CHALLENGES IN THE LEGAL REGIME TO DEAL WITH MONEY LAUNDERING

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I. INTRODUCTION

The general aim of this paper is to explore the contribution of anti-money laundering regimes to the fight against corruption. Corruption is a crime which has as its ultimate aim the enjoyment of ill-gotten proceeds. In instances of grand corruption some form of laundering activity is likely to take place in an attempt to disguise the illegitimate source of wealth. An effective anti-money laundering regime will have in place measures aimed at identifying and investigating such laundering activity and using the evidence obtained in bringing the person or persons concerned to justice. It will also have in place measures aimed at preventing the dissipation or loss of the proceeds of crime and recovering and/or confiscating them. An effective anti-money laundering regime can therefore make a significant contribution to the fight against corruption in at least two main ways:

(i) it can help to uncover evidence of criminal activity through identification of suspicious movements of financial assets, thus increasing the chances of a successful prosecution of the perpetrator of the crime;

(ii) it also enables the tracing of criminal proceeds to facilitate their preservation, recovery and ultimate return to their rightful owner. In the case of State assets which have been pilfered by corrupt officials, these may be returned to their rightful use.

II. EFFECTS OF TERRORISM

Sri Lanka is a country that recently emerged from 30 years of terrorism unleashed by the Liberation Tigers of Tamil Ealam (LTTE). LTTE, albeit as a terrorist organization, has amassed a substantial amount of wealth through illegal activities, including drugs and arms smuggling, human smuggling, credit card fraud and extortion from diaspora communities. In the circumstances, the government of Sri Lanka, together with relevant international law enforcement agencies, is concentrating very much on investigating and prosecuting offenders whilst identifying and recovering all such ill-gotten wealth.

III. SRI LANKA'S INTERNATIONAL STATUS

In addition to the above, during the last decade or so, the state has been confronted with the challenge of dealing with organized crime and proceeds of crime, most of which tend to take a transnational character. Sri Lanka has been ranked 97th in the Corruption Perception Index 2009 of Transparency International which reveals that bribery and corruption has to be dealt with comprehensively if the government is to ensure sustainable development and to attract legitimate and long term foreign direct investment. The above can be identified as the principal areas in which the government needs to engage to deal with ill-gotten wealth and money laundering. It is in this context that Sri Lanka, during the last five years or so, initiated many legislative and institutional reforms. At international level Sri Lanka is a signatory to many international and regional conventions and initiatives on anti-corruption and money laundering, including the United Nations Convention against Corruption (UNCAC).

IV. LEGAL FRAMEWORK TO ERADICATE BRIBERY AND CORRUPTION

Sri Lanka opened its economy in 1978, heralding an era of open economy bringing with it both positive and negative dynamics. A free market economy necessitated deregulation and removing of controls which

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were interpreted as impeding economic activity, particularly those of a transnational nature. This sudden and at times ad hoc deregulation also resulted in the inability of the government to effectively monitor and deal with sophisticated crimes, particularly economic crimes - hallmarks of bribery, corruption and money laundering.

The Sri Lankan legal framework can be approached and analysed in two phases. The first phase is comprised of the legislation enacted in the post-independence period, from 1948 until the end of the last century. This legislation primarily relates to bribery and corruption (Bribery Act of 1950), the emphasis being more on punishing the offender and to *some extent utilizing that as a deterrence to would-be offenders*. The Act was enforced by a dedicated department and the prosecutions were on indictment by the Attorney General. In the mid 1970s, supporting legislation was enacted emphasizing the importance of transparency by requiring public officials to make an annual declaration of their personal assets and those of their immediate family members. An officer was required to explain if this declaration disclosed a disproportionate increase in the assets of the official concerned when compared to his or her legitimate sources of income. However, this legislation was not complied with at an optimal level.

The second phase can be analysed as the period from early 1990s to date. The legal framework was changed with the introduction of an independent institution (Permanent Commission to Investigate Allegations of Bribery and Corruption) which was vested with the power of direct indictment and answerable only to the Parliament.

A. Prevention of Money Laundering Act

A significant milestone is the changes that were taking place in the international arena as a response to the 9/11 terrorist attack: the investigation into aspects of terrorist financing. In keeping with the international trends and in view of the increase in the level of terrorist activity in Sri Lanka, the government enacted the Prevention of Money Laundering Act (No. 05 of 2006). This Act basically related the crime and the resultant liability to activities such as transacting, receiving, possessing, concealing or investing property derived directly or otherwise from an unlawful activity with the knowledge that such property had been derived from such unlawful activity. The law went on to provide an inclusive reference to the types of activities that could attract liability under this Act. These included dangerous drugs, terrorism, bribery, corruption, firearms and explosives, foreign currency transactions, transnational organized crimes, cybercrimes, child pornography and trafficking of persons.

Section 2 of the Prevention of Money Laundering Act makes the Act applicable in relation to:

(a) A person who commits an offence under the provisions of this Act whilst being resident in Sri Lanka;

(b) An Institution which is used for the commission of an offence under the provisions of this Act, which Institution is carrying on business in Sri Lanka and is either incorporated or registered in Sri Lanka or is either incorporated or registered as a branch of a bank incorporated or registered outside Sri Lanka.

The new law provides for the imposition of penal sanctions in respect of persons found guilty by the high court of the commission of the offence of money laundering. They are sentenced (i) to a fine not less than the value of the property in respect of which the offence was committed and not more than three times that value; or (ii) to rigorous imprisonment for a period of not less than five years and not more than twenty years; or (iii) to both such fine and imprisonment. Further, the assets of the person convicted, including the assets derived directly or indirectly from the commission of the offence of money laundering, shall be forfeited.

B. Financial Transactions Reporting Act

To assist in investigations and to ensure continuous monitoring the parliament enacted the Financial Transactions Reporting Act (No. 06 of 2006) which set up a Financial Intelligence Unit to independently monitor suspected financial transactions and to conduct further investigations as may be warranted if there is reasonable suspicion that money laundering is taking place. The Financial Transactions Reporting Act was enacted with the objective of collecting of data relating to suspicious financial transactions to facilitate the prevention, detection, investigation and prosecution of the offenders of money laundering and the financing of terrorism respectively. The Act also operates to require certain institutions to undertake due diligence measures to combat money laundering and the financing of terrorism, and this act seeks to provide extensive supervisory powers to monitor the activities of all financial institutions.

The law sets out entities that would monitor criminal activities of financial industry institutions, dealers in various goods and services, casinos, gambling houses or lottery owners and extends to even service providers such as lawyers, accountants, and estate agents. The law provides to issue freezing orders to prevent money being siphoned off during the investigation period. It also provides for the forfeiture of wealth derived from a predicate offence.

C. Financial Intelligence Unit

The Report of the Sri Lanka Financial Intelligence Unit issued by the Central Bank in November 2006 details the nature, composition and the functions of the Financial Intelligence Unit in Sri Lanka as well as in the other countries, as follows:

"FIUs vary from country to country, but all of them share three core functions which are, to receive, analyse and disseminate information, to combat Money Laundering and Terrorist Financing, which is required to be undertaken both domestically and internationally. Since Money Laundering is often a cross-border activity, there is the need for FIUs to join forces with other intelligence units. Despite the best domestic laws and regulations against money laundering, including those for a FIU, the need for an effective information sharing mechanism is crucial. Financial Institutions are mandated to generate suspicious activity reports and other mandated disclosures, such as cash transaction reports, and forward them to the FIU. The centralization of this function and designating the FIU as the receiver of financial information is fundamental for effective prevention, both in a national and international framework for Money Laundering. Centralization also ensures greater efficiency in information gathering. There are various types of models of operational FIUs. For Sri Lanka, the authorities have chosen the Administrative Model. This model is usually part of the structure, or under the supervision of, an administration or an agency other than Law Enforcement or Judicial Authorities. Accordingly, in Sri Lanka the FIU has been established by *Gazette* Order, No.1437/24 of 23rd March, 2006 as a special unit in the Central Bank of Sri Lanka, reporting directly to the Governor and the Monetary Board."

"Financial Transactions Reporting Regulation No.1 was issued whereby, the reporting threshold for the purposes of Section 6(*a*) of the FTRA was determined to be, any transaction exceeding Rs.1, 000,000 in cash, or its equivalent in foreign currency. In terms of Section 6(*b*) the threshold for the reporting of electronic fund transfers (EFTs) was determined to be, transfers in excess of Rs.1, 000, 000 or its equivalent in foreign currency. The banks, in the first instance, were required to set up AML & CFT regimes and were also advised to report all mandated Cash Transactions, Electronic Fund Transfers meeting the stipulated threshold and any Suspected Transactions relating to money laundering and terrorist funding activities."

D. Requirement to Maintain Records

In order to monitor the functions of the financial institutions, Section 4(1) of the Financial Transactions Reporting Act requires the financial institutions to maintain records of transactions and of correspondence relating to transactions and records of all reports furnished to the Financial Intelligence Unit for a period of six years from the date of the transaction, correspondence or the furnishing of the report.

E. Obligation to Report to Financial Intelligence Unit

Section 6 of the Financial Transactions Act requires the Financial Institutions to report on Financial Transactions. Accordingly, an Institution shall report to the Financial Intelligence Unit any transaction of an amount in cash exceeding such sum as shall be prescribed by the Minister by Order published in the Gazette, or its equivalent in any foreign currency (unless the recipient and the sender is a bank licensed by the Central Bank); and any electronic funds transfer at the request of a customer exceeding such sum as shall be prescribed by regulation.

F. Power of Courts to make Seizure and Forfeiture Orders

Upon an application made to High Court of Colombo under Section 26 of the Financial Transaction Reporting Act, the courts can grant an order of continued detention of the cash and bearer instruments seized under Subsection 4 of Section 24 or 25 for a period not exceeding three months. Furthermore, under Section 26(2) of the Act, the Court may subsequently Order, after hearing, with notice to parties, the continued detention of the cash and negotiable bearer instruments if satisfied of the matters mentioned in section 26(1) but the total period of detention shall not exceed two years from the date of the Order.

However, according to Section 26(4), no cash or negotiable bearer instruments detained under Section 26 shall be released where it is relevant to an investigation, prosecution or proceeding under the Prevention of Money Laundering Act, No. 5 of 2006 or the Convention on the Suppression of Terrorist Financing Act, No. 25 of 2005. Under Section 13(1) of the Prevention of Money Laundering Act, No. 5 of 2006: ''Where a person is convicted of the offence of money laundering, the Court convicting such person shall, make Order that any movable or immovable property of such person derived or realised, directly or indirectly from any unlawful activity, be forfeited to the State free from all encumbrances.'' Further, under Section 13(4) the Court making the Order of Forfeiture may presume that any movable or immovable property belonging to the person convicted of the offence of money laundering is derived or realised, directly or indirectly, from any unlawful activity if such property is not commensurate with the known sources of income of such person, and the holding of which cannot be explained on a balance of probabilities, to the satisfaction of the Court. The burden of proof for the convicted person to prove the sources of income is a civil burden of proof, which in fact favours the convicted person.

Under Section 5 of the Convention on the Suppression of Terrorist Financing Act the court is empowered to make forfeiture orders against the offences specified in Section 3 of the said Act. Accordingly, forfeiture orders could be made against any person who, by any means, directly or indirectly, unlawfully and wilfully provides or collects funds, with the intention that such funds should be used, or in the knowledge that they are to be used or having reason to believe that they are likely to be used, in full or in part, in order to commit any act intended to cause death or serious bodily injury to civilians or to any other person not taking an active part in the hostilities, in a situation of armed conflict, and the purpose of such act, by its nature or context, is to intimidate a population or to compel a government or an international organization, to do or to abstain from doing any act, and who is therefore guilty of the offence of financing of terrorists or terrorist organizations.

Moreover, freezing and seizure orders also could be made under Section 4 of the Convention on the Suppression of Terrorist Financing Act against any person indicted by the Attorney General in the High Court for offences specified in Section 3 of the Act. If such funds are lying in an account with any Bank, they shall be subject to an order of freezing, or if such funds are in the possession or control of any person, they shall be liable to seizure. On the filing of indictment, the Attorney-General shall notify the Central Bank of the freezing or seizure as the case may be.

Further, at the conclusion of the case where the cash or negotiable bearer instruments have not been claimed by any person within one year of it being seized or detained, an authorized officer may make an application to the Court that such cash or negotiable instrument, or its equivalent in Sri Lankan rupees, upon sale to the Central Bank, as the case may be, be forfeited to the Consolidated Fund under Section 26(5) of the Financial Transactions Reporting Act.

In order to facilitate an investigation into offences of money laundering, the law seeks to authorize an investigator to, upon application to a magistrate obtain an order, receive any document relevant to such investigation from any person, including information relating to any identified transaction from any covered entity.

In addition to the aforementioned orders of the courts, the Financial Transactions Reporting Act has also empowered authorized officers to make orders of seizure and detention. Accordingly, under Section 25 of the Act, an authorized officer may seize and, in accordance with the provisions of this part, detain any cash or negotiable bearer instruments which are being imported into, or exported from, Sri Lanka in any form or manner, if he or she has reasonable grounds for suspecting that it is derived from the commission of any unlawful activity or intended by any person for use in the commission of an unlawful activity or intended to be used for or in connection with an offence connected with the financing of terrorism in terms of the Convention on the Suppression of Terrorist Financing Act, No. 25 of 2005.

G. Financial Institutions must exercise Due Diligence

The liability of financial institutions to monitor financial transactions of their customers also has been broadened in the Financial Transactions Reporting Act under Section 5. This requires the institutions to exercise due diligence and scrutiny of customers on transactions. Accordingly, an Institution shall conduct ongoing due diligence on the business relationship with its customer, and conduct ongoing scrutiny of any

transaction undertaken throughout the course of the business relationship with a customer to ensure that any transaction that is being conducted is consistent with the Institution's knowledge of the customer, the customer's business and risk profile, including, where necessary, the source of funds. However, the effectiveness of this section is weakened due to the lack of technical capacity of certain financial institutions to monitor complex and sophisticated transactions that occur through their institutions.

Furthermore, until very recently in Sri Lanka, the existence of unregistered financial institutions was a common phenomenon. These institutions even had the capacity to engage in foreign transactions. The deposits and transactions through such unregistered institutions were not on record. Therefore no documentary evidence was available and this hindered investigations into corrupt financial transactions. Therefore, statutorily requiring the financial institutions to exercise due diligence on transactions is an improvement, but such improvement may be meaningful only if the institutions are provided with the necessary technical capacity to monitor the financial transactions. The existence of such unregistered financial institutions created a gap between the international and local laws but currently every such unregistered financial institution must register with the Central Bank of Sri Lanka which is also the Financial Intelligence Unit and the regulator of all financial institutions. According to the "Know Your Customer" guidelines, all licensed banks are to conduct due diligence on all customers involved in cross-border financial transactions and ensure that all requirements under the relevant statutes are met. Therefore, domestic laws have to a certain extent reduced the gap between international and local laws.

H. FIU may refer Matters for Investigations

The Financial Intelligence Unit has the power to refer any matter to the relevant authorities responsible for carrying out investigations (Financial Investigating Unit in the Criminal Investigating Department) on reasonable grounds. Accordingly, Section 15(1)(f) of the Financial Transactions Reporting Act No. 06 of 2006 states that the Financial Intelligence Unit shall refer any matter or any information derived from any report or information it receives to the appropriate law enforcement agency if, on the basis of its analysis and assessment, the Financial Intelligence Unit has reasonable grounds to suspect that the transaction would be relevant to the investigation or prosecution under this Act or of an act constituting an unlawful activity, and in connection therewith, the Financial Intelligence Unit may send a copy of such referral or information to the relevant supervisory authority.

I. Exchange of Information with Foreign Law-Enforcing Agencies

Furthermore, the Financial Intelligence Unit can disclose to any foreign institution or agency any report or information. This is set out in Section 16 of the Financial Transactions Reporting Act which allows the Financial Intelligence Unit to share any information received on proceeds of crime and evidence gathered in investigations with any other foreign agencies. Section 16 sets out that the Financial Intelligence Unit may disclose any report or information to an institution or agency of a foreign state or of an international organization or body or other institution or agency established by the Government of a foreign State that has powers and duties similar to those of the Financial Intelligence Unit on such terms and conditions as are set out in the agreement or arrangement between the Financial Intelligence Unit and an institution, agency or organization or authority regarding the exchange of such information under Section 17.

Section 17 of the Financial Transactions Reporting Act provides for, subject to the approval of the Minister in charge, working in co-operation with other international organizations which possess powers and duties similar to those of the Financial Intelligence Unit. Accordingly this section allows the Financial Intelligence Unit to enter into agreement with other foreign law enforcement agencies and foreign supervisory authorities in order to exchange information and evidence. The information exchanged in such agreements may not only benefit the Financial Intelligence Unit in Sri Lanka in investigations, but also the foreign law enforcement agencies. Science and technology in South Asia is not as developed as in western countries. Therefore, the Asian region is a shelter for fugitives from western countries. This problem could be arrested in Sri Lanka with the aid of agreements entered into with other international organizations, as the purpose of such agreements is exchange of information. Therefore, information thus exchanged will assist to capture fugitives from foreign countries who take shelter in Sri Lanka. These agreements advance mutual assistance between Sri Lanka and foreign countries to eradicate the crime of money laundering and capture fugitives.

J. Extradition Arrangements

Section 31 of the Prevention of Money Laundering Act, No. 05 2006 provides for extradition arrangements. Accordingly, where there is an extradition arrangement in force between the Government of Sri Lanka and the Government of any other State, such arrangement shall be deemed, for the purposes of the Extradition Law, No. 8 of 1977, to include provision for extradition in respect of the offence of money laundering as defined in this Act, and of attempting or conspiring to commit, aiding and abetting the commission of, or conspiring to commit, such offence. Moreover, under Section 32 of the same Act the Government shall afford such assistance (including the supply of any relevant evidence at its disposal) to the relevant authorities of any foreign State as may be necessary in connection with criminal proceedings instituted in the State against any person, in respect of an offence under the law of that State corresponding to the offence of money laundering. This promotes international co-operation between Sri Lanka and other foreign jurisdictions to tackle the problem of money laundering.

K. Assistance to Foreign Jurisdictions for Anti-Money Laundering Efforts

Under Section 31 of the Mutual Assistance in Criminal Matters Act No. 25 of 2002, Sri Lanka will make arrangements for persons to give evidence or assist investigations if it receives a request by a specified country for a prisoner in Sri Lanka to give evidence or assist in investigations. Accordingly, where a proceeding or an investigation relating to a criminal matter has commenced in a specified country, and the appropriate authority of that specified country requests the removal of a prisoner who is in Sri Lanka, for the purposes of giving evidence at a hearing in connection with such proceeding or of giving assistance in relation to such investigation, as the case may be, being of the opinion that such prisoner is capable of giving evidence relevant to such proceeding, or of giving assistance in relation to such investigation, direct in writing the release of such prisoner from prison for the purposes of removal to the specified country and make arrangements for the travel of such prisoner to the specified country.

Additionally, under Section 27 of the Prevention of Money Laundering Act, Sri Lanka may give assistance to commonwealth countries in investigations and prosecution of offences. Sri Lanka will give the same assistance to countries other than Commonwealth countries upon entering in to agreement with such countries.

Accordingly, the provisions of the Mutual Assistance in Criminal Matters Act, No. 25 of 2002 shall, wherever it is necessary for the investigation and prosecution of an offence under Section 2 of this Act, be applicable in respect of the providing of assistance as between the Government of Sri Lanka and other States who are either (a) Commonwealth countries specified by the Minister by Order under Section 2 of the aforesaid Act; or (b) Non-Commonwealth countries with which the Government of Sri Lanka entered into an agreement in terms of the aforesaid Act. In the case of a country which is neither (a) nor (b) above, then it shall be the duty of the Government to afford all such assistance to such a country, and the Government may, through the Minister, request all such assistance from such country as may be necessary for the investigation and prosecution of an offence.

L. Monitoring Powers of the FIU

Tamil Rehabilitation Organization (TRO) which claims to be engaged in humanitarian operations in Sri Lanka for the welfare of the victims of war, for several years had been suspected by the Government of Sri Lanka and the Central Bank to have been engaged in Terrorist Financing activities. The TRO network in Sri Lanka has for several years received large sums of money to their bank accounts in Sri Lanka from their foreign network. Investigations were carried out based on this suspicion which resulted in the arresting of various persons nationally and internationally, connected to TRO. Following the investigations, the Financial Intelligence Unit made an application under the Financial Transactions reporting Act, in the High Court of Colombo, to freeze the funds of the TRO in local bank accounts, which amounted to over 20 million rupees. The wide powers given by the Financial Transactions Reporting Act to the Financial Intelligence Unit facilitated the making of such an application in the High Court in order to combat terrorism.

The Financial Transactions Reporting Act has granted dominant monitoring powers to the Financial Intelligence Unit under Section 18 to examine books and records of the financial institutions. Accordingly, the Financial Intelligence Unit, or any person authorized by it, may examine the records and inquire into the business and affairs of an Institution for the purpose of ensuring compliance with the Act or any directions,

orders, rules or regulations issued under the Act, and for that purpose may, at any reasonable time, enter any premises in which the Financial Intelligence Unit or authorized person believes, on reasonable grounds, that there are records relevant to ensuring compliance with the provisions, or use or cause to be used any computer system or data processing system found in the premises, to examine any data contained in or available to the system.

M. National Procurement Agency

Sri Lanka has provided for a National Procurement Agency in order to facilitate the fight against corruption and money laundering. The National Procurement Agency operates with the vision to be recognized as an esteemed and dynamic public entity, promoting an efficient and effective, transparent and accountable public procurement system. The objective of the National Procurement Agency is to streamline the government procurement system and standardize the same to be of equal application to all government institutions, to ensure better transparency and good governance in relation to government procurement awards and to put in place a monitoring system in relation to selection of successful bidders and awards of government procurements. The National Procurement Agency must work in co-operation with the Financial Intelligence Unit to provide information regarding the bidders of contracts involving large amounts of money, to prevent any possibility of money laundering activities.

V. AREAS THAT REQUIRE FURTHER ATTENTION

Recent geographical surveys indicate that the formation of the sea bed provides evidence of possible oil deposits. If true, Sri Lanka will be the recipient of huge financial resources. To ensure that these financial resources are legitimate and to prevent Sri Lanka from being used as a place to launder money, it is essential that the legal framework relating to money laundering and terrorist financing is well understood, efficiently enforced and constantly updated.

Furthermore, Sri Lanka is an economy which is endeavouring to emerge from a 30 year fight against terrorism. As a result, the infrastructure of Sri Lanka is destroyed and under-developed. With the end of the war, the Government is intensely engaged in 'Mega Development Projects' to boost the economy and develop infrastructure. Large foreign direct investments are made in Sri Lanka by foreign governments and private companies. Consequently, a large sum of money is flowing into the country. Therefore, the Central Bank, through the Financial Intelligence Unit, must exercise proper and substantial supervision over that money to prevent money laundering activities that may occur in the guise of foreign direct investments.

VI. CONCLUSION

Corruption is a multi-faceted problem that requires a multi-faceted solution. A number of different tools, both legal and non-legal, need to be used to deter the commission of the offence in the first place and, where the offence is committed, to prevent those who have committed it from enjoying the proceeds of their crime. Though anti-money laundering efforts cannot put a stop to corruption, it can be very effective in achieving the latter aim, especially in cases of grand corruption. Anti-money laundering efforts can also play a significant role in tracing and recovering the proceeds of corruption. Whenever this occurs the far-reaching negative effects and implications of corrupt behaviour, especially grand corruption, may be assuaged.