the Official Information Act, when the Official Secrets Act 1951 was in force. This statute was modelled on United Kingdom legislation under which it was said, either literally or notionally, that governmental or official information was "the property of the Queen and her advisers".

The drawbacks in this situation led to discussion in academic and political circles that there needed to be a better way. In the civil service itself, there was a prevailing climate of change. A 1964 Circular from the State Services Commission to Permanent Heads of Government departments said that "information should be withheld only if there is a good reason". An Ombudsman investigation into the Security Intelligence Service in 1976 highlighted the need for information access. In 1980, a committee of senior civil servants chaired by a University academic produced a well-regarded report in favour of a more open approach with regard to information. This was the Danks Committee Report - Committee on Official Information "Towards Open Government" Vol 1 General Report December 1980, which the authors of "Bridled Power" (mentioned and cited above) described as follows:

> "*The Danks Committee report, from which the 1982 legislation sprang, was a document of high quality and considerable liberality. Titled Towards Open Government, the report came in two parts. The reasons the committee articulated for more open access to official information could be summarised as follows:*

- a better informed public can better participate in the democratic process;
- secrecy is an important impediment to accountability when Parliament, press, and public cannot properly follow and scrutinise the actions of government;
- public servants make many important decisions that affect people and the permanent administration should also be accountable through greater flows of information about what they are doing;
- better information flows will produce more effective government and help towards the more flexible development of policy. With more information available, it is easier to prepare for change;
- if more information is available, public co-operation with government will be enhanced."

The Danks Committee concluded:

> "*The case for more openness in government is compelling. It rests on the democratic principles of encouraging participation in public affairs and ensuring the accountability of those in office; it also derives from concern for the interest of individuals. A no less important consideration is that the Government requires public understanding and support to get its policies carried out. This can come only from an informed public.*"

To the surprise of some, legislation incorporating the committee's recommendations was passed quickly and came into force in 1983. The Official Information Act provides for people to have access to official and personal information held by Ministers of the Crown, government departments and local authorities. If a particular request for information to one of these organisations is declined, the requester has the right to ask an Ombudsman to investigate and review the decision.

The only reasons for refusing requests for information are those as set out in the Act. Upon taking up a complaint, an Ombudsman must review the information at issue and assess it against the withholding provisions set out. Some withholding grounds are conclusive: for example prejudice to the security or defence of New Zealand, or serious damage to the New Zealand economy, or prejudice to maintenance of

the law. The Ombudsman sights the information to ascertain that the claim may be made and then makes a recommendation. Other withholding grounds are defensible by the public interest in freedom of information. These include protection of trade secrets, or protection of legal professional privilege. The Ombudsman sights the information and undertakes a balancing test, expressing the public interest in the particular situation and making a recommendation. Those recommendations are then considered by the withholding organisation and acted upon. There is a potential right of veto of an Ombudsman's recommendation by the Cabinet. There has however been no occasion of use of the veto to date, which is a measure of the efficacy of the Ombudsman process. The Ombudsmen must also consider in each case whether the right to preserve personal privacy constitutes a factor in deciding if information should be protected or released. The Ombudsman must then determine whether or not the decision to withhold the information was made in accordance with the provisions of the official information legislation.

At the conclusion of an investigation, an Ombudsman may make a recommendation for release of the information at issue. In certain circumstances, this recommendation imposes a public duty upon the organisation concerned to release the information. When undertaking investigations, the Ombudsmen always keep in mind that the purposes of the legislation:

- enable citizens to effectively participate in the making and administration of laws and policies;
- promote the accountability of Ministers and officials;
- provide for proper access by each person to information about that person; and
- protect official information to the extent consistent with the public interest in the preservation of personal privacy.

In recent years the Ombudsmen have considered requests for:

- the level of salaries paid to chief executives and other Council officers;
- the redundancy packages given to officers whose positions have been terminated;
- discussion papers presented to Ministers or committees for consideration;
- detailed financial information;
- employment related information, such as references provided in confidence;
- information about building permits and planning applications;
- the identities of informants.

It can be seen that there is a wide range of requests. There were approximately 1149 official information request cases dealt with by the Ombudsmen's Office during this past year to June 2003. Several well known cases have involved the Official Information Act including Police V Ombudsman [1988] 1 NZLR 385, TVNZ v Ombudsman [1992] 1 NZLR 106, Queenstown-Lakes District Council v Wyatt Co NZ Ltd [1991] 2 NZLR 180 and Attorney General v Davidson [1994] 3 NZLR 143 and others, all of which in some way have referred to the constitutional kind of situation now pertaining to freedom of information in New Zealand.

III. DEFINITION OF CORRUPTION

The question of definition of corruption will clearly be covered in many other contributions to this conference and in more detail than here. From a New Zealand perspective the head of its civil service, the State Services Commissioner, Michael Wintringham, has said [3] that in his view "Corruption is not inefficiency, poor management or even theft as a servant or fraud but rather the use of public office for personal gain, usually involving bribery with at least two people involved, a buyer and a seller." This kind of definition is orthodox and can be compared readily with other contemporary sources. The Asian Development Bank Anticorruption Policy says it is "the misuse of public or private office for personal gain".[4] The Oxford Unabridged Dictionary has corruption as "the perversion or destruction of integrity in the discharge of public duties by bribery or favour". Webster's Collegiate Dictionary on the other hand says corruption is "inducement to wrong by improper or unlawful means (as bribery)". In some contexts it is considered important and useful to distinguish between graft when the illicit act is proposed by the official and where corruption (so called) is limited to when the illicit act is proposed by the malefactor citizen. The OECD has it in a 1996 publication as follows "In examining conduct it is useful to make a distinction between behaviours: illegal, i.e. that is against the law which covers criminal offences to misdemeanours; unethical, i.e. against ethical guidelines, principles and values and inappropriate i.e. against normal convention and practice. Corruption may fall under any of these headings. Its defining characteristics are the misuse of public office roles or resources for private benefit, material or otherwise".[5]

A. Challenges Wrought by Presence of Corruption - [General]

At all events, the most notorious kinds of corruption can easily be recognised and described. So whether the corruption be of large or small scale it is the questions of identification and eradication that are important. In the context of India, then President Narayanan said in 1997 "Corruption is one of the greatest challenges now confronting [the country]".[6] In another Asia Pacific state, Papua New Guinea, Simon Pentanu Chief Ombudsman of that country in a speech called "Dealing with Corruption" given in Canberra Australia in 1998, but published in June 2000, said "... the answer to corruption is becoming clear and plain. It is by and large about leadership. Honest creative competent leadership throughout all arms of government. This type of leadership is all about self-empowerment, which is the only viable antidote. ... We have to salvage ourselves and our ship of state".[7]

It can thus be stated that agreement will be reached without difficulty, that corruption is something which needs attention, even where in New Zealand for example, the number of cases may be small. Corruption is not confined to any country or continent because a small amount of reflection will bring to mind for example the Matrix - Churchill or "Cash for Questions" scandals of recent times in the United Kingdom, the Carrefours du Developpment scandal in France, each of the Flick, Barschell and Hesse controversies in Germany and either the Watergate or Iran-Contra affairs in the United States.

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[3] New Zealand State Services Commission Annual Report 2000.

[4] Asian Development Bank Anti-Corruption Policy April 1998 p.1.

[5] Ethics in the Public Service, Current Issues and practice OECD 1996.

[6] International Herald Tribune 13 August 1997.

[7] Papua New Guinea Ombudsman Commission 2000.

B. Challenges Wrought By Corruption [New Zealand]

The New Zealand State Services Commissioner put the matter of challenge in the following way. "If corruption is so rare in the New Zealand State sector, why should we be concerned about a handful of cases. There are three reasons. First ... such cases undermine citizens' confidence in public institutions on a scale disproportionate to the offence. In a country that relies largely on voluntary compliance with tax laws, benefit administration and range of licensing and registration arrangements, citizens' compliance is directly related to their trust in the way in which their personal information will be held, the honesty of the officials administering the law and citizens' perception that all are treated equitably. This public confidence is fundamental to a successful civil society. Secondly our [New Zealand's] admirable track record in these matters cannot be taken for granted. There are plenty of overseas examples to demonstrate that once it becomes established, corruption is difficult and costly to eliminate. Openness - that is a willingness to acknowledge the risks and to prosecute those who transgress - is fundamental to minimising such risks. Finally, a State sector and private sector free of corruption contribute to a fair society and a well-performing economy. Neither equity nor efficiency are served by corruption. In recent years international financial institutions which were once tolerant of, or at least philosophical about, a degree of corruption in countries where they were funding development programmes, have brought the eradication of corrupt practices closer to the top of their agenda".[8]

It may therefore be of interest to describe what may be termed the chemistry of the New Zealand public sector and the very limited amount of corruption that has been found to exist and to likewise examine some of the mechanisms that ensure, for the moment that it is kept to a minimum.

IV. CONSTITUENT ELEMENTS OF NEW ZEALAND'S PUBLIC SECTOR

The New Zealand Public Service is comprised of 38 Government departments plus a number of Crown Entities and State Owned Enterprises. As at 30 June 2003, the number of staff employed calculated on a full-time equivalent basis was just short of 35,000. Latest estimates put the population of the country at just over 4.0 million, there being two major ethnicities, European and Maori, the latter being 15%. To this should be added a smaller number of other groupings, people of Pacific Island descent comprising 6% and those of Asian origin 5%. In other words, New Zealand can be described as a predominantly European but significantly multi-cultural country where in day to day living there is considerable evidence of Maori and Polynesian themes. Something of that same ethnic mixture comes to be represented in those employed by the State.

During the past 20 years the New Zealand public sector has been the subject of widespread reform as what is now known as "New Public Management" has come to be applied. This has had a number of constituent elements. Laws governing labour organisations and the negotiating environment were passed. State Owned Enterprises undertaking operations on a commercially viable basis were established. A number of activities more suited to the private sector - such as railways, insurance, telecommunications and banking were sold. A State Sector Act restructured public sector management and aligned the public sector with private sector employment regulations. Employment came to be undertaken by means of contracts renewable after specific terms rather than employment being on a long-term and sometimes lifetime basis. The foregoing and other items have had considerable effects on New Zealand life, a major one being reduction in the number of public sector employees from more than 90,000 to 30,000 in that 15-year period.

[8] New Zealand State Services Commission Annual Report 2000.

As to employment, it can be observed that along with countries of a similar kind, namely Australia and Canada for example, employment patterns have been transformed during the 20th Century. In former times, whereas there were emphases upon manual work and bread winning being the role of the male waged person. These have been replaced by a number of more complex patterns - the involvement of both men and women and different ethnic groups, along with an expanding service sector, increased self-employment, part-time employment and job sharing. This has created, in the public sector as well, more demand for the highly skilled, with increased waged dispersion based on skill levels and greater variations in hours and conditions. In accordance with relatively new employment legislation, New Zealanders, by and large (inclusive of working in the public sector), enter individual contracts of employment with their department or Ministry. This is so at all levels with the Chief Executive very often having a specific contract with the responsible Minister. These contracts provide for particular levels of performance that are expected. It can be stated that, in the context of general employment, people in the State sector are well paid in New Zealand terms. Put in another way, there is no great disparity between ordinary wages earned in the public sector with ordinary wages earned by employees in the regular business community.

The next relevant factor in describing the New Zealand community relates to general levels of education. Without going into detail, New Zealand can be described as a country with a high degree of general literacy where there is an emphasis upon learning up to tertiary level. Education is compulsory to the end of secondary school and, whilst most students attend State funded schools, there are a number of other choices for parents and students and many opportunities for community education and advanced education thereafter.

With a tradition born of a colonial past, which emphasised things such as self-help and an egalitarian approach, New Zealanders can be said to dislike either excesses or abuses of power, which in the context of a small society they are able to remonstrate, when necessary. To describe the New Zealand community in a sentence, the elements of a relatively small but reasonably well-educated and egalitarian minded community emerges, which dislikes unfairness and which will not tolerate corruption in the way adverted to by the New Zealand State Services Commissioner above. All of these things have a bearing in keeping the amount and degree of corruption at low levels.

A. Constituent Elements Available to Combat Corruption

As indicated above in the definition of corruption, many corrupt actions will be illegal in the sense of breach of the criminal law. The New Zealand Police have responsibility for enforcement of the criminal law and principally the Crimes Act, the Summary Offences Act and Misuse of Drugs Act available for use in prosecutions before the Courts.

In addition, for specific matters of fraud of a more serious complex and multiple kind, there was established in New Zealand in 1990 a specific Serious Fraud Office, which was set up to facilitate the detection, investigation and expeditious prosecution of serious and/or fraud offenders. This office involves the resources of multi-disciplinary teams of investigators, forensic accountants and prosecutors. The inception of the New Zealand Serious Fraud Office some ten years ago reflected a trend around the world to establish similar agencies in the face of increasing difficulty for law enforcement agencies using traditional methods to come to grips with serious or complex fraud offending. In the decade to this year, over 100 prosecutions have been taken with a record of successful prosecution; it is said, of more than 90%. International fraud is now becoming a focus of interest for the Serious Fraud Office with a growing need for it to use modern technology in detection.[9]

[9] New Zealand Official Year Book 2000 p. 502.

As was said in commencing, New Zealand was the first English-speaking country in 1962 to adopt by legislation the previously Scandinavian notion of Ombudsman methodology. This envisages the independent investigation of citizens' complaints about an act of maladministration by a Government department or agency. The Ombudsman is furnished with sufficient powers to inquire and obtain such information as may be necessary to form a view of the matter under complaint and to make a recommendation for redress, where that is appropriate. The New Zealand Ombudsman office has functioned now for nearly 40 years with there being now two Ombudsmen undertaking some 6000 cases per year, brought to them by ordinary individuals. The ready availability of a complaint mechanism is thus something to which New Zealand citizens have relatively easy recourse. The work of the New Zealand Ombudsmen, though conducted according to an individual New Zealand statute, broadly accords with the internationally accepted definition of Ombudsman, also mentioned at the outset.

All investigations undertaken by Ombudsmen are conducted in private. When an Ombudsman believes a complaint can be sustained, this opinion is reported to the Government department or organisation concerned along with any recommendation for action. A copy of this report may also be made available to the responsible Minister. At the local government level, over which, in New Zealand, the same Ombudsmen have jurisdiction, the Ombudsman reports the finding to the organisation and may provide a copy of that to the Mayor. Ombudsmen have no authority to investigate complaints against private companies and individuals or decisions of Judges. The foregoing enables Ombudsmen to become aware of evidence of corruption or corrupt activity and to take action with the relevant organisation.

As has also been described, at the beginning of the 1980s, following the report of a Government appointed Committee comprising senior civil servants, New Zealand passed an Official Information Act in 1982 and became a "freedom of information" country. This is based on the principle that information shall be made available unless there is a good reason for withholding it. The purposes of the Act are to increase the availability of official information to the people and provide for proper access by bodies corporate to official information relating to them but at the same time, where it is in the public interest, to protect official information from disclosure and to preserve such things as individual privacy. The Official Information Act, by and large, covers all Government departments, statutory bodies and State Owned Enterprises, with the exception of the Courts. Ombudsmen can review a decision by a Government organisation to refuse supply of information, and the formal recommendation of an Ombudsman, after such review, is binding unless overridden in very limited circumstances. The Official Information legislation also contains provisions enabling citizens to be advised of reasons for decisions. The provision of information or the absence of it can frequently identify something wrong (which may be evidence of corruption) and which will become apparent to an Ombudsman who can then do something about it.

In short, the Ombudsmen, whether acting in their jurisdiction on complaints about maladministration, or in their jurisdiction to make available, where appropriate, official information, play a role in ensuring the transparency and accountability of Government. It follows that the Ombudsmen can in the course of this work become aware of evidence of corruption and can be in a position to recommend action regarding it.

Statutory measures against corruption have continued to be added to the law in New Zealand. The New Zealand Parliament in April 2000 passed legislation which came into effect on 1 January 2001. This legislation, called the Protected Disclosures Act, enables employees who observe serious wrongdoing in or by an organisation to disclose that to what are called "appropriate authorities" such as the Ombudsmen, the State Services Commissioner, the Commissioner of Police, the Auditor-General, the Director of the Serious Fraud Office and others. In circumstances where that is done, the notifying person will be

protected from civil, criminal or disciplinary proceedings, or retaliatory action which might be taken by an erstwhile employer. New Zealand thus joined those countries which have what is termed "whistleblower" legislation.

One of the functions of the State Service Commission, which superintends the Public Service and its staff, is to promote appropriate values and standards of behaviour for the Public Service. That organisation publishes a specific Public Service Code of Conduct, which comprises three principles, these being first that "employees should fulfil their lawful obligations to Government with professionalism and integrity", secondly that "employees should perform their official duties honestly, faithfully and efficiently, respecting the rights of the public and their colleagues", and thirdly "employees should not bring their employer into disrepute through their private activities".

More recently, in 2000, the New Zealand Government appointed a State Sector Standards Board comprised of a group of senior people from commerce and Government and the Trade Unions, to draft a statement of Government expectations of the State sector and the priorities that departments and agencies are to observe in responding to citizens.

In a small country there is the opportunity for a considerable amount of cross-fertilisation of ideas and concepts. There is available, when one talks of means to avoid corruption, the following, connected with Ombudsman methodology. It will be recalled from above, that the Ombudsman concept enables independent investigation of complaints of maladministration. That model, after having been applied for a great many years in the public sector, has come to be taken up in two New Zealand industries. First, the Banking Ombudsman scheme began in July 1992. It arbitrates unresolved disputes about banking services in an independent and impartial manner and such help is available free to the complainant. The Banking Ombudsman is, in the instance of that industry, furnished with power to award compensation to cover direct losses of up to $100,000, inconvenience of up to $2,000 and some costs. There is a reporting mechanism to a Banking Ombudsman Commission, which comprises representatives of the banks and consumer organisations. Episodes of corruption, if any, are able to be complained of through this means. In 1995 there was also commenced in New Zealand an office of Insurance and Savings Ombudsman, this being an independent body to help consumers resolve their complaints against participating insurance and savings companies. Again, this is a free service to consumers operating independently of the insurance and savings industry and funded by levies upon companies involved in the scheme. The Insurance and Savings Ombudsman's jurisdiction extends to investigation of personal and domestic insurance, where less than $100,000 is involved and the person is able to approach the Ombudsman after having taken it up with the insurance company in question.

One can therefore see the mirroring or modelling in the private sector of something which has proven to be successful in the public sector. Parliamentary Ombudsman methodology has proved successful for New Zealand citizens and for the public sector. The shift to the private sector and the adoption of many of the methods employed by the Parliamentary Ombudsman - inquisitorial approach, informal resolution and use of alternative dispute resolution means - assist this in being successful. It is to be noted that there is a distinction with industry Ombudsmen having the power to make binding orders in certain circumstances, whereas Parliamentary Ombudsmen are restricted to recommendations which goes back to the original Scandinavian conception of Ombudsman.

V. CONCLUSION

The foregoing has been a brief survey of measures available to combat corruption from the standpoint of a small country in the Asia-Pacific region. It is from the standpoint of a country which has registered a high placing in the well-known Transparency International Corruption Percentage Index for a number of years. That assessment, conducted each year, is not an assessment of the corruption level in any country but an assessment of the level at which corruption is perceived by people working for multi-national firms and institutions as impacting on the commercial and social life in that country. It can be said that New Zealand is fortunate in having very low levels of corruption and that, with the measures described above, such is likely to continue in the future. To quote a recent New Zealand representative for Transparency International (an international non-governmental organisation with a specific interest in public sector corruption and its eradication), Dr Peter Perry of the University of Canterbury in Christchurch New Zealand, "Corruption is an ever-present threat, globally increasing and better tackled before rather than after the event". "All commentators", he said, "agree that good governance is the best preventative".

In ending I wish to draw together the two streams - of the Ombudsman role affecting maladministration and the Ombudsman role affecting freedom of information, in order to address some general remarks about the future of the office.

A question often posed to Ombudsmen worldwide is whether the ordinary community sufficiently understands the redress offered by the service. This is no area for complacency. In New Zealand, the legislation has been in force for more than 40 years, and the jurisdiction has been extended to cover local government, state owned enterprises and schools. The daily workload of the two Ombudsmen sees several hundred cases open at any given time and some thousands dealt with each year. And yet there needs to be continuing publicity given to the work of the office. This can be in the media, through the country's ethno-minorities, in school publications and by receiving public airing in Parliament and its Select Committees. The New Zealand office continues to handle more complaints annually. In 1965 the annual total was 743; in 1975, 1163; in 1985, 1994, in 1995, 4707 and in 2003 no fewer than 5121 cases were under investigation in the course of the year to June 2003.

Publicity is vital. The notion of the office being one of last resort for the community must be preserved. It also seems appropriate to ensure that the office is reactive to complaints by individuals and is not engaged in what might be termed artificial solicitation of complaint. It is generally agreed that low key but regular publicity and dissertation regarding its services meets the matter best.

It might be thought that the Ombudsman office, by having grown incrementally for over 40 years, all over the world, would have an assured position in the framework of every modern state, and that nothing has emerged which might replace it. Developments of the last decade would suggest this to be so. The installation of an Ombudsman (entitled the Public Protector) in South Africa is a good example, but so too are new States in Africa and Eastern Europe. But there is no room for complacency regarding ongoing growth though, because whilst the office has certainly grown through two generations (taking 1960 as a baseline), government administrations of the early 21st century can be of a far different size and style and may exert a much different influence on the citizenry. In New Zealand, widespread economic reform and restructuring of government enterprise have reduced the numbers in the civil service. Many people are now working under contract and for shorter periods. Successive Governments have adopted a funder/provider split with many of the providing functions being delivered by the private sector rather than by government departments. In these terms, it could be argued that the need for an Ombudsman service in New Zealand has lessened. But yet, the number of complaints referred to our office continue to increase each year.

Is recourse to the Ombudsman a worthwhile asset to the ordinary citizen? The question is intriguing because the term 'redress' usually connotes the ability to obtain some kind of order or sanction against a department or organisation. That ability to bring down sanctions is one reserved to judicial tribunals. The Ombudsmen have, at least in New Zealand, never been granted such powers and neither have any ever been sought. Professor Larry Hill, in his book "The Model Ombudsman" commented poignantly that "... one of the institution's most interesting puzzles is its apparent effectiveness, despite minimal coercive capabilities". The recent Netherlands Ombudsman, Marten Oosting is on record as saying that the major power available to an Ombudsman is in "the mobilisation of shame".

The emphasis has rather always been on the Ombudsmen's ability to persuade the parties to some kind of resolution. It can certainly be said, from a New Zealand standpoint, that Ombudsman recommendations have developed an enviable record of being adopted, even if not in the short term, then certainly in the medium and longer terms.

New Zealand barrister and writer, Dr Graham Taylor (who co-incidentally worked as legal counsel to the Ombudsmen in the 1980s), in a paper published in "Judicial Review of Administrative Action in the 1980s described administrative review in New Zealand as being available by three broad means: "first in the courts, secondly under the Official Information Act and thirdly by referral to the Ombudsmen". If the jurisdiction of the third of these is to remain meaningful, there must be regular review and reappraisal of the role. The Ombudsmen must be able to operate in an independent fashion; they must be encouraged to be flexible in resolving items, particularly where dispute has occurred; and they must retain credibility both with the public and with those organisations subject to coverage. One of the keys to maintaining credibility for the Ombudsmen office is that the incumbent should never be seen to become an advocate for either complainant or organisation. The Ombudsman should be seen to undertake a separate and distinct review. If there is a role for advocacy, it should be restricted to the Ombudsman advocating the particular recommendation in a particular case following an independent review.

Let me end with four quotations, the first from "Bridled Power" one of the co-authors of which is a former New Zealand Prime Minister, Sir Geoffrey Palmer:-

> "*The introduction of Ombudsmen has had a healthy effect on decision-making in the New Zealand Government. They provide the check of independent scrutiny with full access to the relevant information and the possibility of publicity about erroneous Government decisions that affect individuals.*"

The second quotation is from Hon Mrs Anson Chan who, in 1997 was appointed to be Head of the Civil Service in the Special Administrative Region of Hong Kong - where the office has been retained, following the return of Hong Kong from British Colonial status to being part of China.

> "*An Ombudsman has a difficult job. [He] has to maintain [his] independence and impartiality, not an easy task as many issues become more and more politicised. And a good Ombudsman should always try to strengthen the relationship between the public and the government. It is only too easy to find fault in a way that will adversely affect the credibility of the government and demoralise staff. It is all the more difficult to make constructive criticisms that will enable civil servants to understand how they can do their jobs better, thereby improving the standard of service to the community, and at the same time enhance the public understanding of why a government takes the decision it does. An Ombudsman needs courage, intelligence, determination and sensitivity to do [his] work successfully.*"

The third quotation is from Justice Kantharia, recently deceased Ombudsman of the State of Maharashtra, India, writing for an Ombudsman meeting in the mid 1990's.

> "*The basic foundation of the institution of Ombudsman is to ensure that citizens should not be the victims of actions of the bureaucracy or other functionaries. The central feature of the institution is that the investigation and association of administrative conduct would confirm the basis for proposals as to future conduct of the bureaucrats. The purpose of investigation is not only the redress of individual complaint, but prevention of future ones. Thus an Ombudsman is able to make suggestions for improving performance and better service to the citizens in the light of experience gained while investigating into public grievances. The institution has to be quite alert to prevent maladministration. To put it precisely, the institution of Ombudsman is a device by which the state provides free service of an independent investigator for looking into citizens' complaints and submits its own decisions and suggestions for remedial action.*"

The final quotation is from New Zealand's first Ombudsman, Sir Guy Powles, who declared upon taking office.

> "*The Ombudsman is Parliament's person - put there for the protection of the individual, and if you protect the individual, you protect society. I am not looking for any scapegoats or embarking on any witch hunts. I shall look for reason, justice, sympathy and honour, and if I don't find them, then I shall report accordingly.*"

CORRUPTION CONTROL: MORE THAN JUST STRUCTURES, SYSTEMS AND PROCESSES ALONE

Chua Cher Yak *

I. BACKGROUND

Post independent Singapore has transformed itself from a corruption-infested city-state to one that has been consistently rated by independent survey agencies to be amongst the least corrupt countries in the world. We have been placed amongst the five least corrupt countries in the world by Transparency International in the last two years (not mentioning even third in 1995). The Political and Economic Risk Consultancy (PERC) on the other hand, has placed us, since the inception of the survey in 1996, as the cleanest in Asia.

It may sound immodest but I must hasten to say that this is certainly not due to some fortuitous circumstances, or some quirks or accidents in history. The Government was determined, through sheer political will, to reverse the trend of the colonial and the immediate post colonial days. It has made corruption control very much part of its national agenda, viewing corruption control as inextricably tied to good governance. Corruption control ensures our survival as a nation and as a people. Consequently, corruption which was probably once a way of life, gradually gave way to a counter culture that abhors corruption, nepotism and cronyism.

II. RATIONALE & GUIDING PRINCIPLES

Enough has been said publicly by government leaders about the need to maintain a corruption-free Singapore. I will, however, recount some of the more significant ones.

First, the mood for a strong anti-corruption policy and the resolve to curb corruption was struck by the government as early as 1960 in Parliament when it declared that:

> "The Government is deeply conscious that a Government cannot survive, no matter how good its aims and intentions are, if corruption exists in its ranks and its public service on which it depends to provide the efficient and effective administrative machinery to translate its policies into action... Therefore, this Government is determined to take all possible steps to see that all necessary legislative and administrative measures are taken to reduce the opportunities of corruption, to make its detection easier and to deter and punish severely those who are susceptible to it and who engage in it shamelessly."

* Director, Corrupt Practices Investigation Bureau, Singapore.

Second, the strong anti-corruption refrain was heard again and again including this one, made in 1979 by the then Prime Minister, Mr. Lee Kuan Yew, when he explained the need for a corruption-free Singapore in the following way:

> "The moment key leaders are less than incorruptible, less than stern in demanding high standards, from that moment the structure of administrative integrity will weaken, and eventually crumble.
>
> Singapore can survive only if Ministers and senior officers are incorruptible and efficient... Only when we uphold the integrity of the administration can the economy work in a way which enables Singaporeans to clearly see the nexus between hard work and high rewards.
>
> Only then will people, foreigners and Singaporeans, invest in Singapore; only then will Singaporeans work to improve themselves and their children through better education and further training, instead of hoping for windfalls through powerful friends and relatives or through greasing contacts in the right places."

Third, corruption control is not viewed simply as just a moral issue. Senior Minister Lee Kuan Yew explained as recently as 1999 that Singapore's tough stand against corruption was "not a matter of virtue, but of necessity". This is consistent with an earlier statement he made. As Prime Minister, he said: "Staying clean and dismissing the venal is one of the six guiding principles of the PAP Government.

III. SIGNIFICANCE OF POLITICAL WILL IN CORRUPTION CONTROL

What of this? How does this explain what works and what does not? How much does all the political will translate into success? I shall attempt to explain how political will, in my personal opinion, is almost everything, in this long and arduous road to relative success.

Political will provides the foundation for all anti-corruption efforts. It forms that all important sub-structure, upon which, all the super-structures of anti-corruption work rest. It provides the soil and the nutrient which allows the seeds of anti-corruption work to germinate and grow; first into a strong sapling, then into a sturdy tree.

But genuine political will has to be more than some pious rhetoric, some empty sloganeering. Words must match deeds. There has to be a sincerity of purpose and the all important display of personal example. Recognising this, political leaders have unflinchingly submitted themselves to scrutiny and demonstrated much verve and vigour fighting corruption. Knowing that if they were to live in glass-houses they cannot throw stones, they set personal examples and established the much needed moral authority to stamp out corruption. It is simply a question of honest men and honest deeds. Honest deeds, surely, are the ultimate expression of the political will for corruption-control.

Fired by a consuming political will, the government then set out to remove all obstacles that are in their way. Weak laws were strengthened when they could have easily been exploited by the ruling elite for their corrupt ends. They mobilised the public, the entire civil service and all apparatus of the state, including the judiciary, to fight corruption. Nobody works at cross-purposes. All efforts are harmonised. There is unity of action as much as there is unity of purpose. Everyone is galvanised by like-mindedness, almost as if they were swept by some royal or imperial edict.

Spurred by a grand political purpose, the Government re-created and re-fashioned the Corrupt Practices Investigation Bureau out of the ashes of an ineffectual anti-corruption agency left behind by the colonial masters, to help it fight corruption. We became but one of the many instruments in the government's arsenal to fight corruption. CPIB, as reconstituted, however, could just be a still-born idea if not for the fact that political will and blessings allowed it to flourish. A revamped CPIB was never born out of a need to fight a corrupt government. We were re-created by an incorrupt government to fight corruption. We did not start as a civil movement fighting against a corrupt government. If we had, we would not have gone far. Unlike many agencies which grew out of a need to fight a corrupt establishment, we never have to work antagonistically against the Government and the entire public service. Certainly civil movements or NGOs played no significant role in the successful fight against corruption in Singapore. The presence of any such movement will, in fact, be seen as an affront to, and an indictment of the effectiveness of CPIB. After all, NGO is just a euphemism for lobby groups or pressure groups, established by those disenchanted or dissatisfied with the state of corruption.

Driven by an intense political will, there was an almost obsessive desire to succeed in the anti-corruption effort. The Government signalled this by taking complete control and ownership of the entire anti-corruption movement. It made CPIB report directly to the Prime Minister so as to block any undue interference from any quarters and to ensure that CPIB favours no one particular department or agency. Under the wings of the Prime Minister's Office, CPIB was able to truly operate without fear or favour. In fact, by 1992, CPIB's independence of action was more or less guaranteed constitutionally. With such independence of action, CPIB took action against Ministers and many top civil servants.

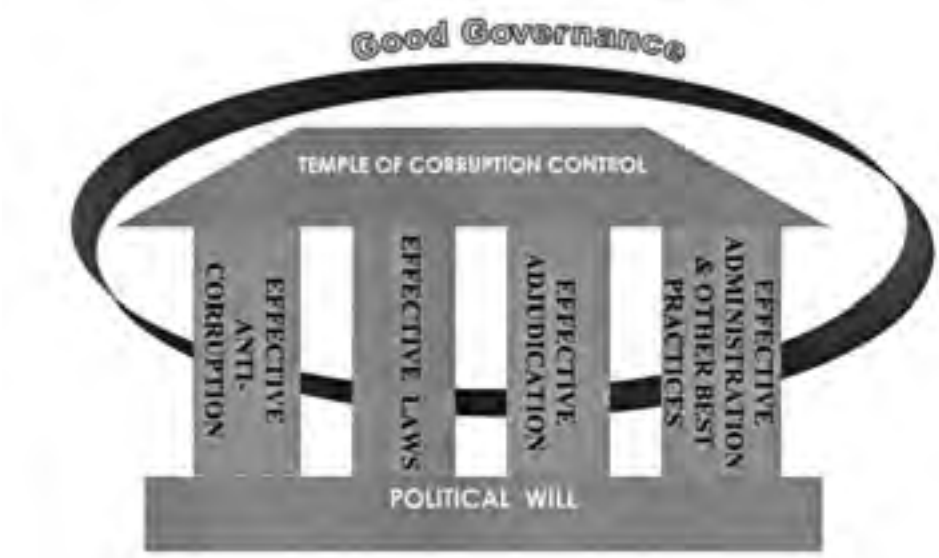
IV. A SIMPLE FORMULA?

So is there a simple formula in corruption control? An ancient Chinese official once said that corruption is the product of bad men and bad laws. If this be so, the formula must then be a frightfully simple one: have good men and have good laws. Let there be good men in government. Let them be blessed with the necessary political will. They will then have sufficient motivation, as standard bearers of anti-corruption, to enact good laws which are a sufficient deterrent against the wayward. If the bad strayed from the straight and narrow, they could be straightened and recycled through good laws so that they may become good again.

A. Framework: "Temple of Corruption Control"

Contemporary mankind is, however, more used to formatting solutions according to systems and frameworks. For this, I have constructed a framework which I shall call the "Temple of Corruption Control". This consists of four pillars resting on the foundation provided by "Political Will". These four pillars are: "Effective Anti-Corruption Agency", "Effective Laws", "Effective Adjudication" and "Effective Administration and Other Best Practices". Of course, the temple is shrouded by a halo, significantly known as "Good Governance". These constitute the National Integrity System. Having dealt with "Political Will" as an important foundation, I shall now elaborate on each of these four pillars.

Temple of Corruption Control



B. Effective Anti-Corruption Agency

It will, of course, be difficult for me to make judgement on how effective CPIB is, as an anti-corruption agency. But, let me say that we have always endeavoured to be a crack investigative agency, committed fully to our mission of "combat(ting) corruption through swift and sure action". We hope to fulfil this sacred mission through three broad strategic objectives:

(i) To continuously improve operational effectiveness;
(ii) To be proactive through superb intelligence craft; and
(iii) To support operations through learning and innovation and associated human resource programmes.

We would like to think that we have through swift and sure action heightened the perceived risks of involvement in corrupt activities. We also hope that through our strong action, we have rendered corruption a high risk, low return business.

Our aspirations and what we stand for, is best captured by the following features in our logo:-

CPIB
Swift and Sure

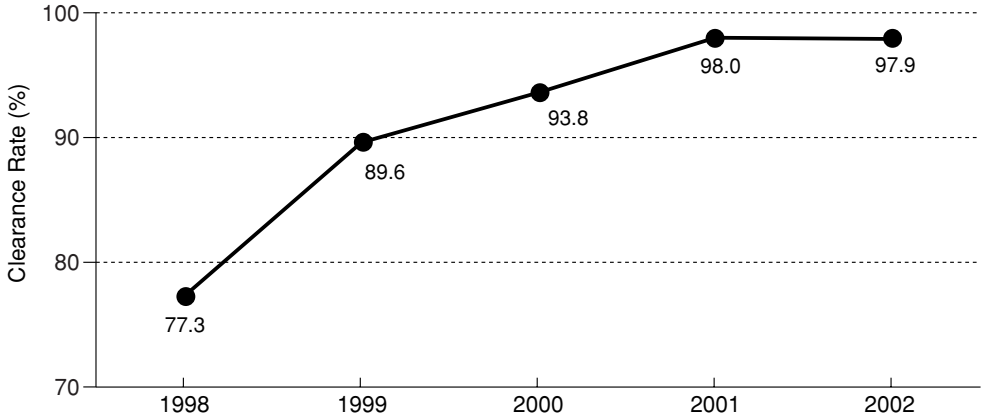
(i) A "cascade of squares" symbolises the pervasive effects of our anti-corruption efforts, besides being a stylised version of the letter 'I' in CPIB'. Significantly, a square is both an icon and a metaphor for fairness;

(ii) The dot in the letter 'i' doubles as an eye and a globe. As an eye, it proclaims our watchful and vigilant stance while the globe symbolises our aspiration as an effective agency on a global scale.

What statistics have we to back this up? The following facts and figures are pertinent.

(i) *Clearance Trend*

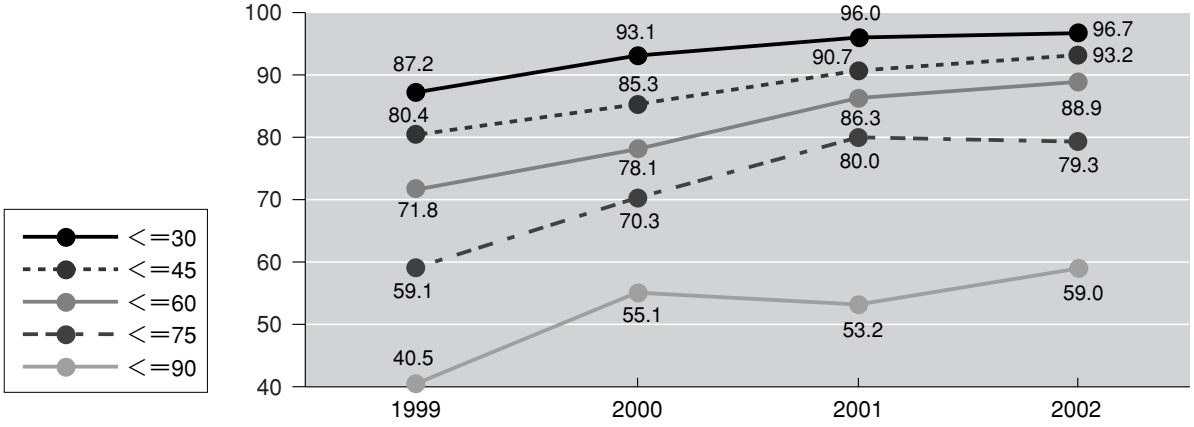
The Clearance Trend for the past five years shows that it has crept up significantly from 77.3% in 1998 to 97.9% in 2002.



(ii) *Cycle Time*

The Cycle-Time which shows an improving trend over the last five years, such that at the end of 2002:

59% of cases were cleared within 30 days or less
79.3% of cases were cleared within 45 days or less
88.9% of cases were cleared within 60 days or less
93.2% of cases were cleared within 75 days or less
96.7% of cases were cleared within 90 days or less



(iii) *Prosecution Rate*

The Prosecution Rate shows that between 187 and 251 persons were charged in court in the last three years, and between 74 and 125 were disciplined for the same period. Expressed as a percentage of the cases completed, the prosecution rate for the past three years is between 73.4% and 87.3%.

Year	Total No. of Persons Charged in Court	Total No. of Persons sent for Disciplinary Action
2000	242	125
2001	187	94
2002	251	74

It is also important to mention that we subscribe fully to the principle of continuous improvement. Our yearly targets are reviewed. Fresh targets and benchmarks are set annually in a bid to raise the bar.

C. Effective Laws

Effective laws are enforcement-friendly laws that give us the necessary teeth and the cutting edge. Enforcement-friendly laws are particularly necessary in corruption control. This is because corrupt practices, by their very nature, make evidence collection and the eventual conviction in a court of law difficult. Corrupt practices are consensual in nature, with both the giver and the taker motivated by mutual interests. Often, a happy situation exists. There is a satisfied giver and a satisfied taker. Bonded by such mutual interests, one, naturally, will not squeal against the other.

The distinctive features of our law that gives us the much needed cutting edge are:

(i) "gratification" is so broadly defined that it covers a whole multitude of sins as it embraces, inter alia, "favour or advantage of any description whatsoever".

(ii) a presumption that any gratification received by a public officer from a person who has or seek to have dealings with him or the department, is deemed to have been received corruptly, shifting the burden of proving otherwise to the defence (and a very significant shift at that);

(iii) an acceptor of a gratification can be guilty even if he does not have the power, right or opportunity to return the favour;

(iv) the "accomplice-rule" which views the evidence of an accomplice as unworthy of credit unless corroborated, is removed;

(v) wealth disproportionate to income is admitted as corroborative evidence of corruption in a trial;

(vi) the Public Prosecutor can order any other public officers or persons who can assist in the investigation of a public officer, to furnish sworn statements, specifying property belonging to him, his spouse and children, including money and property transferred out of Singapore;

(vii) every person under investigation is legally obliged to give information;

(viii) the Public Prosecutor can obtain information from the Comptroller of Income Tax on anyone under investigation;

(ix) extra territorial jurisdiction can be exercised against Singapore citizens committing corruption offences outside Singapore;

(x) punishment is sufficiently deterrent. A single charge attracts a maximum fine of $100,000 or an imprisonment term not exceeding five years or both. For offences involving Government contracts or those involving bribery of a Member of Parliament, the maximum jail term is extended to seven years, although the maximum fine remains at $100,000. A penalty equal to the amount of bribe taken shall also be imposed. The Corruption, Drug Trafficking and other Serious Crimes (Confiscation of Benefits) Act can be invoked to confiscate any benefits derived from corruption from anyone convicted of the crime.

D. Effective Adjudication

Sure detection, and strict enforcement of laws, no matter how effective, must however, be complemented by effective adjudication. Detection, prosecution and subsequent conviction in a court of law exert a powerful specific deterrence directly on the person indicted for the offence. This also has a general deterrence on the like-minded. To borrow an old Chinese saying, this amounts to "killing one to frighten a hundred". Or, as they also sometimes put it, it is "killing the chicken to teach the monkey". It is prevention through sure detection and conviction in a court of law. In the words of the Chief Justice:

> "The Government recognizes that deterrence remains the cornerstone of our penal philosophy. Our sentencing policies must continue to reflect the importance of public order and discipline. The criminal justice system must bear down on the recidivist. The framework for benchmark sentence should be consistently reviewed and refined, in the light of evolving criminal trends." (Subordinate Courts Workplan Seminar, 2003).

Yet nothing is more poignant than what Senior Minister Lee Kuan Yew said when he was Prime Minister, in Parliament in 1987:

> "The strongest deterrent is in a public opinion which censures and condemns corrupt persons; in other words, in attitudes which make corruption so unacceptable that the stigma of corruption cannot be washed away by serving a prison term."

Consistently over the last five years, we have very good conviction numbers to back this penal philosophy. The average is above 95%, with the figure peaking at 99.1% in 2002. This is not possible if the prosecution office and the judiciary do not see themselves as having a part to play in dispensing justice to ensure overall crime control, including corruption control. How well has our Judiciary played this role? At least well enough to be rated as No. 1 in the world by World Bank since 1997. The prelude to this were some extensive judicial reforms undertaken from 1992 to 1999, during which more than 1,000 justice-related initiatives were implemented. In a paper presented to the 10th UN Congress on the Prevention of Crime and the Treatment of Offenders in 2000, Lau Wing Yum, a judge and a registrar of courts, said: "This (the reforms) greatly enhanced access to justice and advanced public trust and confidence in the justice system and in the rule of law ... in turn prevents the breeding of corruption within the court system, as the justice processes become more transparent and visible to public scrutiny and as the Judiciary makes itself accountable to the public for the use of its resources."

In the same paper, Lau also mentioned that the Courts observed the "Ten Commandments" in order to keep the Judiciary corruption free. The "Ten Commandments" are:

1. Transparency in the selection and promotion of judges based on merit, competency in legal knowledge and experience, besides publicly gazetting all promotions and appointments.
2. Adequate remuneration to judges and court staff, according to salary scales prescribed by the Judges Remuneration Act.
3. An independent yet accountable Judiciary. The Courts are free of any external interference in the judicial decision making process. At the same time, the Judiciary is subject to external audits to ensure accountability in the courts' use of public resources.
4. A coherent system of case management which eliminates backlogs and shortens waiting time, rendering the Judiciary almost invulnerable to mismanagement of cases.
5. A Justices' Scorecard for the Judiciary and the Judges which rigorously tracks performance measured through time-based, volume-based and disposal-based indicators.
6. Consistent and objective criteria in the administration of justice, including the establishment of a

centralised sentencing court, standardised composition fees and fines and the application of tariffs in sentencing, etc.

7. Clear ethical markers and guidelines for the Judges, comprising the Judges' Oath of Office, Judicial Ethics Reference Committee Report, Code of Judiciary Ethics and the Government's Instruction Manual.
8. A common vision for the Judiciary and Leadership by Example by the Chief Justice provides unity of vision and purpose. This checks any likely corrupt tendencies arising from uncertainties and uncoordinated action.
9. Transparency in the justice process as all court proceedings are open, public hearings. Decisions are documented and subject to public scrutiny. Both the prosecution and the defence can appeal against any decision made by the Courts.
10. Learn from forward-looking institutions, through the forging of strategic partnership with forward looking, progressive judiciaries and justice-related institutions.

E. Strategic Intent

Whatever the framework may be, the strategic intent is that corruption control should form part of the broader framework of good governance. It is an important "enabler", which, at least in Singapore, resulted in two spin-offs; which in turn, set off a virtuous cycle.

1. It helps the Government to create national wealth. This concomitantly, enables it to pay public officials fairly attractive wages. Decent wages were, thus, only possible because it was corruption control that helped create the initial abundance and prosperity. Yet, are high wages a strategy in corruption control? High wages satisfies needs but does it curb greed? The Government's views on this are best captured by Bob Crew of the South China Post in Aug 1973, when he said:

   "by giving people their self respect and enough money in their pockets - by restoring to them, if you like, their dignity and its corresponding integrity of purpose, they are more likely to regard corruption as beneath them and less likely to abandon their public and private consciences; less likely to sell their souls to the devil.

   If one's wallet is as big as one's conscience then, in the view of many a worldly-wise cynic, one's conscience is better able to succeed."

2. It helps to bring about efficient administration, an obvious outcome of good governance, perhaps. The inter-relationship between efficiency and corruption control is again succinctly summed up by Bob Crew of the South China Post when he said in the same previously cited article, the following:

   "Singapore's approach to the problem of corruption is, we are told, simply one of efficiency in administration.

   The theory is that the administration is so tight, so efficiently run and controlled, that there is no room for corruption which thrives much better in an inefficient administration in which there are plenty of loopholes for it to flourish unnoticed and unchecked, where there is scope for hoodwinking and beating the system.

   Singapore takes the view that if a Government can institute and operate an efficient system, then it can as easily achieve an efficient anti-corruption sector as it can achieve efficient business, industrial, political and military sectors.

> Additionally an efficient administration can only be run by people who are turned on by and, good at, efficiency; people who are thereby content rather than discontent, fulfilled rather than frustrated, dedicated rather than disloyal, satisfied rather than dissatisfied, incorrupt rather than corrupt."

Imbuing in public officers a desire for service orientedness definitely has far reaching consequences. Since service excellence and the need to comply with standard operating procedures are incompatible with corrupt practices, any quality related movement will militate against corruption, and hence have pre-emptive potential. And in this, the stark question is, "what if CPIB itself, of all agencies, underperforms?"

Singapore has a head start of some forty odd years in corruption control. But success came as early as in the 60's and the 70's, during which two turning points caused a fundamental shift in the national psyche. These were:

1. the conviction in 1975 of Wee Toon Boon, a Minister then, and the subsequent investigation of other political leaders, had tremendous symbolic significance for the public. The public saw for themselves the Government's sincerity and resolve to fight corruption. They probably reasoned that if the Gods at Mount Olympus are not spared of the due processes of the law, what chance would lesser mortals like them have; and

2. the public, so used to a previous situation in which corruption was rife, appreciated immensely, a new public service in the 60's and the 70's that was free of all encumbrances brought upon by corruption. This whetted their appetite for further corruption control. Demands when met resulted in even higher expectations. This touched off yet another virtuous cycle.

V. CONCLUSION

The moral of my story, the bottom-line, is that it is far easier to have a good, clean government administering a good, clean system than it is for a good anti-corruption agency to clean up a corrupt government and a crooked system. In the latter case, the result is almost predictable; the anti-corruption agency is likely to come off second best. Clearly, most governments will possess enough fire power to overwhelm even the most intense, well-meaning anti-corruption agency. They can make or mar the efforts of any anti-corruption agency. So, we in CPIB can only be as effective as the government wants us to be. CPIB has the structures, systems and processes that were allowed to work, given the right operating environment created by a strong political will. Unless the will to succeed is forged, much of any anti- corruption programme will remain a passive declaration of intention. They will be nothing more than some idle talk. There is, therefore, always the need to walk the talk. Clearly, mere systems, structures and processes, do not necessarily provide the template for success. The magic is in the sincerity of purpose; genuine efforts, not the less than honest labour.

CPIB has to a large extent, executed the Government's will. Propelled by a strong political will, CPIB helped create a strong anti-corruption ethos and the accompanying odium attached to corruption. This, however, does not mean that we have completely eradicated corruption. No society ever will, given the fact that mankind is fallible, not infallible. By nature man is acquisitive, almost covetous. While the majority in Singapore falls in line, there is always the offending few who will find it necessary to satiate either their greed or their needs.

REPORT OF THE GENERAL DISCUSSION

Chairperson:	Ms Deana Perez	(Philippines)
Co Chairperson:	Mr Roberto Javier Moreno	(Panama)
Rapporteur:	Ms Yara Esquivel Soto	(Costa Rica)
Co Rapporteur:	Mr Mwape Dancewell Bowa	(Zambia)
Members:	Mr Mohammad Mohiuddin	(Bangladesh)
	Mr George Svanidze	(Georgia)
	Mr Ramji Lal Koli	(India)
	Mr Purbatua Hutabarat	(Indonesia)
	Mr Zulqarnain Bin Hassan	(Malaysia)
	Mr Kedar Prasad Chalise	(Nepal)
	Mr Daniel Isaac Centeno Espinoza	(Nicaragua)
	Mr Jim Wala Tamate	(Papua New Guinea)
	Ms Wassa Chaimanee	(Thailand)
	Mr Shin Hashimoto	(Japan)
	Mr Yosuke Kodama	(Japan)
	Ms Mihoko Tanabe	(Japan)
	Ms Chadarat Anakkaorn	(Thailand)
	Mr Piset Nakhaphan	(Thailand)
	Mr Salem Oustas	(Thailand)
	Ms Sirirat Vasuvat	(Thailand)
Visiting Experts:	Judge Anand Satyanand	
	Mr. Chua Cher Yak	
Advisers:	Director Kunihiko Sakai	(UNAFEI)
	Deputy Director Tomoko Akane	(UNAFEI)
	Professor Toru Miura	(UNAFEI)
	Professor Yasuhiro Tanabe	(UNAFEI)
	Professor Keisuke Senta	(UNAFEI)

I. INTRODUCTION

The participants of the Sixth International Training Course on Corruption Control started the general discussion after having heard lectures from visiting experts, ad hoc lecturers and UNAFEI professors as well as individual presentations from each participant. They had before them various materials concerning corruption, including the text of the United Nations Convention against Corruption, which was adopted by the General Assembly on October 31st, 2003. The discussion of the participants focused on how to implement the provisions of this Convention, so that their countries could become parties to this instrument.

II. POLITICAL WILL

In addition to legal and technical questions related to the implementation of the Convention, the group emphasized the necessity for political will on the part of government leaders, law makers and top officials, to actually fight corruption and become an effective party to this Convention. It is essential for this purpose to raise public and political awareness, and the existence itself of the UN Convention can be used for this campaign.

The participants agreed that political will is the main ingredient necessary when dealing with corruption. It has been established that their legislation include several provisions to deal with this illness, but depicting them on paper is not enough. The political will has to be manifested with actions in order for it to be brought down from "Legal Heaven" into reality. However, political will is not present in most of our government's underlying behaviour. It can easily be inferred from almost all the individual presentations of this Course, mentioning that it is necessary to obtain congressional approval in order to lift immunity for some politicians, or when anti-corruption institutions are forced to work with insufficient tools, technology and financial support.

III. CRIMINALIZATION AND LAW ENFORCEMENT

The participants reviewed the provisions in the Convention related to the criminalization of certain conduct related to corruption. All countries have enacted laws against embezzlement, misappropriation or other diversions of property by public officials. Thus, the main issue seemed to be the criminalization of bribery of foreign public officials and officials of public international organizations. Many participants stated that their countries have to revise their domestic legislation to meet the requirements of Article 16 of the Convention. The criminalization of bribery of domestic officials does not pose any serious problems, since all countries have provisions to criminalize this conduct. However, some countries have to revise their laws because a simple offering of a bribe is not enough to constitute a crime. Many countries also need to revise their laws to criminalize the conduct of the obstruction of justice as required by Article 25. Although most countries include intimidation of witnesses as a criminal offence in their legislation, they lack provisions for paragraph (a) of this article on the influence to the witnesses. The main issue brought up by this article is the action of the briber in influencing the witness more than the reaction of the latter, because failure to testify by the witness has consequences but bribery of a witness to influence him/her goes unpunished. Although all countries have a law to punish money laundering, the meeting noted that in order to fulfil the obligations under the convention, there is a need to expand the scope of predicate offences. Most countries manifested that their legislation includes the laundering of proceeds of corruption crimes in some way or another. However, it is yet to be seen if their legislation covers all the offences established by this Convention.

While some articles were established as mandatory by the Convention, others were left to the discretion of the State Parties. To illustrate, paragraph two of Article 16, merely suggests the criminalization of solicitation or acceptance of bribery by a foreign public official, etc. However, the participants agreed on the advantages of making this provision mandatory. Regarding this matter, international mutual assistance becomes essential, because investigators have to gather evidence outside their own jurisdictions.

IV. PREVENTIVE MEASURES

Preventive measures are even more necessary than repressive actions. The latter become redundant once the problem is treated from the root. The participants concluded that preventive measures and anti corruption policies are best conducted by an independent body. To complement such a body, there is a need for the legislation of free access to information to be enacted in all jurisdictions, in order to arm and empower all sectors of society in matters of transparency and good governance.

Out of several measures included in the Convention, the participants emphasized educational strategies targeting the youth, such as the inclusion of an ethics programme in school curricula and values formation in order to reshape the countries' consciousness. For example, the Zambian Community Relations Department conducts annual youth festivals, where, among others, the youth are encouraged to

participate in essay competitions and theatre performances on the theme of corruption. Also, in Thailand, the NCCC publishes and distributes children's story books which depict honesty and integrity as noble values.

Awareness campaigns for the general public are instrumental. The public should be conscious of the evils of corruption, as well as their capacity to carry on the necessary actions to prevent, report and suppress it. A strong and educated media is essential for these purposes. Providing the press with reasonable access to governmental offices and documentation is a helpful tool for the civil society in the fight against corruption. It helps in maintaining constant public scrutiny over public officials, therefore making it more difficult to commit wrongdoing.

Involvement of Non-Governmental Organizations should be promoted, as it gives private citizens one of the last resorts against corrupt public officials belonging to government institutions perceived by them as insensitive to their concerns. Finally, the control of campaign contributions during election periods was discussed. The participants agreed that even if most of their countries have the legislation requiring the disclosure of the origin of such contributions, there is no real criminal sanction, or at least administrative sanction, for concealing or altering this information.

V. ASSET RECOVERY

The participants noted that most jurisdictions have legislative provisions for asset recovery, however, in practice, these provisions have proven ineffective. Different procedures to obtain banking information are common to all the countries, but there are subsequent difficulties and delays to secure the documents needed for investigation.

The main problem revolves around the implementation or enforcement of the law, particularly when assets are deposited in foreign jurisdictions. Therefore, the participants believe once more that international mutual legal assistance should be encouraged. The participants also expressed concern with the fact that confiscated assets from corruption offences can seldom be returned to their origin, and possibly utilized by law enforcement institutions to continue with their efforts. On the other hand, most legislation obliges governments to maintain all income in one single account managed by the treasury, emphasizing the difficulty of the recovery. The only real mechanism established in most of their legislation for the recovery of proceeds of crime, is the interposal of civil actions, which has proven to be ineffective, as these assets are easily distracted.

Furthermore, the recovery of property acquired with proceeds of corruption offences in other jurisdictions is quite difficult when there are no international treaties that bind foreign governments to cooperate. The participants agreed that the UN Convention provides the basis to recover such property in a swifter manner.

VI. OTHER ISSUES

Other issues discussed by the participants included the need for the establishment of a merit based civil service system, in which public officials would be selected and promoted according to their skills, knowledge and experience, rather than their political connections. This new system is required to provide public servants with an adequate work environment, in order to avoid the attraction of bribes. Measures such as the increase of salaries for public officials and security of tenure that prevent their removal after new elections are held are imperative to achieve this. It was noted that although this has financial implications on the national treasury of each country, governments should consider making this issue a priority, in light of the important role that public workers play in the delivery of social services, as well as attending to the high economic cost that corrupt officials represent year after year.

The participants also manifested concern in regard to the issue of immunity and concurred that each country's law should be revised to limit the extent of the immunity granted to politicians, so that it does not hinder the investigation and subsequent prosecution of these people.

The importance of human resource development through training activities in the general field of corruption was also considered by the participants and it is recommended that governments invest in this. It was underscored that certain provisions in the convention had financial implications, such as the call for a witness protection programme. However, this poses an enormous difficulty for most of their countries, due to their small populations and the lack of financial resources to provide the required protection and benefits for witnesses. Thus, international cooperation, as stipulated in paragraph 3 of article 32 of the Convention, particularly in the area of witness relocation, is essential to achieve this.

But international cooperation should go beyond this matter. Chapter VI of the Convention deals with international technological and training assistance. This subject was introduced when discussing the lack of technology and modern surveillance equipment in most of their countries, which contributes to the rate of failure of detection and investigation of these offences. It has become clear that white collar criminality is transcending the borders, and this means that law enforcement agencies must transcend these borders themselves, through international cooperation.

VII. RECOMMENDATIONS

At the end of the discussion, the participants agreed to adopt the following recommendations:

1. Countries should seriously consider signing and ratifying the UN Convention Against Corruption without any reservations.
2. Countries should implement in full the mandatory provisions of the Convention by enacting necessary legislation and taking other measures.
3. For that purpose, countries should examine their domestic legislation and their practices in corruption counter fields vis-a-vis every provision of the Convention.
4. Subject to the basic principles of their domestic legal systems, countries are encouraged to implement the optional provisions of the Convention.
5. Countries are also encouraged to adopt, as appropriate, more strict or severe measures than those provided by the Convention for preventing and combating corruption, in accordance with article 65 of the Convention.
6. Countries should enhance international cooperation, including extradition, mutual legal assistance and law enforcement cooperation, to effectively cope with corruption.
7. United Nations and other organizations, as well as countries, should play an active role in facilitating the signing and ratification of the Convention through technical assistance and technical cooperation.

APPENDIX

COMMEMORATIVE PHOTOGRAPHS

- ***125th International Training Course***
- ***Sixth International Training Course on Corruption Control in Criminal Justice***

UNAFEI

The 125th International Training Course

Left to Right:
Above:
Mr Kwok (Hong Kong), Prof. Miura, Prof. Yokochi

4th Row:
Mr Koyama (Staff), Mr Dai (Staff), Mr Saito (Chef), Mr Tada (Staff), Mr Nakayama (Staff), Mr Miyakawa (Staff), Mr Inoue (Staff), Ms Masaki (Staff), Ms Tsubouchi (Staff), Ms Yanagisawa (Staff)

3rd Row:
Ms Nagaoka (Staff), Ms Yamashita (Staff), Ms Miyagawa (Staff), Mr Mugasa (Tanzania), Mr Nishikata (Ministry of Justice), Mr Sawada (Japan), Mr Watanabe (Japan), Mr El Miggbbir (Egypt), Mr Fujisawa (Japan), Mr Suzuki (Japan), Mr Vilavath (Laos), Mr Furusaki (Japan), Ms Yamamoto (JICA)

2nd Row:
Mr Jiwal (India), Mr Siinmaa (Estonia), Mr Hirata (Japan), Mr Nakauchi (Japan), Mr Krirkkiat (Thailand), Mr Kume (Japan), Mr Kanosue (Japan), Mr Dorji (Bhutan), Mr Kazmi (Pakistan), Mr Bartolome (Philippines), Mr Sibounzom (Laos), Mr Asra (Indonesia), Mr Hussain (Maldives), Mr Jalalludin (Malaysia), Ms Muto (Japan), Ms Diah (Indonesia)

1st Row:
Mr Cornell (L.A.), Mr Ezura (Staff), Prof. Shinkai, Prof. Senta, Prof. Tanabe, Mr Oberg (Sweden), Ms Somerville (Australia), Ms Samuel (U.S.A.), Mr Nilsson (EU), Director Sakai, Mr Prempooti (Thailand), Mr Laborde (UN), Dr. Smith (Australia) Dep. Director Akane, Prof. Takasu, Prof. Someda, Prof. Teramura, Mr Fukushima (Staff)

The Sixth International Training Course on Corruption Control in Criminal Justice

Left to Right:
Above:
Prof. Someda, Prof. Teramura, Prof. Yokochi, Prof. Shinkai

4th Row:
Mr Nakayama (Staff), Mr Dai (Staff), Mr Saito (Chef), Mr Tada (Staff), Mr Miyakawa (Staff), Mr Inoue (Staff), Ms Yanagisawa (Staff), Ms Yamashita (Staff), Ms Masaki (Staff), Ms Tsubouchi (Staff), Mr Koyama (Staff)

3rd Row:
Ms Miyagawa (Staff), Mr Tamate (Papua New Guinea), Mr Zulqarnain (Malaysia), Mr Hashimoto (Japan), Mr Bowa (Zambia), Mr Kodama (Japan), Mr Piset (Thailand), Ms Tanabe (Japan), Mr Salem (Thailand), Mr Moreno (Panama), Ms Nagaoka (Staff), Ms Taniguchi (JICA), Ms Ymamoto (JICA)

2nd Row:
Mr Centeno (Nicaragua), Mr Hutabarat (Indonesia), Mr Chalise (Nepal), Mr Koli (India), Mr Mohiuddin (Bangladesh), Ms Perez (Philippines), Ms Chadarat (Thailand), Ms Wassa (Thailand), Ms Sirirat (Thailand), Ms Rakotoarisoa (Madagascar), Ms Esquivel (Costa Rica), Mr Svanidze (Georgia)

1st Row:
Mr Fukushima (Staff), Prof. Takasu, Prof. Senta, Dep. Director Akane, Judge Satyanand (New Zealand), Director Sakai, Mr Chua (Singapore), Prof. Miura, Prof. Tanabe, Mr Ezura (Staff), Mr Cornell (L.A.)