THIRD REGIONAL SEMINAR ON GOOD GOVERNANCE FOR SOUTHEAST ASIAN COUNTRIES

MEASURES TO FREEZE, CONFISCATE AND RECOVER PROCEEDS OF CORRUPTION, INCLUDING PREVENTION OF MONEY-LAUNDERING

Co-hosted by UNAFEI, the Department of Justice of the Republic of the Philippines and the UNODC Regional Centre for East Asia and the Pacific
9-12 December 2009, Manila, the Philippines

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FOREWORD

It is my great pleasure and privilege to present this report of the Third Regional Seminar on Good Governance for Southeast Asian Countries which was held in Manila from 9 – 12 December 2009. This was our first opportunity to hold a Good Governance Seminar in Manila and we were deeply impressed and touched by the warm hospitality afforded to us by our Philippine hosts.

The main theme of the Seminar was "Measures to Freeze, Confiscate and Recover Proceeds of Corruption, including Prevention of Money-Laundering" and it was attended by 23 criminal justice practitioners from Cambodia, Indonesia, the Lao PDR, Malaysia, Myanmar, the Philippines, and Thailand. The Seminar was co-organized by UNAFEI, the Department of Justice of the Republic of the Philippines and the UNODC Regional Centre for East Asia and the Pacific.

As widely known, the United Nations Convention against Corruption (UNCAC) provides the most fundamental legal framework to tackle corruption. To effectively implement the measures provided by the UNCAC, it is indispensable to develop each country's criminal justice practitioners' knowledge of how identifying, tracing, freezing, confiscating and recovering the proceeds of corruption can be carried out successfully, thus overcoming their lack of expertise and experience. Therefore, the organizers decided to hold this Seminar to provide an opportunity for practitioners from Southeast Asian countries to familiarize themselves with the current situation of this global issue as it occurs in this region and to broaden their knowledge of how to identify, trace, freeze, confiscate and recover the proceeds of corruption.

By the conclusion of the three-day seminar, we had gained a broader perspective from which to evaluate and analyse the current situation regarding this issue in the context of Southeast Asian countries. We also gained information on beneficial practices employed by our international colleagues and have been apprised of useful international methods of addressing this issue.

On the basis of the all above, the recommendations were adopted. The recommendations reflect the very well prepared and informative presentations given by the participants and the great contributions given by the visiting experts and honourable guests. As an organizer of this Seminar, I genuinely hope that these recommendations will prove to be a practical and realistic step in our common endeavour, and that the Seminar will also contribute to the mutual understanding and friendship of the Southeast Asian nations.

Finally, on behalf of UNAFEI, I would like to express my deepest appreciation to the Department of Justice of the Republic of the Philippines, especially the National Prosecution Service, and the UNODC Regional Centre for East Asia and the Pacific for their unwavering support and commitment to the realization of this Seminar.

Masaki Sasaki
Director, UNAFEI

October 2010

INTRODUCTION

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The Honourable Agnes Devanadera
Secretary of Justice of the Republic of the Philippines

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Introductory Remarks by
Mr. Haruhiko Ukawa
Deputy Director, UNAFEI

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Presentation by
Mr. Michel Bonnieu
Senior Legal Adviser,
UNODC Regional Centre for East Asia and the Pacific

OPENING REMARKS

The Honourable Agnes Devanadera
Secretary of Justice of the Republic of the Philippines

Mr. Makoto Katsura (Ambassador of Japan)
Mr. Masaki Sasaki (Director of UNAFEI)
Mr. Haruhiko Ukawa (Deputy Director of UNAFEI)
Mr. Michel Bonnieu (Senior Legal Adviser, UNODC RC)
Key Speakers and Participants from fellow Southeast Asian Nations

Good morning!

Money laundering is a particular form of corruption which remains a very serious problem in many countries, especially here in Southeast Asia. As the "life blood" of any profit-generating criminal activity, the laundering process allows terrorists, drug-traffickers, warlords, perpetrators of financial fraud, and every other criminal enterprise to perpetuate and to live lavishly from illegal activity. Money laundering is a particularly damaging aspect of corruption in many of the countries around the globe.

We should note too that the problem of corruption exists in each and every nation in the world, but it is in the developing countries that the effects are more devastating. Corruption indirectly impairs the poor as it redirects funds intended for development, giving rise to more injustice and consequently discouraging foreign aid and investment.

According to IMF estimates, the aggregate size of money laundering in the world is about 2-5% of global GDP. On the other hand, *The Economist* has estimated that about US$500 billion to US$1.5 trillion is laundered each year through the global banking system.

Early this year, research by Transparency International, a global coalition against corruption, conducted a survey to determine the public's perception about the causes of corruption and whether or not they believe their governments are effective at curbing the said phenomenon.

Out of 73, 123 people in 69 countries and territories surveyed between October 2008 and February 2009, it was found that:

1. The private sector is perceived to be corrupt by half of those interviewed.
2. The general public is critical of the private sector's role in their countries' policy making processes. More than half of respondents held the view that bribery is often used to shape policies and regulations in companies' favour.
3. Political parties and civil service are perceived on average to be the most corrupt sectors around the world.
4. Globally, respondents perceived political parties as the single most corrupt domestic institution, followed closely by civil service.
5. Aggregate results, however, mask the important country differences. In 13 of the countries sampled, the private sector was deemed to be the most corrupt, while in 11 countries, respondents identified the judiciary.
6. Governments are considered to be ineffective in the fight against corruption – a view that has remained worryingly consistent in most countries over time. Thirty one percent perceived them as effective, compared to the 56 percent that viewed government anti-corruption measures to be ineffective.
7. Results indicate that respondents from low-income households are more likely to pay bribes than those from high-income households when dealing with the police, the judiciary, land services and

the education services.

The figures that were reflected from this study support the notion that the public (or at least a portion of it) believes that governments are not exerting enough anti-corruption efforts.

The U.S. State Department has also reported that some countries in Southeast Asia are deeply involved in the illegal drug trade. The Philippines, in particular, continues to experience an increase in foreign organized criminal activity from China, Hong Kong, and Taiwan. Insurgency groups operating in the Philippines partially fund their activities through local crime, the trafficking of drugs and arms, money laundering through ties to organized crime and smuggling. According to the reports, the proceeds of corrupt activities by government officials are also a source of laundered funds. The Federation of Philippine Industries estimates that lost government revenue from uncollected taxes on smuggled items is over $2 billion annually, including substantial losses from illegally imported fuel and automobiles. Remittance and bulk cash smuggling are also channels of money laundering.

I am happy to report however that since 2005, through the Anti-Money Laundering Council or AMLC, the Philippines has continued to make progress enhancing and implementing its amended anti-money laundering regime. As of December 2007, there have been 107 money laundering, civil forfeiture and related cases in the Philippine court system that involved AMLC investigations or prosecutions, including 37 for money laundering, 20 for civil forfeiture and the rest pertaining to freeze orders and bank inquiries. The Philippines had its first conviction for a money laundering offence in early 2006.

AMLC's role goes beyond traditional Finance Intelligence Unit responsibilities and includes the investigation and assisting of the Office of the Solicitor General in the handling of civil forfeiture cases. Through the end of 2007, funds amounting to almost 1.4 billion pesos have been frozen by the AMLC, including funds frozen at the request of the UN secretary Council, the United States and other foreign governments.

But there is a lot more that needs to be done to defeat the evils of corruption on a much larger scale. There is a growing need for more co-ordination among relevant international organizations to improve advocacy, and dissemination of information to help foster action against the laundering of criminal proceeds.

UNODC report that indeed there are varied integral problems that hinder the recovery and return of assets. For example, the following factors hinder the successful recovery of assets or render it impossible:

1. The absence or weakness of the political will within the victim country as well as within those countries to which the assets have been diverted;
2. The lack of an adequate legal framework allowing for necessary actions in an efficient and effective manner; and
3. Insufficient technical expertise within the victim country to prepare the groundwork at the national level, such as filing charges against the offenders and at the international level to prepare the mutual legal assistance request.

We need to push our efforts into protecting our financial institutions from the negative effects of money laundering itself by conscientiously adopting anti-money-laundering policies through government financial supervisors and regulators as well as by banks. Doing so would certainly reinforce the other good-governance practices that are important to the development of our countries' economies.

These concerns are what we intend to address in the next two days and I hope that as we all become aware of the global threat of corruption (specifically in the guise of money-laundering) we will be able to construct an integrative framework to fully eradicate it.

Thank you and good morning.

INTRODUCTORY REMARKS

Haruhiko Ukawa
Deputy Director, UNAFEI

I. INTRODUCTION

It is my pleasure to be given this opportunity to address a group of distinguished criminal justice and law enforcement specialists attending the Third Regional Seminar on Good Governance for Southeast Asian Countries. We have decided to organize this Seminar on the subject of "Measures to Freeze, Confiscate and Recover Proceeds of Corruption, including Prevention of Money-Laundering."

As a mental warm-up to the seminar, I will first explain the reason why we chose this particular topic, and then shall proceed with a general over view of the major issues relevant to the topic.

II. WHY ASSET RECOVERY?

Why Asset Recovery?

Because it is important and, at the same time, an extremely complicated area of law, with which the law enforcement authorities have yet to familiarize themselves.

The need to fight corruption is undebatable and it has been voiced over and over in every conceivable forum, domestic and international. "Corruption poses serious governance challenges and threats to the stability and security of societies, undermines institutions and values of democracy, and jeopardizes sustainable development and economic prosperity." Corruption also constitutes a major obstacle in the international fight against transnational organized crime and terrorism.

Consequently, once a corruption scheme is uncovered, public officials involved should be promptly removed and appropriate criminal sanctions need to be imposed. While these are no easy tasks, and if successful, are worthy of highest commendation, they should not be the end of the matter. Corruption often involves cross-border flow of assets illicitly acquired by kleptocrats over a period of years. They will keep their ill-gotten gains unless efforts are made to recover the funds, and the international community simply cannot blink at such injustice.

Seen from the victim country's perspective, such transfers are outright usurpation of monies rightfully belonging to its people; looting of monies that could have been spent for useful governmental purposes, such as basic health or education programmes, poverty reduction, environmental protection, and institution-building for the country's overall integrity. The precise scope of the problem and the amount of assets stolen worldwide are not readily quantifiable. Several estimates have been furnished by international organizations such as UNODC or the World Bank, and they place the amount in the order of billions and trillions of dollars every year. Suffice it to say that the drain of national wealth and collateral damages in terms of foregone growth is staggering.

The problem of stolen assets should be a matter of concern for the countries into which the assets are transported as well. Such assets are often hidden in the financial centres of developed countries, and in today's world, where abuses of the global financial system – particularly money-laundering – are considered serious criminal conduct, such countries need to be prepared to provide appropriate and timely responses if they wish to continue to be seen as responsible and reputable financial centres. Developed countries, in their capacity as donors of development assistance and foreign aid, also have legitimate interests in seeing that the funds provided are spent in accordance with sound development policies, and for the national good

of the recipient country.

In short, preventing the theft of public assets by corrupt officials, and taking effective remedial measures once it has been uncovered, are pressing objectives of global concern. This notion is clearly codified in Article 51 of the United Nations Convention against Corruption which reads "The return of assets pursuant to this chapter is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard."

There are several notable success stories in which millions of dollars were recovered by victim countries. Nigeria recovered more than $500 million, Peru nearly $185 million, and the Philippines $624 million. It should be noted, however, that these occurred following a regime change, and it took a prolonged period before the money was actually transferred back to their respective national treasuries. In the case of Nigeria, more than seven years after the death of General Sani Abacha, in the case of Peru, three years after the political bribery scandal broke and President Fujimori fled the country, and in the case of the Philippines, eighteen years have passed since the "People Power Revolution," which put an end to Marcos's regime. Heartening though these cases were, we know that successful repatriation of stolen assets is still rare.

Retracing the myriad steps of asset transfers is a time-consuming enterprise, and it is not realistic to take such actions in every single case of corruption. Naturally, they will have to be limited to where the amount of money involved is substantial or the nature of the underlying corruption is egregious. On the other hand, however, there is no reason why it should be limited to cases of grand corruption in which hundreds of millions of dollars were stolen by national leaders. There is a need to systemize and streamline the process so that cross-border asset-recovery actions are undertaken in a broader array of cases and on a more regular basis.

This is a huge challenge for the countries victimized by corruption as well as the countries that are recipients of stolen assets. Specific issues and difficulties involved will be described in the following section. Before proceeding, however, let me point out that the initial obstacle to overcome is the lack of experience and expertise on the part of criminal justice and law enforcement practitioners. This is no secret or mystery given that it is relatively recently that asset recovery has become a focus of international debate and an urgent topic in the criminal justice field.

By now, I hope you understand why we chose "Measures to Freeze, Confiscate and Recover Proceeds of Corruption, including Prevention of Money-Laundering" as our main theme. This seminar is intended to serve as an opportunity for learning, experience sharing, and network-building on the subject of asset recovery.

III. ISSUES AND DIFFICULTIES

A. Prevention, Detection, Identification and Tracing

Prevention of crime has always been important, and this is especially true of corruption offences. Unlike murders or other crimes of violence, corruption leaves no readily visible traces that alert authorities to its occurrence, and after-the-fact prosecution and recovery of stolen assets are usually very laborious, time-consuming and costly.

Codes of conduct and financial disclosure requirements for public officials, know-your -customer due diligence and record-keeping requirements for financial institutions, and the suspicious transaction reporting systems are major examples of commonly employed measures to prevent, deter, and detect corruption and money-laundering resulting from corruption. Every jurisdiction is expected to have their laws and regulations in compliance with 40+9 FATF recommendations and requirements of UNCAC, and

whether and how that is achieved are matters of interest.

Furthermore, the measures I have just described presuppose the establishment of anti-corruption bodies and financial intelligence units. These bodies should not only be established, but adequately empowered, staffed and financed so that they will be able to execute their expected responsibilities.

At this point, in connection with identification and tracing of stolen assets, let me stress that jurisdictions are expected to ensure that bank secrecy and fiscal secrecy do not stand in the way of international mutual legal assistance of corruption offences. We need to bear in mind that proceeds of crime are geographically mobile, and they will quickly move to jurisdictions where compliance is ineffective, enforcement is limited, and transparency is below international standards.

B. Freezing

As I have already mentioned, asset recovery is an arduous and time-consuming process, and as such it necessitates a procedure by which authorities can immobilize targeted assets before they disappear. Article 31, paragraph 2 of UNCAC thus mandates States Parties to take necessary measures to freeze or seize relevant assets for the purpose of eventual confiscation, and Article 54 paragraph 2 requires States Parties to make available parallel measures for mutual legal assistance purposes.

In this regard, a proper balance between the rapidity and effectiveness of freezing/seizure mechanisms and the adequacy of procedural safeguards given to legitimate property interests must be incorporated into the legal framework. One country tries to achieve this by requiring financial institutions that have filed suspicious transactions reports to automatically freeze relevant assets for several days, during which the authorities will have time to consider the course of actions to be taken. There also may be instances in which it is undesirable to notify the account holder of the freezing or seizure. This situation likewise requires a careful balancing between the law enforcement needs and the protection of property rights.

C. Confiscation

Procedural requirements in the judicial phase of the asset–recovery process most frequently mentioned as obstacles to the implementation of foreign confiscation orders are proof of unlawful origin of the alleged proceeds of corruption and specification of the assets to be confiscated. An obvious solution to these problems is to mitigate or shift the burden of proof regarding the source of criminal assets.

Another major topic in this area concerns "non-conviction-based confiscation." Article 54 paragraph 1 (c) of UNCAC obliges States Parties to consider, in accordance with their domestic law, taking measures as may be necessary to allow confiscation without a criminal conviction, when the offender cannot be prosecuted. For such purposes, several countries allow forfeiture actions to be brought against the asset itself (*In Rem forfeiture*), which has an obvious advantage when the offender has died or fled its jurisdiction. The applicability of civil standards of burden of proof is also cited in its support.

The pros and cons of these solutions, however, as well as their compatibility with existing procedures and traditional principles, such as presumption of innocence, may be still open to debate. Many would like to know the experiences of and lessons learned in jurisdictions that already have these measures in place.

D. Repatriation

Repatriation, the final step in the international asset recovery process, can also raise quite complicated issues such as disposal of the confiscated property – whether and to what extent victim countries can claim ownership – and the treatment of costs incurred by the requested state in order to achieve its confiscation. In this regard, Article 57 of UNCAC generally prefers the repatriation of confiscated proceeds to the victim country and sets rules for disposal according to the type of underlying corruption offences. At the same time, it allows requested states to deduct reasonable costs from the proceeds or other assets before they are returned. Additionally, requested states may wish to impose conditions on how and when the assets will be used. Information on arrangements made in practice in connection with these matters would be very

helpful.

E. General Impediments

I have so far described some of the issues and difficulties that are encountered in the process of international asset recovery. However, the single most pervasive impediment may be the differences and variations in substantive laws and criminal procedures among the states and jurisdictions, which is exactly what the kleptocrats and money-launderers try to exploit. Dialogue, sharing of information, creating relationships and networks, and developing cumulative knowledge and experiences should be the key to overcoming this longstanding issue in international co-operation and mutual legal assistance.

IV. CONCLUSION

Confiscation of criminal proceeds and repatriation of stolen assets restores justice and repair damages done to the victim country. They are also powerful deterrents that hit the kleptocrats where it hurts them most. The current state of affairs, however, leaves much to be desired in terms of their real-life application. To give sharper teeth to these important legal tools, a better understanding and expertise-building are much called for. I hope this seminar will contribute to your understanding of the subject and, in the long run, help translate the text of the UNCAC into effective action.

UNODC REGIONAL CENTRE EFFORTS AND CHALLENGES IN FACILITATING THE RECOVERY OF THE PROCEEDS OF CORRUPTION AND TRANSNATIONAL ORGANIZED CRIME IN SOUTH-EAST ASIAN COUNTRIES

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I. INTRODUCTION

The globalization process, enhanced by the ease of travel and unprecedented technological developments in recent years, has had a dramatic impact on many aspects of life and society, most of them for the better. However, the related growth of transnational organized crime and the response of the international community to it, has created a variety of new challenges in relation to the actions of law enforcement authorities and judiciaries, whose main role is to ensure the security of states, persons and the public, as well as legally acquired private property in all organized societies.

Today, law enforcement and judiciaries face a new challenge: the investigation, prosecution and adjudication of corruption and TOC[1] cannot be efficiently conducted within the legal framework of national boundaries. And ironically, sovereignty, a fundamental principle under international law which grounds the relations of states, has become a major tool in the armory of organized crime.

There can be no illusions about international co-operation in criminal matters. The criminals are far more skilled in using national borders to protect themselves and the evidence and profits of their crimes from detection than law enforcement is in overcoming the barriers of sovereignty, in pursuing them.

The purpose of this paper is to provide a brief overview of the vision and strategy offered under UNODC/RC Regional Programme Framework for the Southeast Asia and Pacific region as it relates to the implementation of international co-operation between the judiciary, prosecutors and other law enforcement authorities with a specific focus on the recovery of the proceeds of corruption in the region. The intent is to give a brief "comparative snapshot" of where we have been, where we are and the future challenges that Southeast Asia and the Pacific region face.

International co-operation in criminal matters encompasses many measures including extradition, mutual assistance, transfer of sentenced prisoners, transfer of proceedings, and co-operation in the restraint, forfeiture and, since the entry into force of the UNCAC[2] in 2005, the repatriation of proceeds of crime to the countries they were stolen from.

This paper will focus on three of the most common aspects of international co-operation, those which most directly impact on the work of prosecutors - extradition, mutual assistance and co-operation in the restraint, forfeiture and return of proceeds of crime.

II. WHERE WE HAVE BEEN

It cannot be disputed that organized crime, which is most of the time facilitated by corruption, began its operations across borders long ago, and that comparatively, state agencies took a long time to

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* Senior Judge, Senior Legal Advisor to UNODC. The contents of this publication do not necessarily reflect the views or policies of UNODC or contributory organizations and neither do they imply any endorsement.

1. TOC: Transnational Organized Crime
2. UNCAC: United Nations Convention against Corruption

start getting better organized to address this issue. The very first agencies to realize the importance of the phenomenon and the risks it posed to modern societies were law enforcement agencies, and more precisely, the police forces in charge of the investigations into serious crime. Therefore it is no surprise that Interpol was established as early as 1923 and has since then developed to become the current global network of police investigators with its headquarters in Lyon, France.

However, despite its efficiency, the Interpol network needed to be supported by international conventions containing legal provisions governing international co-operation. The first conventions to come into force were the drug Conventions of 1961, 1971 and 1988. Article 37 of the single convention on narcotic drugs and article 22 of the convention on psychotropic substances stipulate that:

"Any drugs, psychotropic substances and equipment used in or intended for the commission of any of the offences, referred to in article 36, shall be liable to seizure and confiscation".

However the international community only decided in 1988, with the entry into force of the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, to establish a mechanism to facilitate international co-operation in criminal matters among Member States.

Fifteen more years were necessary for the entry into force of the 2003 Convention on Transnational Organized Crime which complemented the framework by adding under article 13 provisions on international co-operation for the purpose of confiscation and under article 14 provisions governing the disposal of confiscated proceeds of crime or property.

Finally, the UNCAC, which came into force in 2005, completed the whole framework of international co-operation by adding legal mechanisms, such as mechanisms for recovery of property through international co-operation in confiscation (Art 54), and posed under article 57 the return of confiscated assets to their prior legitimate owners in the State of origin. Article 58 of the UNCAC provides for the establishment of Financial Intelligence Units in order to better control suspicious financial transactions and fight money laundering.

The above described evolution clearly evidences that before 2005 there was no comprehensive international legal framework to address organized crime and corruption in their various manifestations. Additionally, States would categorize offences where organized criminals had long understood that criminal activities were much more efficient when combined together: for example the passive corruption of public servants to facilitate fraud, money laundering or any illicit traffic.

Thus, before the establishment of the international legal framework criminals would take advantage of the barriers of sovereignty to shield themselves and the evidence of their crimes from detection. Organizations which orchestrated transnational crime and which then dispersed and concealed the proceeds of their illicit activities the world over had no regard for national borders. In fact, by structuring their organizations to span borders, they were better able to protect their interests and operations. They were positioned to take advantage of the differences between legal systems, the clash of bureaucracies, the lack of ethics of some public officials, the protection of sovereignty, and, at many times, the complete incapacity of nations to work together to overcome their differences.

III. WHERE WE ARE IN THE SOUTHEAST ASIA AND PACIFIC REGION

A. Lack of Co-operation in Recovery of Stolen Public Assets

Since the mid-1990s the General Assembly of the United Nations, through multiple resolutions, has expressed serious concern about the problems and threats posed by corruption to the stability and security of societies. Corruption attacks the foundation of democratic institutions, corrodes government institutions and starves the economy.

The UN Convention against Corruption (UNCAC) provides a powerful tool to strengthen anti-corruption programmes in the region. However, the main challenge is thus to turn the Convention from a mere legal framework into an effective tool for the rule of law.

At present, many countries in the region tend to focus only on the investigation and conviction of corruption.

Specific provisions of the UNCAC tackle the bribery of national public officials and the criminalization

of the obstruction of justice. The provisions on asset recovery – the first of their kind – require Member States to return assets obtained through corruption to the country from which they were stolen. This is a major breakthrough. Judiciaries in countries where corrupt elites have looted billions of dollars are now empowered to implement these innovative provisions to recover the proceeds of crime. Yet they are being called upon to act with little or no prior training. Given the magnitude of corruption and the amounts at stake, there is a serious risk of improper influence and possible misconduct, as well as bribery within the judiciary itself.

Appropriate national legislation and institutional capacity to deal with proceeds of other forms of organized crime is also lacking in the region.

While progress is being achieved through the establishment of national Financial Intelligence Units, participation in regional mechanisms for the enhancement of anti-money laundering and anti-corruption capacity still needs to be strengthened via engagement with relevant international regulatory bodies. This is of particular importance in relation to countries in post-conflict situations.

B. Money Laundering

East Asia and the Pacific remain vulnerable to money laundering.

Given the relatively weak financial and economic monitoring and control systems present in some countries in the region, it is often difficult to follow money trails, which are an essential element for the investigation of this form of crime.

While many jurisdictions are working to adopt AML[3] laws, the level of effective implementation remains very low. Countries require expertise to develop their respective AML systems and UNODC is well placed to deliver such assistance. There are a number of key areas that could benefit from a regional approach to capacity building of AML systems. Two such areas are: (i) training and development of investigators, prosecutors, judges and customs officials in relation to identification, investigation and prosecution of money laundering and the confiscation of criminal assets; and (ii) the development of mechanisms for more effective international co-operation in money laundering investigation and prosecution of money laundering cases.

Therefore UNODC's main role will be to support partner countries to meet the requirements of the UNCAC, through providing technical support to translate the provisions of the convention into sustainable institutions and procedures. In other words, the idea is to shift the type of assistance and activities delivered in the region into technical support to operational agencies in charge of fighting corruption and recover the proceeds of crime.

C. Lack of Independent and Fair Justice Systems

By its very nature, transnational organized crime actively weakens the sovereignty of the State itself. If sovereignty is defined as a monopoly on the use of force and the ability to establish an effective legal framework to govern this use of force, transnational organized crime groups tend to chip away at the state's very foundations. Not only do transnational organized crime groups use their resources to set up parallel sources of power, they also undermine the very legitimacy of the legal regime. By co-operating with each other to respond to the threats from organized crime, Member States both reduce the threat to their sovereignty and strengthen the basis of legitimate international co-operation.

As a region, East Asia and the Pacific has the lowest ratification level of the international crime and drug conventions. This is a fundamental problem in terms of addressing UNODC's mandates at the national and regional levels. It is part of UNODC's normative mandate to encourage the countries of the region to ratify the crime, drugs and terrorism conventions.

The Drug-Free ASEAN 2015 Status and Recommendations report notes that the regional mutual legal assistance (MLA) framework established by ASEAN is impeded by a lack of national legislation. The report specifically states that, "While some bilateral MLA agreements in the region show promise, the challenge is to find operational solutions for wider implementation."[4] Until the use of MLA and other legal

3. AML: Anti Money Laundering
4. Drug-Free ASEAN 2015, "Achieving a Drug-Free ASEAN 2015 – Status and Recommendations".

tools becomes the status quo, a divided “patchwork approach” of agreements will prevent greater success.

For justice systems to be effective in countering organized crime, an evidence-based approach is required. There is a need to raise awareness of the value of physical evidence, as well as its forensic examination and the need to preserve its integrity, from the crime scene to the courtroom. For this reason, enhancing forensic capacity and the exchange of experiences and data in the region through improved national and regional networking is essential.

IV. WHAT FUTURE CHALLENGE FOR UNODC REGIONAL CENTRE IN SOUTHEAST ASIA?

If one considers where we have been and where we have come in co-operation matters in the last fifty years, there is much reason to be optimistic. There should be no doubt, that with the continued efforts of the world community, its effectiveness in combating transnational crime will continue to increase, as will the security of our global village. International co-operation in criminal matters is made possible through the use of a series of legal specifically designed tools to overcome the barriers of sovereignty and allow the international community to "fight back".

A. The “Towards AsiaJust” Initiative

International co-operation in criminal matters has on a practical level come of age. Most of the regions in the world have developed formal networks of judicial institutions using secure online forums in order to legally extend the mechanisms of international co-operation when investigative measures become coercive.

Such is the case in North America with the establishment of the Organization of American States (OAS); in Europe with EuroJust and its affiliated judicial network (EJN); or in South America with the Ibero-American Assistance Network (Iber-Red).

However, the Southeast Asia and Pacific region does not have any network of the kind. Given that situation, UNODC/RC – after discussing the needs of the States Parties with their representatives – has endeavoured to develop a new programme called “Towards AsiaJust” which has a strong focus on the recovery of the proceeds of the crime.

Essentially, The “Towards AsiaJust” programme is developed along the idea that UNODC, because of its neutral status and mandate, is the most appropriate organization to support the efforts of criminal justice systems in East Asia and the Pacific to respond to TOC and corruption with a more effective form of "transnational organized criminal justice scheme " than the one that is in place at the moment.

“The Towards AsiaJust” programme has been developed under the supervision of the UNODC Representative for East Asia and the Pacific by senior members of the judiciary formerly in charge of transnational serious crime who are now seconded by their respective countries to the UNODC Regional Centre in Bangkok. Prior to that, criminal trends and needs assessments have been conducted by UNODC/RC with the authorities in charge of criminal issues in several countries of the region.

The result is that "Towards AsiaJust" has been conceptualized as a programme meant to operate with already existing entities such as the networks of prosecutors, special investigative teams, central authorities in charge of mutual legal assistance, recovery and return of stolen assets and extradition procedures, as well as other highly specialized professionals.

The main objective of the programme is to put in place an operational “modus operandi” among the various players in charge of combating Transnational Organized Crime and corruption in the region, starting with inter-agency co-operation both at the domestic level and cross border level, based on a clear understanding of the differences in the different criminal systems in force in the region.

Therefore, through measurable elements, the programme aims to shift the balance of power between criminal organized groups and institutionalized state bodies in charge of the security of the State, persons

and property.

To reach that aim, the "Towards AsiaJust" Programme provides the logical framework and necessary steps to transform a region lacking judicial independence, integrity and organizational capacity to address Transnational Crime. It aims to respond to Transnational Organized Crime in a region composed of strong independent judiciaries that have demonstrated the political will to form a transnational organized justice scheme.

While the ratification and implementation of the UN Conventions remain a vital priority, "Towards AsiaJust" will go beyond mere ratification to utilize the provisions of the UN Conventions in a context that perceives international co-operation as a necessary and inherently beneficial asset, instead of as a burden.

The programme is a product of empirical and practical evidence that demands the formation of an organized justice scheme founded on the criminal provisions of the UN Conventions to realistically and intelligently respond to highly-organized, intelligence-driven international criminal groups.

It aims at making the illegal activities of criminal syndicates significantly more difficult through enforcement of legal mechanisms by competent agencies acting in synergy in member states that are ready to waive unnecessary obstacles when security is at stake. It also aims at making technically possible the implementation of Chapter V of the UNCAC, and more specifically, the return of the proceeds of crime to their legitimate owners in their country of origin.

For that purpose it will be built upon, and eventually encompass, the regional capacity established by INTERPOL[5], ASEANAPOL[5], ASLOM[5], ARTIP[5], FIU[5], HSU[5], SAARC[5], SOMTC[5] and the central authorities for Mutual Legal Assistance and extradition where they exist.

V. CONCLUSION

More and more successful prosecution, particularly of economic drug crime and money laundering cases, is dependent upon the assistance and co-operation of other states. The return of the proceeds of crime to the country of origin indisputably cannot operate without international co-operation.

UNODC/RC hopes that the result will be that the rare cases where assistance from another country is necessary to gather evidence, or locate and return an accused or the proceeds of crime to the country of origin, will no longer be rare.

5. INTERPOL: International Criminal Police Organization
ASEANAPOL: ASEAN Chiefs of Police
ASLOM: ASEAN Senior Law Officials Meeting
ARTIP: Asia Regional Trafficking in Persons (Project)
FIU: Finance Intelligence Unit
HSU: Heads of Specialist Trafficking Units
SAARC: South Asian Association for Regional Cooperation
SOMTC: ASEAN Senior Officials Meeting on Transnational Crime

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Please note that the following papers have not been edited for publication. The opinions expressed therein are those of the authors, and do not necessarily reflect the position of the departments they represent.

RECOVERING PROCEEDS OF CORRUPTION

*Linda M. Samuel**

I. INTRODUCTION

On November 7, 2009, United States Attorney General Eric H. Holder, Jr., in delivering opening remarks at Plenary VI Ministerial Global Forum on Fighting Corruption and Safeguarding Integrity in Doha, Qatar, said that "[C]orruption is condemned by all religions, all ethical codes, all legal systems. It hinders all development, slows all progress, impedes all advancement -- both within our own countries and across our borders. It strikes hardest at the poor and vulnerable, siphoning scarce resources away from those most in need. It advances the selfish interests of a dishonest few over the interests of the great many who work hard and who obey the law and our common traditions. Corruption erodes trust in government and private institutions alike; it undermines confidence in the fairness of free and open markets; and it breeds contempt for the rule of law. Corruption is, simply put, a scourge on civil society." All countries, including the United States, struggle with corruption. The acknowledged amount of stolen funds by high ranking government officials throughout the world is mind boggling. Sadly, there have been only a relatively small amount of successful prosecutions of "grand corruption" cases[1] and limited success in the recovery and return of the related illicitly acquired assets. This paper explores some of the impediments to asset recovery that account for the dismal results in attacking a crime problem that receives worldwide condemnation and for which there is international consensus about its debilitating impact on rule of law, development and poverty. This paper also identifies needed tools for prosecutors to pursue successful asset recovery cases.

II. THE UNITED NATIONS CONVENTION AGAINST CORRUPTION (UNCAC)

The principal international instrument for dealing with asset recovery is the United Nations Convention against Corruption (UNCAC). It is the first globally negotiated anticorruption treaty that contains a framework for governments to cooperate to achieve the goal of returning embezzled public funds and other proceeds of corruption by providing the vehicle for countries to make requests to each other for legal assistance in the recovery of illicit assets. Chapter V of UNCAC (asset recovery) reflects a mutual aspiration of developing and developed states parties for more effective cooperation to recover the proceeds of grand corruption. The Convention sets forth mutual legal assistance procedures for countries to follow to enable them to partner in asset recovery cases. It imposes a binding legal commitment for parties to repatriate embezzled assets where the victim state has instituted proceedings and obtained a confiscation judgment which is then enforced by the state where the property is located. The Convention advocates the use of "mutually acceptable arrangements, on a case-by-case basis, for the final disposition of forfeited property.

Since the time that UNCAC entered into force on December 14, 2005, the Conference of States

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1. Grand Corruption, also referred to as kleptocracy, is large-scale corruption by senior officials in the executive, judicial, legislative, or other official positions in government, including senior executives of government-owned corporations, military officials, and senior politicians or senior officials from major political parties, who use their influence to steal, extort, and misappropriate large sums of money from their governments and citizens. In addition, kleptocracy involves the family members and close associates of senior government officials, as well as support networks of advisors, attorneys, and accountants.

Parties has met on an annual basis to discuss implementation issues. Most recently, the States Parties met in Doha, Qatar during November 9-13, 2009. The resulting Doha Resolution from COSP III acknowledges "the important progress made towards implementation of chapter V of the Convention, but recognize[es] that States parties continue to face challenges in asset recovery owing, inter alia, to differences in legal systems, the complexity of multi-jurisdictional investigations and prosecutions, lack of familiarity with mutual legal assistance procedures of other States and difficulties in identifying the flow of corruption proceeds. . . " The Resolution notes that there are particular challenges posed in recovering the proceeds of corruption in cases involving individuals who are or have been entrusted with prominent public functions and their family members and close associates. To overcome these challenges to effective asset recovery, States Parties must, among other things: (1) take a proactive Approach to international cooperation in asset recovery; (2) timely respond to Mutual Legal Assistance Requests; (3) remove barriers to asset recovery; (4) study application of changes to legal frameworks including use of presumptions and illicit enrichment.

III. BARRIERS TO ASSET RECOVERY

Despite the existence of a framework to follow and a vehicle for jurisdictions to make requests to one another in UNCAC, there are numerous obstacles that continue to thwart asset recovery. The following is a list of many of the hurdles that jurisdictions face in undertaking asset recovery work:

- Lack of adequate legal framework (anti-corruption, anti-money laundering, and confiscation laws)
- Absence of an organizational structure, designated responsible government authorities, and implementing procedures and policies concerning asset recovery
- Lack of political will and government support to pursue asset recovery
- Unfamiliarity with how to investigate and prosecute corruption.
- Failure to appreciate or possess the skills required
- Scarcity of financial and human resources and inability to pay the cost of advisors
- Lack of capacity to conduct financial and money laundering investigations
- Impossibility of accurately conducting the time consuming process of tracing illicit proceeds, particularly where they have been concealed and comingled
- Inability to identify where the proceeds of grand corruption are on deposit
- Lack of independent prosecuting and investigating authorities and anti-corruption commissions
- Overly excessively protracted legal proceedings
- Inability to successfully prosecute the underlying corrupt conduct, particularly to overcome vigorous legal challenges raised by legal representatives for corrupt officials
- Inability of a victim state to obtain a confiscation judgments without a conviction in the victim state, including where corrupt official is dead, a fugitive, possesses immunity, or is too influential to prosecute
- Unfamiliarity with process of requesting mutual legal assistance and limited capacity to formulate executable assistance requests
- Failure of victim states to provide timely and sufficient evidence in support of mutual legal assistance requests
- Unfamiliarity with points of contact to assist in mutual legal assistance
- Incompatibility of legal procedures in proceedings in requesting and requested states, including dual criminality requirements, statute of limitations, and requirement of a final judgment as a condition of providing legal assistance
- Inability to secure assistance from non-responsive jurisdictions
- Inability for a jurisdiction where corruption proceeds are located to freeze and confiscate illicit property based on their own investigation or to have the statutory basis to recognize a foreign restraint order or forfeiture judgment
- Difficulties of states where proceeds of corruption are located to promptly execute mutual legal

assistance requests, including requests to enforce requesting states' restraint orders and forfeiture judgments
- Lack of confidence and trust between requesting and requested states
- Lack of transparent mechanisms for the use and disposition of recovered assets

IV. WHAT HAS PROVEN EFFECTIVE IN RECOVERING THE PROCEEDS OF CORRUPTION?

Rarely are corrupt officials pursued while they are still in office. Once the new government is installed and is sufficiently organized to pursue past cases of corruption, the corrupt former official typically has had ample time to conceal his illegal wealth, attempt to protect himself from accountability by obtaining immunity from prosecution, or to flee. Most jurisdictions do not allow for the confiscation and return of assets except on the basis of a criminal conviction, which of course, is unlikely where the corrupt official cannot be prosecuted. Increasingly, jurisdictions are recognizing that many of the challenges to successful asset recovery can be overcome through the adoption and use of non-conviction based (NCB) forfeiture statutes. NCB forfeiture, called "civil forfeiture" in some countries, is an action not against an individual, but against the property itself. Because it is against the property, an NCB forfeiture action is not dependent on a criminal conviction and may be pursued even if the corrupt official is dead, a fugitive, has been acquitted of a related criminal offense, is immune from criminal prosecution, or enjoys residual political influence making criminal prosecution not possible. Most NCB forfeiture statutes require proof by a preponderance of the evidence or balance of the probabilities whereas criminal forfeiture statutes require a conviction of the individual, usually by the higher "beyond a reasonable doubt standard", though in some countries the lower preponderance of the evidence standard governs the forfeiture phase of the criminal proceeding once guilt is proved by the higher standard. While a criminal prosecution is obviously a desirable law enforcement objective when dealing with corrupt officials who have undermined the public trust and stolen state funds, having the ability to strip away their illegal proceeds, particularly when a successful criminal prosecution is unlikely, is also an important law enforcement objective to achieve and helps to restore confidence in government.

In addition to adopting NCB forfeiture laws, other enumerated obstacles to asset recovery can be addressed through the enactment and implementation of effective, comprehensive, and flexible mutual legal assistance legislation that provides for the enforcement of foreign restraining orders and final forfeiture judgments. Corrupt officials frequently launder their illicit proceeds to places outside their own jurisdiction. Requesting and requested jurisdictions need flexible mutual assistance laws that will enable them to act speedily to freeze the illicit proceeds so they cannot be dissipated. In most cases, the requested jurisdiction cannot be expected to bring its own domestic case because the underlying corrupt activities will have occurred in the requesting state, which will posses that evidence, and it will be a rare occasion that the foreign corrupt official is located in the jurisdiction where the assets are located. Accordingly, in interests of judicial economy and practicality, jurisdictions need the ability to enforce one another's restraining orders and final forfeiture judgments. This includes one another's non conviction based judgments. In other words, the jurisdiction pursuing the underlying corruption case needs to have the ability to enter orders affecting property located beyond its borders, and the requested jurisdiction needs to have the ability to give effect to such foreign orders. This is consistent with the asset return framework set out in Article 57 of UNCAC, in which the binding legal commitment to repatriate proceeds of corruption applies to embezzlement proceeds where the victim state obtains a forfeiture judgment that is then enforced by the state where such proceeds are located.

Another improvement to the legal framework that can aid in overcoming challenges to asset recovery is the incorporation of presumptions in the law. Often times, corrupt officials, particularly those who have been in power from an extended period of time, have engaged in multiple schemes and have taken bribes and kickbacks from numerous sources and have comingled funds to such an extent that law enforcement may never be able to unravel the transactions and trace assets to particular corrupt activities. Presumptions will

essentially shift the burden of proof after the government has made an initial showing (based on a probable cause standard) that the property is the proceeds or instrumentalities of foreign corruption, and accordingly will require the corrupt official to demonstrate that his or her property has been legitimately acquired. Tracing is time consuming and in many cases, impossible. Thus, putting the onus on the corrupt official to establish that his or her property is lawful is not unjust or unreasonable since the official is in the best position to know how the property was acquired. An example of a presumption is that the government is entitled to presume that the property subject to forfeiture was derived from corruption where such property is held by or for the benefit of a foreign official and the value is inconsistent with his or her income and declared assets. Another presumption is that where an official has been convicted of corruption or money laundering in one state, then another state where his or her property is located is entitled to initiate forfeiture proceedings and have a presumption in its favor that the property is derived from corruption. Typically these presumptions are contained in non conviction based forfeiture regimes in which the government is not seeking to take the property owner's liberty interest away through a criminal conviction. Consequently, the presumption – which is rebuttable - should not run afoul of due process concerns and presumptions of innocence. Similarly, where such presumptions are applied in the context of a criminal prosecution, it will be in the forfeiture phase of the case following a conviction where guilt has been is proved by the higher standard, and therefore, should not bee considered a violation of the presumption of innocence.

Other impediments to identifying and tracing proceeds of corruption can be surmounted by adhering to Chapter V of UNCAC, which requires the financial institutions in the member states to apply enhanced scrutiny to accounts of politically exposed persons (PEPs) and requires states to develop effective financial disclosure systems. Many of the barriers to asset recovery stem from a lack of knowledge, skills, procedures, and training. Through the development of specialized prosecutorial and investigative units, anti-corruption task forces, and anti-corruption commissions, the creation of national strategies and internal integrity programs, and the provision of related training for relevant authorities, law enforcement authorities will be better able to detect, investigate and prosecute corrupt public officials and those who bribe and be better able to confiscate the property involved in corruption crimes.

V. U.S. LEGAL AUTHORITY

The U.S. has a strong interest in encouraging effective investigation and forfeiture of proceeds of corruption and the rendering of related mutual legal assistance. As a result of successful forfeiture cases brought by the U.S. Department of Justice, millions of dollars in forfeited corruption proceeds has been repatriated to victim states and hundreds of millions of additional funds are currently under judicial restraint subject to pending forfeiture proceedings. The U.S. legal framework that enables it to provide assistance in asset recovery cases stems from potent national laws, flexible mutual assistance authority, and a forceful commitment to combating grand corruption and assisting other nations in asset recovery efforts that is embodied in a consolidated national strategy. In August 2006, the United States issued a national Strategy to Internationalize Efforts Against Kleptocracy, which remains effective today, and in broad terms, strives to prevent kleptocracies and deny safe haven to corrupt officials, those who corrupt them, and their proceeds. To achieve these objectives, the United States undertakes to:

1. Launch a coalition of International Financial Centers exploited by kleptocrats and work with private and public sector partners in key international financial centers where illicit funds transit and/or are hidden and use financial and economic sanctions where necessary to stop grand corruption;
2. Vigorously prosecute Foreign Corruption Offenses and Forfeit Illicitly Acquired Assets. The U.S. Government will seek to expand its capacity to investigate and prosecute criminal violations associated with high level foreign official corruption and related money laundering, as well as to forfeit the proceeds of such crimes;
3. Deny safe haven so that kleptocrats and those who corrupt are denied entry to the United

States;
4. Strengthen multilateral action against the bribery of kleptocrats, foreign political parties, party officials, and candidates for office;
5. Facilitate and reinforce responsible repatriation and use when returning recovered assets so that they benefit of the citizens of countries victimized by grand corruption; and
6. Target and internationalize enhanced capacity by providing technical assistance and focusing international attention on building capacity to detect, prosecute, and recover the proceeds of high level public corruption while helping countries build strong systems to promote responsible and accountable governments.

The mechanism for confiscating corruption proceeds in the United States is based on flexible authority to institute legal proceedings either with or without a conviction through which title to property is vested in the government, following proof of criminal conduct and demonstrating that the property or its value was derived from or involved in the commission of a crime.[2] *See, generally,* 18 U.S.C. §§ 981 and 982 and 21 U.S.C. §§ 853 and 881. Critical U.S. legal authority relied on by American prosecutors in asset recovery cases includes:

- *Criminal forfeiture:* The United States must first prove beyond a reasonable doubt that the corrupt official is guilty of an offense for which forfeiture is available. Forfeiture is available for a wide array of corruption related and money laundering offenses. Following conviction, the defendant's interest in property constituting the proceeds of an offense or property used in the commission of the offense is forfeited to the United States as part of the criminal sentence. Because a criminal prosecution is an *in personam* action, the United States can also seek a forfeiture judgment for the value of property involved in the commission of the crime or forfeit property the defendant legitimately acquired in lieu of his or her tainted assets if the assets involved in the offense have been dissipated or hidden.

- *Non Conviction Based (NCB) forfeiture:* NCB or civil (or *in rem*) forfeiture actions are actions against property, rather than a criminal defendant, and do not require a conviction. In the United States, such actions are regarded to be quasi criminal because the authority is located in the penal code and the government must establish the existence of a criminal offense and the property's nexus to that offense, but the procedure utilized is civil. NCB forfeiture actions depend upon the government's ability to demonstrate the relationship between the criminal conduct and the particular property subject to confiscation, and, as a general rule, are limited to property somehow traceable to the offense such that it was used or acquired illegally. As already noted, NCB forfeiture actions are particularly useful in grand corruption cases where a criminal conviction is not possible, such as when the property is owned or controlled by a corrupt official who is a fugitive, has immunity from prosecution, or has died.

- *Restraint/Seizure for U.S. Forfeiture:* In both criminal and NCB forfeiture actions, United States courts have broad authority to order the seizure or restraint of property prior to trial to ensure that it remains available for forfeiture, provided there is probable cause to believe the property is traceable to the offense. *See, e.g.* 18 U.S.C. §§ 981(b), 983(j); 21 U.S.C. § 853(e).
    - *Restraint Based Upon Foreign Arrest or Charge:* Where a U.S. civil forfeiture action would

2. Relevant foreign crimes giving rise to forfeiture in the United States are enumerated in 18 U.S.C. § 1956(c)(7(B) as predicates for U.S. money laundering violations and include foreign extortion, bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official. In addition, the United States may be able to reach corruption-related property if the conduct transcends national boundaries so as to violate United States law or if it occurred, in part, in the United States in violation of other U.S. laws, such as those prohibiting wire fraud, mail fraud, or transportation of property taken by theft or fraud. Forfeiture may also be possible for violations of U.S. statutes that provide for extraterritorial jurisdiction over United States nationals and residents, such as the Foreign Corrupt Practices Act.

be based upon evidence of a foreign crime, such as a corruption offense, the United States may seek preliminary restraint of assets based solely on a foreign arrest or criminal charge in order to allow foreign authorities time to provide sufficient probable cause evidence to enable the United States to file its own NCB forfeiture action. Such a preliminary restraint does not require a showing of probable cause and is of temporary duration that can be extended by the court upon a showing of good cause. 18 U.S.C. § 981(b)(4).

- *Enforcement of Foreign Forfeiture Judgments:* In addition to authority to initiate its own forfeiture actions, the United States has authority to enforce foreign forfeiture or confiscation judgments against property located in the United States. This provision covers assets that could be covered under a U.S. forfeiture judgment had the crime been committed in the United States, and therefore includes property involved in foreign corruption. In addition, the order must be issued by a court in a foreign nation that is party to a treaty or other formal international agreement with the United States providing for mutual forfeiture assistance and the foreign order must be certified for enforcement by the U.S. Attorney General. In enforcement proceedings, claimants cannot re-litigate substantive issues that have been adjudicated in the foreign court, such as guilt or forfeitability of the property. However, claimants can challenge the enforcement of a foreign forfeiture judgment in the United States based upon violation of procedural due process guarantees (such as failure to receive notice, lack of opportunity to participate, judgment procured by fraud etc.). *See* 28 U.S.C. § 2467 Enforcement of a foreign judgment would result in the forfeiture of the property to the United States, which would then control disposition of the assets.

- *Extraterritorial Reach of U.S. Forfeiture:* United States forfeiture authority extends not only to criminal proceeds and instrumentalities located in the United States, but also to property located *outside* the United States that is traceable to a criminal defendant prosecuted in the United States or criminal conduct occurring, in part, in the United States. *See* 21 U.S.C. §§ 853(l) (criminal forfeiture) and 28 U.S.C. § 1355(b)(2) (civil forfeiture). U.S. money laundering laws contain a grant of extraterritorial authority and numerous predicate offenses cover acts that occur outside the United States. Additionally, foreign corruption offenses are specifically designated as a predicate offense to money laundering. Where United States' treaty arrangements are insufficient to reach assets located abroad, the USA PATRIOT Act provides authority to restrain, seize and later forfeit funds from the U.S. correspondent bank account of the foreign institution(s) holding the forfeitable funds/assets located abroad in lieu of property located abroad. *See* 18 U.S.C. § 981(k).

- *Asset Return Provisions:* The United States is committed to the principles of disposition and return set forth in Article 57 and has ample authority through its asset sharing and remission statutes to execute the obligations under UNCAC. Where the United States successfully forfeits corruption proceeds, it is the policy and practice of the United States to repatriate the funds to the victim state and to encourage its use in effective programs to combat corruption and to dedicate recovered corruption proceeds to programs and institution building that will benefit the people who have suffered as a result of the corrupt activities. Pursuant to 18 U.S.C. §981(i), the United States can share the net forfeited proceeds with jurisdictions that cooperate to facilitate the successful forfeiture effort. This authority can be used in grand corruption cases where the victim country typically provides evidence to help establish the underlying corrupt activities. Under U.S. asset sharing laws, the United States is not limited to transferring any particular percentage of the assets, and for example, in the case of embezzlement and theft, the United States has the discretion to share all of the forfeited proceeds with the victim state. In addition to its broad asset sharing authority, the U.S. Attorney General has discretionary authority to restore forfeited property to innocent crime victims under the Department of Justice remission authority. Such authority is generally governed by regulations set out in 28 C.F.R. Part 9 (2008). The regulations define a "victim" as an individual, partnership, corporation, joint business enterprise, estate, or other legal entity capable of owning property, "who has incurred a pecuniary loss as a direct result of the

commission of the offense underlying a forfeiture." 28 C.F.R. § 9.2(v).[3] Thus, a victim can be a foreign state.

VI. CONCLUSION

We should all be striving for a world where there is no safe haven for stolen assets. Through vigorous enforcement of asset forfeiture laws, and in close cooperation with law enforcement partners in other countries, we can all do our part to ensure that corrupt officials do not retain the illicit proceeds of their corruption. However, prosecutors need to have an arsenal of weapons at their disposal in the form of legal authorities to prosecute domestic and foreign grand corruption and related money laundering offenses, and to confiscate the property involved in such crimes. Experience has shown that the linchpin to making the promise of asset recovery in UNCAC a reality is employing critical tools, such as non-conviction-based forfeiture or enforcement of foreign restraint orders or confiscation judgments. These powers, as part of a comprehensive domestic and international forfeiture regime, will enable effective implementation of the spirit of Chapter V of UNCAC and will increase the ability of nations to detect, investigate, and confiscate proceeds of grand corruption, as well as to provide mutual legal assistance to member states on asset recovery and return.

3. A victim does not include one who acquires a right to sue the perpetrator of the criminal offense for any loss by assignment, subrogation, inheritance, or otherwise from the actual victim, unless that person has acquired an actual ownership interest in the forfeited property. *Id.* Pursuant to 28 C.F.R. § 9.8(a), in order for a victim to receive remission, they must generally establish that: (1) they suffered a pecuniary loss of a specific amount directly caused by the offense underlying the forfeiture or a related offense, and the loss is supported by documentary evidence including invoices and receipts; (2) the loss is the direct result of the illegal acts and not otherwise lawful acts committed in the course of a criminal offense; (3) they did not knowingly contribute to, participate in, benefit from, or act in a willfully blind manner toward the offense; (4) they have not been compensated for the loss; and (5) they do not have recourse reasonably available to other assets from which to obtain compensation for the loss.

STOLEN ASSET RECOVERY: POLICY DEVELOPMENT AND PRACTICAL TOOLS

(SUMMARY)

*Emile van der Does de Willebois**

An intimate connection exists between corruption and development, and development organizations, including the World Bank, must be very conscious that they do not sponsor or fund the private activities of corrupt officials; not only is the aid lent thus rendered less effective, but it also perpetuates corruption.

Until recently, the World Bank advocated a non-law enforcement approach to corruption, but there has been a policy change: a shift from this developmental view of the matter to a more "law and order" view. While good governance and transparent and effective public financial systems are vital, they need to be complimented by law enforcement efforts. Realizing this, in 2007 the World Bank and the UN launched the StAR Initiative, which receives strong support from World Bank management as well as external support; for example, the explicit call of the G20 leaders in Pittsburgh on the StAR Initiative to continue its efforts to mitigate the effects of corruption. With this support comes the responsibility to make a real contribution to combating corruption.

The StAR Initiative's objectives are to reduce barriers to asset recovery, and thereby to encourage and facilitate systematic and timely return of stolen assets. StAR emphasizes the joint responsibility of developed and developing countries in this endeavour. Specifically, these objectives take the form of technical assistance and financing training courses; advisory services to support the preparation and analysis of mutual legal assistance requests (not their execution); and knowledge and advocacy, on which this presentation focused.

Many jurisdictions already have asset recovery legislation in place, and while it is largely focused on proceeds from drugs and organized crime, it can also be used for corruption. The Financial Market Integrity Unit can give advice in this regard, as well as supporting multi-agency teams, encouraging co-ordination and communication between investigators, prosecutors, AMLUs and FIUs, etc. The Financial Market Integrity Unit also contributes to the development of asset recovery programmes and has produced a paper on the management of assets after return. With regard to mutual legal assistance, while the World Bank cannot take control of specific cases, it can give advice in hypothetical terms. Details of these projects are outlined in the accompanying slides 7 to 10.

Of great importance is the integration of the anti-money-laundering (AML) and anticorruption agendas. This is illustrated with the example of James Ibori of Nigeria, a state governor, who, although immune from prosecution under the Nigerian Constitution, had his assets frozen under AML legislation in the UK, the jurisdiction to which he had moved his assets, following advice from the Nigerian Economic and Financial Crimes Commission (EFCC).

The FATF Recommendations overlap with certain provisions of the UNCAC (listed in slide 11) and of particular importance is the issue of politically exposed persons (PEPs), specifically scrutiny of bank accounts held by such persons, which is addressed by Article 52 of the UNCAC and Recommendation 6 of the FATF40+9 Recommendations. However, there is a low level of compliance with FATF Recommendation 6 (only three of 124 surveyed jurisdictions were deemed to be fully compliant), and other provisions relating to PEPs generally.

The issue of PEPs is an important one for the StAR Initiative, and it has written a policy paper, entitled "Politically Exposed Persons – A Policy Paper on Strengthening Preventive Measures", which

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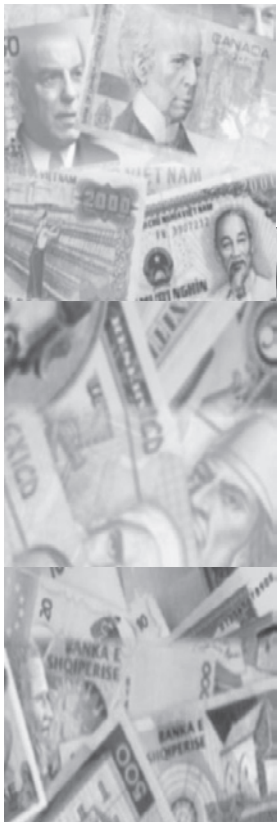
aims to give policy recommendations to states on how they should deal with PEPs and then is divided into principle recommendations and good practices. Some of the principle recommendations are: enhanced due diligence, (which all countries which have ratified the UNCAC should apply to both domestic and foreign PEPs, regardless of FATF status); requiring a declaration of beneficial ownership at the point of opening an account; requiring an asset and income declaration; periodic review of PEPs customers; and avoiding setting time limits on the time a PEP remains a PEP (this should be considered on a case-by-case basis). See slides 14 to 18.

On the basis of UNCAC Article 54 and FATF Recommendation 3, the StAR Initiative has produced a knowledge product entitled the Non-Conviction Based Guide to Asset Recovery, co-authored by a VE to the Seminar, Ms. Linda Samuel. The guide draws upon the experience and expertise of practitioners from the common law and civil law traditions, as well as from the developing and the developed world. Some of the key concepts addressed in this guide are outlined in slides 23 to 28, including the differences between conviction based or criminal forfeiture and non-conviction based or civil forfeiture. FATF is working on reviewing some of the 40 Recommendations, including forming a Working Group on the issue of confiscation, and possibly strengthening the Recommendation on civil forfeiture, although NCB forfeiture ought never to be a substitute for criminal prosecution. Furthermore, fundamental principles relating to NCB forfeiture, such as the standard of proof to be employed and the use of a rebuttable presumption that unexplained wealth accumulated during a period of public service is attributable to corruption, should be delineated in statutory law.

A further policy product of the StAR Initiative is the publication entitled "Barriers to Asset Recovery", which will be published in the second half of 2010. (See slides 29 to 38). This publication reflects one of the UNCACs most fundamental principles: the return of assets (Article 51). This principle is also reflected in Recommendation 38 of the FATF 40+9 Recommendations. The publication's objective is to identify and analyse operational and practical barriers to asset recovery. It also lists recommendations as to how developing countries can deal with the barriers thus identified. Its most important conclusion is that "where there is a political will, there is a legal way". Lack of political will is the greatest barrier to asset recovery. Legal barriers affecting requesting and requested states, as well as operational, institutional and practical barriers are listed in slides 31 to 35. The publication also recommends that countries utilize the assistance and training offered by the StAR Initiative and other international organizations in the process of asset recovery.

Another of the StAR Initiative's policy products is a publication on the "Misuse of Corporate Vehicles", which means using legal entities, including corporations, trusts, foundations and partnerships with limited liability, for illicit purposes, for example, money-laundering. The publication is based on UNCAC Article 12 and FATF Recommendation 33. The Leaders' Statement at the Pittsburgh Summit requests FATF to strengthen standards on customer due diligence, beneficial ownership and transparency. Details of the contents are available in slides 41 to 43.

Finally, another StAR knowledge product, the Asset Recovery Handbook, the ultimate "how to" guide in asset recovery, will be published in October 2010.



Stolen Asset Recovery

Policy development and practical tools

Third Seminar on Good Governance for
Southeast Asian Countries, UNAFEI
Manila, December 9-11, 2009

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1

Corruption – why we care

- The cross-border flow of the global proceeds from criminal activities, corruption, and tax evasion is estimated at between $1 trillion and $1.6 trillion per year.
- Many developing nations are hemorrhaging money desperately needed to alleviate poverty. By one estimate, corrupt money flowing abroad from the developing and transition countries is estimated at $40 billion per year.
- This represents 40% of annual official development assistance funds (ODA).
- Twenty-five percent of the GDP of African states is lost to corruption every year, amounting to $148 billion, but the problem exists in every continent.

2

Corruption-why we care

Assets stolen by corrupt leaders at the individual country-level are frequently of staggering magnitude (estimates by TI):

- Suharto (1967-98) $15 - $35 billion
- Marcos (1972-86) $ 5 - $10 billion
- Abacha (1993-98) $ 2 - $ 5 billion

Even a portion of recovered assets could provide much-needed funding for social programs or badly needed infrastructure. Every $100 million recovered:

- could fund full immunizations for 4 million children,
- provide water connections for some 250,000 households, or
- fund treatment for over 600,000 people with HIV/AIDS for a full year; or
- fund 50–100 million drug treatments for malaria.

3

Stolen Asset Recovery (StAR) Initiative Was Launched by the World Bank and UNODC on September 17, 2007

"There should be no safe haven for those who steal from the poor,"

"Helping developing countries recover the stolen money will be key to fund social programs and put corrupt leaders on notice that they will not escape the law."

World Bank President, Robert B. Zoellick

"This Initiative will foster much needed cooperation between developed and developing countries and between the public and private sectors to ensure that looted assets are returned to their rightful owners,"

Secretary General of the United Nations, Ban Ki-moon

4

High Level Political Support

"As we increase the flow of capital to developing countries, we also need to prevent its illicit outflow. We will work with the World Bank's Stolen Assets Recovery (StAR) program to secure the return of stolen assets to developing countries, and support other efforts to stem illicit outflows.."

Leaders' Statement, The Pittsburgh Summit, September 24-25, 2009

5

Objective of StAR

"To reduce barriers to asset recovery and thereby encourage and facilitate more systematic and timely return of stolen assets. StAR emphasizes that developed and developing countries share a joint responsibility in tackling corruption and that international collaboration and collective action are needed to facilitate asset recovery and prevent asset theft."

6

Objective of StAR

- Development of national capacity through technical assistance and financing training courses for practitioners at both the national and regional levels.

- Assistance in the Recovery of Stolen Assets in preparatory stages of asset recovery proceedings. This may include advisory services to support the preparation and analysis of mutual legal assistance requests

- Knowledge and advocacy
  I. "how to" guides for practitioners
  II. tools and supporting information systems for practitioners; and
  III. analytical work to inform the design and implementation of policies aimed at lowering the barriers to asset recovery in financial centers

7

Country assistance

- Twenty country requests for StAR assistance
- Key areas for assistance
  - Awareness raising
  - Gap analysis
  - Integrating the AML and anti-corruption agendas
  - Legal reform and development
  - Support to multi-agency teams
  - Development of asset recovery programs
  - Support on specific cases

8

Knowledge and advocacy

NETWORKS

- Interpol Focal Point Database (Launched February 2009)

HANDBOOKS FOR PRACTITIONERS

- Non-Conviction Based Asset Forfeiture Guide (April 2009)
- Proceeds of Corruption: Managing Asset Return (July 2009)
- Asset Recovery Handbook (October 2010)
- Good Practice Guide on Income and Asset Declaration (September 2009).

TOOLS FOR PRACTITIONERS

- Legal Library on Asset Recovery (October 2009 and then continuous)
- Reporting on UNCAC Implementation (October 2009 and then continuous)
- Mutual Legal Assistance (MLA) Request Writer Tool (October 2009)
- Knowledge Consortium (October 2009 and then continuous)

9

Knowledge and advocacy

POLICY ANALYSIS

- Managing Politically Exposed Persons (PEPs) : enhanced due-diligence (October 2009)
- International Architecture : gaps in the institutional framework (October 2009)
- Lowering the Barriers : innovation and policy options in financial centers (second half 2010)
- Corporate Vehicles : identifying beneficial ownership (second half 2010)

10

Overlap AML and Anti Corruption agenda

- UNCAC and FATF 40 recommendations cover some of the same ground
  - Chapter II Preventive Measures covers FATF Recs 5,10,13, 19, 20, 23, 31, 33-34, 40, SR VI, VII, SR IX
  - Chapter III Criminalization and Law Enforcement covers FATF Recs 1-4 and 14 a
  - Chapter IV International Cooperation covers FATF Recs 27, 31 36, 37, 39
  - Chapter V Asset recovery covers FATF Recs 5,6,7,10,18,26,38

11

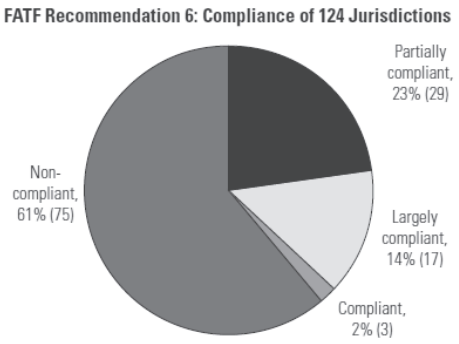
StAR policy development: PEPs

- UNCAC, Article 52:
  - "to conduct enhanced scrutiny of accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates."
- FATF 40+9 Recommendations: Rec. 6
  - Risk management systems to identify PEPs
  - Senior management approval
  - Establish source of funds and source of wealth
  - Conduct enhanced ongoing monitoring

12

PEPs- low compliance

- More than 80% of jurisdictions have not implemented effective measures. Only 3 jurisdictions compliant
- Compliance lower in FATF jurisdictions



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PEPs- Principle Recommendation 1

<u>Apply EDD to All PEPs, Foreign and Domestic</u>

- UNCAC - domestic and foreign PEPs; FATF – foreign only
- Why?
  - Legal and reputation risks remain same – domestic politicians are subject to same pressures and perverse incentives.
  - Increase credibility of commitment to fighting corruption and money laundering
  - Reality: Many banks are already covering both

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PEPs- Principle Recommendation 2

Require a Declaration of Beneficial Ownership

- Provides background to assist with identification and verification
- Assist regulatory authorities in evaluating BO practices
- Requirement to sign under criminal penalty, where existing, serves as deterrent
- *One* tool – not *only* tool—to identify and verify BO. Not sufficient to let banks "off the hook"

BOX 2.2 Sample Form for Declaration of Identify of the Beneficial Owner

Form X: Declaration of Identity of the Beneficial Owner

[To be executed by the contracting customer in writing.]

Account/Deposit No.

Contracting customer: _____

[full name and address] _____

I, the contracting customer, hereby declare:
(mark with a "X" where appropriate)

❑ that I am the sole beneficial owner* of the assets in the account referenced above

OR

❑ that the beneficial owner(s) of the assets in the account referenced above is(are): (Provide: Full Name of the natural person(s), Date and place of birth, Nationality, Address/Domicile, Country, Passport Number, National ID Number or similar national identification document and a copy of such documents)

_____
_____
_____
_____

The contracting customer undertakes to [automatically] [or within a reasonable period of time and in any event no less than two weeks] inform the Financial Services Business [insert applicable Bank contact] in writing about any changes in the information provided above.

It is a criminal offense to [deliberately] [intentionally] provide material false information on this form [insert applicable criminal law and penalty in bold type].

Signature(s) of the contracting customer: _____

Date: _____

Witnessed by Bank Official: _____

Name: _____

Title: _____

Date: _____

* Beneficial Owner includes [the natural person(s) who ultimately owns or controls a customer and/or the person on whose behalf the transaction is being conducted. It also incorporates those persons who exercise ultimate effective control over a legal person or arrangement and relevant third parties.] [Citations to national law, international standards or conventions as appropriate.]

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PEPs- Principle Recommendation 3

Request Asset and Income Declarations

- Required in more than 110 countries
- Provides a "snapshot in time" that bank can use to compare with profile or account activity
- Addressing refusals
- Issues: Verification is uneven
- Other uses: PEP identification if public list of filers, analysis of STRs by FIUs

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PEPs- Principle Recommendation 4

Periodic Review of PEP Customers

- Review of the "big picture" on risk-based approach, at least yearly
- Helps to overcome silo approach
- Should include consideration by at least one senior manager
- Good Practice: PEPs Committee

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PEPs- Principle Recommendation 5

Avoid Setting Limits on the Time a PEP Remains a PEP

- UNCAC and FATF – "once a PEP always a PEP"
- Problems with time limits
- Consider on case-by-case basis using risk-based approach

18

StAR knowledge products: NCB guide

- UNCAC, Article 54 (1)(c) (entered into force Dec 2005):

  "Consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other cases."
- FATF 40+9 Recommendations: Rec. 3 (June 2003)

  "Countries may consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction."

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StAR knowledge products: NCB guide

- Limitation of Criminal Forfeiture:

  Cannot always forfeit property that was derived from crime or was used to commit a crime in a criminal prosecution. Defendant may be:
  - Dead
  - A fugitive
  - Immune from criminal prosecution
  - Too powerful
  - [Acquitted for lack of admissible evidence]

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StAR knowledge products: NCB guide

- Criminal and NCB Forfeiture:

Conviction Based or Criminal Forfeiture (Common law jurisdictions)		**Non-Conviction Based or Civil Forfeiture**
Against the person (in personam) → Part of the criminal charge against a person	Action	Against the thing (in rem) → Judicial action filed by a government against the thing as the wrongdoer
Imposed as part of sentence in criminal case	When	Filed before, during, or after criminal conviction, or even if there is no criminal charge against a person
Criminal conviction → beyond a reasonable doubt	Proof required	Unlawful conduct → balance of probabilities. Criminal conviction not required
Forfeit defendant's interest in property	Forfeiture	Forfeit the thing itself, subject to innocent owners

21

StAR knowledge products: NCB guide

- Based on experience of experts in the field of NCB asset forfeiture, both from civil and common law and from developed and developing countries- investigating magistrates, prosecutors, law enforcement officials and asset managers.
- 36 key concepts- recommendations critical for designing and building an effective NCB forfeiture regime
- Designed as a practical tool for policy makes, legislative drafting groups and pracitioners

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NCB guide, selected key concepts

- NCB asset forfeiture should never be a substitute for criminal prosecution
  - Undermines the effectiveness of criminal law and confidence in law enforcement
  - Should be viewed as complementary to criminal prosecutions and convictions
- Relationship between NCB asset forfeiture and criminal proceedings should be defined
  - NCB procedure may collide with criminal investigation and prosecution
  - Jurisdictions need to decide whether NCB are permitted only when criminal proceeds impossible or whether the two can proceed simultaneously (preferred)
- Applicable evidentiary and procedural rules should be as specific as possible
  - Promotes uniformity in the application of the law, reduces opportunity for judicially imposed rules- particularly important in regimes with a judiciary inexperienced in forfeiture

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NCB guide, selected key concepts

- Tainted assets acquired prior to the enactment of an NCB asset forfeiture law should be subject to forfeiture
  - If not criminal defendants would be given the opportunity to profit from acts illegal at the time- particularly important for recovering proceeds of corruption against official who are in power for long periods of time
  - Not in conflict with the “nulla poena sine previa lege” rule:
    - NCB asset forfeiture does not amount to a criminal prosecution or penalty
    - ECHR: NCB asset forfeiture “comparable to a civil law restitution of unjustified enrichment and therefore not a “penalty within the meaning of the ECHR”. In addition NCB law “aimed at guaranteeing crime did not pay”
    - Cf UK POCA 2002, section 340(4) “It is immaterial (…) whether the conduct occurred before or after the passing of this Act.”

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NCB guide, selected key concepts

- The government should have discretion to set appropriate thresholds and policy guidelines for forfeiture
  - Relevant for assets that are depreciating in value or burdensome to maintain (eg house with substantial mortgage, live animals-racehorses) or items that are unsellable (counterfeit products)
  - To avoid the asset forfeiture system from becoming overburdened
- Preservation and investigative measures taken ex parte should be authorized when notice could prejudice the ability to prosecute the forfeiture case
  - Where dissipation of assets is possible if notice is given

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NCB guide, selected key concepts

- Fundamental concept such as the standard of proof and use of rebuttable presumptions should be delineated by statute
  - Eg rebuttable presumption that unexplained wealth accumulated during a period of service as a public official is attributable to corruption
  - Thailand rebuttable presumption to invalidate transfers to family members (section 51/52 AMLA)
  - Switzerland: assets belonging to a person who has participated in or supported a criminal organisation are presumed to be at the disposal of the organisation (used to forfeit 7 million Swiss Francs in the case against Duvalier)

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NCB guide, selected key concepts

- Rebuttable presumptions cont'd
  - UK any property acquired 6 years before conviction was criminally derived
  - Philippines, section 31 of rules of Procedure in Civil forfeiture cases
  - ECHR confirmed in case that, provided the presumption is worded strictly, rebuttable and reasonable there is no a violation of the principle of presumption of innocence

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NCB guide, selected key concepts

- The government should be authorized to void transfers if property has been transferred to insiders or to anyone with knowledge of the underlying illegal conduct.
  - To void transfers to insiders/relatives as a way to avoid detection/forfeiture
- Consider assignment of judges and prosecutors with special expertise or training in forfeiture to handle NCB asset forfeiture

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StAR policy products: Barriers to Asset Recovery (2nd half 2010)

- UNCAC, Article 51 and Article 54 (1)(c):

  "The return of assets (…)is a fundamental principle of this Convention."

  "Each State Party shall take such measures as may be necessary to permit its competent authorities to give effect to an order of confiscation issued by a court of another State Party."
- FATF 40+9 Recommendations: Rec. 38 (June 2003)

  "There should be authority to take expeditious action in response to requests by foreign countries to identify, freeze, seize and confiscate property laundered, proceeds from money laundering or predicate offences (…) or property of corresponding value."

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StAR policy products: Barriers to Asset Recovery

- The overall objective is to identify and analyze the barriers—operational and practical—that impede the recovery of stolen assets located within financial centers to:
  - Provide analytical work to inform the design and implementation of policies and action plans by financial centers aimed at lowering the barriers to asset recovery; and
  - Assist practitioners in requesting jurisdictions
- The financial centers on which the study will focus are Canada, France, Germany, Italy, Japan, United Kingdom, United States of America, Switzerland, Liechtenstein, Singapore, Hong Kong, Spain, Cayman Islands, Channel Islands (Guernsey), and the United Arab Emirates

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Barriers to Asset Recovery, tentative conclusions

- Most important: lack of political will- "where there is political will there is a legal way"
- Legal Barriers
  - Dual criminality requirements (eg no assistance for cases involving unlawful enrichment), strict application of dual criminality
  - Reciprocity requirement – requesting countries would allow requested countries to do much more than they themselves would allow.
  - Requirement of final judgment
  - Bank secrecy laws make it difficult to trace assets
  - Statute of limitations – length is too limited
  - Laws and procedure do not incorporate principles of UNCAC or other international conventions, despite signature or ratification
  - Additional requirements: in some countries (eg Switzerland), notice is given to defendant before MLA is sent and defendant is allowed to challenge.
  - Requirement to link asset and offence (no money value judgment)

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Barriers to Asset Recovery, tentative conclusions

- Legal, in requesting states
  - NCB asset forfeiture is limited.
  - Immunity laws – perhaps these extend too far
  - No internal legislation on MLA
  - Not a signatory to UNCAC, UNTOC, or other regional or international convention involving cooperation; not member of Egmont
  - Time requirements on investigation and trial proceedings is insufficient to allow for MLA request to be completed

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Barriers to Asset Recovery, tentative conclusions cont'd

- Operational/Institutional Barriers:
  - Request is channeled through too many departments or agencies.
  - Limited resources (managing assets, available expertise, time) to commit to request and assist foreign jurisdictions. Priority will go to big cases
  - Agencies (Law enforcement / FIU) are not connected to key databases (eg., direct link to bank accounts, real estate database) which limits amount of assistance that can be provided through informal channels
  - Jurisdictions that require submission through diplomatic channels, rather than accepting informal requests.
  - Translation requirements
  - Jurisdictions / agencies not proactive, eg they provide MLA assistance only on accounts requested –not on accounts traceable to – nor do they instigate their own investigations into possible money laundering

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Barriers to Asset Recovery, tentative conclusions cont'd

- Operational/Institutional Barriers in requesting states:
  - Individuals in power are perpetrators and beneficiaries of corruption
  - Asset management process is new and very difficult to manage.
  - Prosecutors hesitant to put cases before courts or move cases with MLA requests to low priority because likelihood of obtaining sufficient evidence for trial is low
  - Strict formalities set by central authority
  - More than one central authority in some jurisdictions – cases may get shuffled between authorities or agencies
  - Changing governments
  - Difficulty in proving link between assets and offense, money trail-relative inexperience in conducting financial investigations

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Barriers to Asset Recovery, tentative conclusions cont'd

- Practical Barriers
  - Identifying the proper authority/agency to contact
  - Certain procedural laws are ineffective (e.g., direct enforcement of foreign order can be slower than asking foreign jurisdiction to obtain order on country's own behalf)
  - Poor communication (eg., unclear requests/response, no information on status of request, translation), lack of trust, geographical distance
  - Difficulty to link asset and offence
  - Time delays (for MLA, for freeze, for return)
  - Time delays differ from jurisdiction to jurisdiction depending on information request
    - Freeze order quicker in some civil law jurisdictions (eg Switzerland); but slower in common law
    - Breaching bank secrecy can take a lengthy time in some countries, less time in others.
  - Lack of guidance on MLA process

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Barriers to Asset Recovery, tentative recommendations

- Communicate → builds trust, avoids misunderstandings
  - In multi-jurisdictional cases, bring countries together in a joint task force atmosphere (pressure element to other jurisdictions; sharing of information)
  - Build communication institution-institution, rather than individual-individual
  - Establish networks, regional workshops
  - Travel for case conferences, communicate receipt of request,
  - Elaborate mechanisms to eliminate barriers to communications: email not common, networks difficult to develop, hesitant to call
- Maximize informal channels for assistance (FIUs, law enforcement)

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Barriers to Asset Recovery, tentative recommendations cont'd

- Commit resources
  - In requested jurisdictions to proactive efforts (eg dedicated police units)
  - In requesting jurisdictions to assisting them with investigations, filing proper requests, going through proper channels, trainings, legal support through foreign experts or foreign practitioners that would work on ad hoc basis
    - Initiative in South Africa focused on confiscation. They have POC units and place them in a developed country for 3 months. Undertaking from individual and agency that they will stay in place and do confiscation for 2 years
- Use international conventions to push other jurisdictions to comply

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Barriers to Asset Recovery, tentative recommendations cont'd

- Use good offices, training of StAR and other international organizations to assist with process
- Gather more information about recovery from financial centers
  - examples of Procedural Documents with MLA Requests or application of model documentation;
  - available on-line
  - list of focal points available on-line
- Incorporate in national legislations the legal provisions providing for accountability and terms for carrying out MLA Requests; regionally have a peer review mechanism to ensure compliance;
- Swiftly take the matters before courts, understanding the time frame that some countries are working under [perhaps countries should also consider amending legislation to allow for extensions in cases of MLA]
- Provide for statutory provision for execution of conviction and sentence awarded by foreign country

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StAR policy work, Misuse of Corporate Vehicles (2nd half 2010)

- UNCAC Article 12 (1) and (2):

  "Each State party shall take measures to prevent corruption involing the private sector [which] may include (…) Promoting transparency among private entities".

- FATF Rec 33:

  "Countries should ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities.

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StAR policy work, Misuse of Corporate Vehicles

"We ask the FATF to help detect and deter the proceeds of corruption by prioritizing work to strengthen standards on customer due diligence, beneficial ownership and transparency."

Leaders' Statement, The Pittsburgh Summit, September 24-25, 2009

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StAR policy work, Misuse of Corporate Vehicles

- The overall objective of this study is both to inform the debate on this topic and to assist those involved in the investigation thereof.
- At the policy level the project aims to collect and systematize available data on the use of corporate vehicles in grand corruption cases and test implementation of BO identification obligations and possibly how the policy responses could be refined.
- At the operational level the project aims to gather information on the practical difficulties encountered in investigating corporate vehicles and put forward good practices on how these may be overcome.

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StAR policy work, Misuse of Corporate Vehicles

3 components:

- Database on grand corruption cases involving the abuse of corporate vehicles verifying/debunking commonly held beliefs on this (eg Is “the classic corrupt PEP” dead?)
- Field work on Due Diligence obligations of TCSPs and identification of Beneficial Ownership by financial institutions
- Round tables with investigators to discuss obstacles in obtaining BO information and good practices in trying to deal with those obstacles

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StAR knowledge products: Asset Recovery Handbook (Oct 2010)

- UNCAC, Articles 31, 43, 46, 48, 49, 50, 52, 53, 54, 55, 58
- FATF 40+9 Recommendations: Rec. 3, 26, 27, 28, 36,38
- Covers
  - Strategy for asset recovery
  - Identifying and securing evidence
  - Tracing and securing of assets
  - Obtaining assistance from Foreign Jurisdiction- informal channels and mutual legal assistance
  - Asset forfeiture mechanisms

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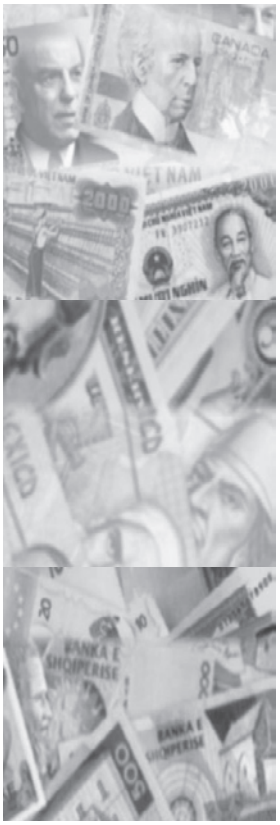

Thank You

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THE ROLE OF THE ANTI-MONEY LAUNDERING COUNCIL (AMLC) IN "IDENTIFYING, FREEZING, CONFISCATING, AND RECOVERING PROCEEDS OF CORRUPTION"

*Julia C. Bacay-Abad**

I. THE ANTI-MONEY LAUNDERING ACT OF 2001; CREATION OF PHILIPPINES' FIU

On 29 September 2001, the Congress enacted Republic Act (R.A.) 9160, otherwise known as the Anti-Money Laundering Act of 2001. The law took effect on 17 October 2001. On 5 March 2003, the Congress enacted R.A. 9194, amending R.A. 9160. The amendatory Act became effective on 23 March 2003.

R.A. 9160 criminalized money laundering in the Philippines and, at the same time, introduced civil forfeiture as an appropriate remedy for the seizure and forfeiture in favor of the State, without the necessity of conviction or prosecution in a criminal case, of monetary instrument, property or proceeds involved in or related to an unlawful activity or money laundering offense as defined in the law.

R.A. 9160 likewise created the Philippines' Financial Intelligence Unit (FIU) -- the Anti-Money Laundering Council (AMLC). The AMLC is composed of:

(i) the Governor of the Bangko Sentral ng Pilipinas (BSP), as Chairman
(ii) the Commissioner of the Insurance Commission (IC); and
(iii) the Chairman of the Securities and Exchange Commission (SEC), as Members.

The AMLC is assisted by a Secretariat which is headed by an Executive Director and consists of four (4) units:

(i) Compliance and Investigation Group;
(ii) Legal and Evaluation Group;
(iii) Information Management and Analysis Group;
(iv) Administrative and Financial Services Division.

The Philippines is a founding member of the Asia Pacific Group on Money Laundering (APG) and attends its meetings regularly. Also, the AMLC is a member of the Egmont Group (association of FIUs around the world) since 2005.

Under R.A. 9160, as amended, the AMLC has the following functions:

1. Require and receive covered or suspicious transaction reports from covered institutions;
2. Issue orders addressed to the appropriate Supervising Authority or the covered institution to determine the true identity of the owner of any monetary instrument or property subject of a covered transaction or suspicious transaction report or request for assistance from a foreign State, or believed by the Council, on the basis of substantial evidence, to be, in whole or in part, wherever located, representing, involving, or related to, directly or indirectly, in any manner or by any means, the proceeds of an unlawful activity.

* Deputy Director, Head, Legal Evaluation Group, AMLC Secretariat, Philippines.

3. Institute civil forfeiture proceedings and all other remedial proceedings through the Office of the Solicitor General.
4. Cause the filing of complaints with the Department of Justice or the Office of the Ombudsman for the prosecution of money laundering offenses.
5. Investigate suspicious transactions and covered transactions deemed suspicious after an investigation, money laundering activities, and other violations of the Act.
6. Apply before the Court of Appeals, *ex parte*, for the freezing of any monetary instrument or property alleged to be the proceeds of any unlawful activity as defined in Section 3(i) of R.A. 9160, as amended.
7. Implement such measures as may be necessary and justified under the law to counteract money laundering.
8. Receive and take action in respect of any request from foreign states or jurisdictions for assistance in their own anti- money laundering operations provided in the law.
9. Develop educational programs on the pernicious effects of money laundering, the methods and techniques used in money laundering, the viable means of preventing money laundering and the effective ways of prosecuting and punishing offenders.
10. Enlist the assistance of any branch, department, bureau, office, agency or instrumentality of the government, including government-owned-and-controlled corporations, in undertaking any and all anti-money laundering operations, which may include the use of its personnel, facilities and resources for the more resolute prevention, detection and investigation of money laundering offenses and prosecution of offenders.
11. Impose administrative sanctions for the violation of laws, rules, regulations and orders and resolutions issued pursuant thereto.
12. Examine or inquire into bank deposits/investments upon order of any competent court in cases of violation of the AMLA, when it has been established that there is probable cause that the deposits/investments are related to an unlawful activity or money laundering offense. No court order, however, is necessary in cases involving kidnapping for ransom; narcotics offenses; and "acts of terrorism".

Money laundering, as defined in the law, is a crime whereby the proceeds of an unlawful activity are transacted thereby making them appear to have originated from legitimate sources (Section 4, R.A. 9160, as amended). For purposes of money laundering, the term "unlawful activity" refers to any act or omission or series or combination thereof involving or having direct relation to the following:

1. Kidnapping for ransom
2. Drug Trafficking and other violations of the Comprehensive Dangerous Drugs Act of 2002
3. Graft and Corruption under R.A. No. 3019, as amended
4. Plunder (R.A. No. 7080 as amended)
5. Robbery and extortion
6. Jueteng and Masiao (Presidential Decree [PD]1602)
7. Piracy on the high seas (Revised Penal Code [RPC] & PD 532)
8. Qualified Theft under Art. 310, RPC
9. Swindling under Art. 315, RPC
10. Smuggling under R.A. 455 & 1937
11. Violations of Electronic Commerce Act of 2000
12. Hijacking, destructive arson and murder, including those perpetrated by terrorists against non-combatant persons and similar targets
13. Fraudulent practices and other violations under the Securities Regulation Code of 2000 (RA 8799)
14. Felonies or offenses of a similar nature punishable under the penal laws of other countries.

II. HOW ARE CASES LITIGATED?

The process basically begins with the submission of the covered transaction and suspicious transaction reports by the covered institutions to the AMLC. The reports are being filed within five (5) working days from the occurrence of the transactions. In addition to the covered and suspicious transaction reports submitted by covered institutions, the AMLC may also initiate an investigation based on referrals of law enforcement and other government agencies, media reports and sworn complaints of private individuals. The AMLC is also empowered to act directly on requests from foreign jurisdictions for legal assistance in relation to their own anti-money laundering operations.

When, after its investigation, the AMLC finds that money laundering has been committed, it causes the filing of a criminal complaint with the Department of Justice (DOJ), or with the Office of the Ombudsman in cases involving public officers or employees, which conducts the preliminary investigation of the case. If the DOJ or the Ombudsman finds probable cause to indict the offenders, criminal cases are filed with the Regional Trial Courts which have the jurisdiction to try all cases of money laundering, or with the *Sandiganbayan* if the offender is a high ranking public officer or a private person in conspiracy with the public officer.

Under the Revised Implementing Rules and Regulations (RIRRs) of the AMLA, as amended, all the elements of money laundering must be proved beyond reasonable doubt, including "the element of knowledge that the monetary instrument or property represents, involves or relates to the proceeds of any unlawful activity."

If, in the course of its investigation, the AMLC finds it necessary, it may file an *ex-parte* petition with the Court of Appeals for the issuance of a freeze order against any monetary instrument, property or proceeds that are deemed related to an unlawful activity or a money laundering offense.

A freeze order issued by the Court of Appeals is effective, initially, for a period of twenty (20) days. Upon motion filed by the AMLC, the effectivity of the freeze order may, for good cause, be extended for a period not exceeding six months.

After due investigation on a particular monetary instrument, property or proceeds, if the AMLC finds sufficient evidence that would support a conclusion that the said monetary instrument, property or proceeds are related to an unlawful activity or a money laundering offense, it shall file, through the Office of the Solicitor General, a petition for civil forfeiture against the said monetary instrument, property or proceeds. The petition for civil forfeiture is being filed with the Regional Trial Court, a court of general jurisdiction.

In relation to its power to investigate money laundering, the AMLC, *upon order of a competent court,* is authorized to inquire into or examine any particular bank deposits or investments that are deemed related to an unlawful activity or a money laundering offense. No court order, however, is necessary in cases involving kidnapping for ransom; narcotics offenses; and "acts of terrorism". Such authority of the AMLC to inquire into bank deposits or investments is an express exception to the provisions of the Bank Deposit Secrecy Law which prohibits any person from examining, inquiring or looking into any bank deposit.

On 15 November 2005, the Supreme Court of the Philippines, upon request of the AMLC, promulgated the so-called "Rules on Civil Forfeiture" which governs court proceedings relating to petitions for freeze order before the Court of Appeals and petitions for civil forfeiture before the Regional Trial Courts. The Rules of Civil Forfeiture took effect on 15 December 2005.

Under the "Rule on Civil Forfeiture", the Court of Appeals, upon filing by the AMLC of a petition for freeze order, is mandated to act thereon within twenty-four (24) hours. If, based on the allegations of the *ex-parte* petition and the supporting documents, it finds probable cause that the property or asset subject of the petition is related to an unlawful activity or a money laundering offense, it shall issue a freeze order which shall be immediately effective for a period of twenty (20) days. Thereafter, the Court of Appeals shall conduct a summary hearing for purposes of determining whether the freeze order should be modified, lifted, or otherwise extended. Should the Court of Appeals find good cause to extend the effectivity of the freeze order, it shall do so for a period not exceeding six (6) months. Once a freeze order is issued, the property subject thereof may not be transacted, withdrawn, transferred, removed, converted or otherwise disposed of by any person during the effectivity of the freeze order.

Likewise, under the "Rule on Civil Forfeiture", once a petition for civil for forfeiture is filed by the

AMLC, within twenty-four hours, the Executive Judge of the Regional Trial Court shall, upon finding of probable cause that the property subject of the petition is related to an unlawful activity or a money laundering offense, issue a Provisional Asset Preservation Order (PAPO). Just like a freeze order, a PAPO is effective initially for a period of twenty (20) days. During the 20-day effectivity of the PAPO, the court shall conduct summary hearing to determine whether or not the PAPO should be modified or lifted, or whether an Asset Preservation Order (APO) should be issued. An APO is more permanent in character, in that it remains effective until the termination of the case.

All monetary instruments, property or proceeds forfeited by the AMLC in favor of the State are being turned over to the National Treasury, unless a third party claimant is able to prove in a "post-forfeiture" proceedings that the monetary instrument or property legitimately belongs to him.

III. STATISTICS

The following tables show the number of cases filed involving the issuance of freeze order, civil forfeiture and the amounts involved, including those relating to corruption-related cases, as of 30 September 2009.

A. Petitions for Freeze Order filed as of 30 September 2009

Total No. of Petitions filed with the Court of Appeals	**33**
Terminated/Granted	**24**
Pending	**9**
Corruption Related Petitions for Freeze Order	**8**

B. Total Amount Frozen as of 30 September 2009

TOTAL AMOUNT	**PhP 2.556 billion**
Returned to Victims	**1.250 billion**
Corruption-Related Frozen Amount	**PhP146.6 million**

C. Civil Forfeiture Cases filed as of 30 September 2009

	No. of Cases	Amount
Pending Petitions	26	**PhP371,942,346.68**
Decided Petitions		**PhP 43,401,714.60**
• Proceeds turned over to the National Treasury	12	**(PhP19,630,062.20)**
• Claimed by Third-Parties		**(PhP2,401,568.50)**
• Pending execution		**(PhP21,370,083.90)**
Corruption-Related Petitions for Civil Forfeiture	**5**	**PhP 62,593,806.27**

In conclusion, since 2001, the AMLC has been a partner of the Government in fighting corruption and recovering proceeds thereof. Legal framework and procedural measures for the recovery of stolen assets are in place in the Philippines. They may not be perfect, but are working.

MEASURES TO FREEZE, CONFISCATE AND RECOVER PROCEEDS OF CORRUPTION INCLUDING PREVENTION OF MONEY LAUNDERING IN THE PHILIPPINES

*Roman G. Del Rosario**

I. INTRODUCTION

> *Money is the barometer of a society's virtue. When you see that trading is done, not by consent, but by compulsion—when you see that in order to produce, you need to obtain permission from men who produce nothing—when you see that money is flowing to those who deal, not in goods, but in favors—when you see that men get richer by graft and by pull than by work, and your laws don't protect you against them, but protect them against you—when you see corruption being rewarded and honesty becoming a self-sacrifice—you may know that your society is doomed.*
>
> - Ayn Rand

A. Defining Graft and Corruption

The term "graft" means the "acquisition of gain or advantage by dishonest, unfair or sordid means, especially through the abuse of his position or influence in politics, business, etc.,"[1] while the term "corruption" generally means "the misuse of entrusted power for private benefit."[2] In a bigger sense, both terms are synonymous and interchangeable.[3]

In the Philippine setting, the term "graft" lacks an exact legal definition. The *Anti-Graft and Corrupt Practices Act,*[4] merely enumerates a number of punishable corrupt practices of public officers, while the *Code of Conduct and Ethical Standards for Public Officials*[5] declares as unlawful certain prohibited acts and transactions.

Generally, courts and laws do not give a clear-cut definition of the terms graft and corruption, considering the extreme difficulty to "contain all the elements of the different types of 'graft' or 'corruption' in one sweeping generalization."[6] Each case must be evaluated on the basis of its own facts.[7]

1. Forms

Corruption takes a number of different forms and is found at different levels of government.

Corruption has been classified in various manners, according to:

(i) Place where corruption occurs[8]--

a. Public-sector corruption is that which happens in the government offices.[9]

b. On the other hand, private-sector corruption involves businesses and other non-state sectors --

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1. Resolution No. 559, Amending the Existing Board Policy on Conferment of CES Eligibility to Applicants with Pending Cases.
2. J.J. Senturia, *Encyclopedia of Social Sciences,* Vol. VI (1993).
3. L.V. Carino. Ed., Bureaucratic Corruption in Asia: Causes, Consequences and Controls (Quezon City: CPA, University of the Philippines).
4. Republic Act No. 3019 (1960).
5. Republic Act No. 6713 (1989).
6. Sofronio B. Urusal, Anti-Graft Guidebook 6, 2006, [hereinafter Urusal].
7. *Ibid.*
8. Investigating Corruption, A Do-It Yourself 10-12, 2002 [hereinafter Investigating Corruption].
9. *Ibid.*

churches, NGOs, foundations, and professional associations.[10]

c. Bureaucratic corruption occurs in the civil service, especially among state officials and employees who run the day-to-day affairs of the government. It may involve low-level government employees and/or higher-level officials. It happens when low-level government employees are given small amounts as "grease" to speed up transactions for licenses, permits or other processes in their offices. On the other hand, higher-level officials, such as district or provincial highways engineers, or members of bid committees who get considerable amount of commissions for awarding government contracts to favored firms, commit this form of corruption.[11]
d. Political corruption, as the name implies, takes place among elected officials. It involves vote buying, corruption of the electoral system, the political harassment of opponents, and the preferential treatment of friends and cronies. It also refers to the use of influence to obtain positions, appointments, tax incentives, behest loans, and other special considerations from the government. Illustrative examples include: 1) approval of hundred-million peso worth of preferential loans from state banks to Former President Ferdinand Marcos' cronies; and 2) acquisition of shares of stock from favored companies using state pension funds upon instruction of Former President Joseph Estrada.[12]

(ii) "Scale and intensity"[13]

a. Retail, petty or street-level corruption is what the general public encounters in their daily activities. This form of corruption involves those who are providing frontline services[14] or lower-level administrative bureaucrats who transact with the public on matters involving taxes, traffic regulations, licensing requirements or the discretionary allocation of government benefits such as subsidized food and fertilizer, disaster relief, or low-level jobs in state-funded projects. A motorist paying a policeman to escape from a traffic violation; or a person availing the services of a fixer to hasten the processing of a driver's license or an NBI clearance, are illustrative examples of this type. Petty corruption involves lower-level administrative bureaucrats, while grand corruption involves big amounts.[15]
b. Isolated corruption occurs in bureaucracies or sectors that are normally honest. These corrupt acts do not normally happen in such sectors.[16]
c. Systematic corruption is prevalent in almost all levels of a government agency. This is perceived to be the case with the Department of Public Works and Highways ("DPWH"). Studies have shown that corruption permeates the entire life of most DPWH projects --from bidding to completion. Collusion among bidders for a project is a practice that cannot be discounted, resulting in the rigging of bids.[17]

(iii) "Types of corrupt action or behaviour"[18]

a. Bribery is the act of the "public officer who receives a gift, present, offer or promise by reason or in connection with the performance of his official duties."[19] It is probably the most common and visible type of corruption
b. Patronage is also considered a form of corruption. It is a way of acquiring, maintaining, and

10. *Ibid.*
11. *Ibid.*
12. *Ibid.*
13. *Id*. at 12-14.
14. "Frontline Service" refers to the process or transaction between clients and government offices or agencies involving applications for any privilege, right, permit, reward, license, concession, or for any modification, renewal or extension of the enumerated applications and/or requests which are acted upon in the ordinary course of business of the agency or office concerned. (An Act to Improve Efficiency in the Delivery of Government Service to the Public by Reducing Bureaucratic Red Tape, Preventing Graft and Corruption, and Providing Penalties therefore [R.A. 9485], June 2, 2007).
15. Investigating Corruption, *supra* 8 at 12.
16. *Id*. at 13.
17. *Id*. at 14.
18. *Id*. at 14-16.
19. Leonor D. Boado, Notes and Cases on the Revised Penal Code 535, 2004.

expanding political power by distributing economic benefits from the state and dispensing them to political allies, and cronies in exchange of the latter's political support.[20]

c. Cronyism is present when personal relationships become a consideration in state policy-making and the allocation of public resources.[21]

(iv) "General Modes of Committing Graft"[22]

a. Administrative grafts are those occurring in government agencies. It includes anomalies concerning the receipt, custody, and expenditure of public funds, and in the "acquisition, procurement, utilization, and disposal of government property."[23]

b. Policy-related grafts refer to irregularities committed by senior public officials who are vested with extensive discretionary authorities to determine public policies entailing financial implications.[24]

c. Grafts in arbitrations include "abuses committed by authorities imbued with judicial, quasi-judicial, or prosecutory powers" regarding cases pending before them.[25]

d. Political grafts have two forms. "One form includes bribery and inducement of election officials to alter election results, as well as vote-buying of the electorate by candidates during periods of elections. The other form of political graft involves politicians who undertake to sponsor or to block requests needing executive approval or requiring legislative authorization" with regard to any past or political favors of the requesting party.[26]

(v) "Based on rank and service of public officer committing the act"[27]

a. Graft in the career service may be committed by: "(i) clerical and custodial service personnel involved in non-professional or sub-professional work; (ii) personnel involved in professional or technical work, up to Division Chief level; (iii) Career Executive Service Officers; (iv) career service heads of government agencies; and (v) members of the judiciary."[28]

b. Graft in the Non-career Service may be committed by: "(i) impeachable officials, such as the President, the Vice President, the Members of the Supreme Court, the Members of the Constitutional Commission, and the Ombudsman; (ii) elective national and local officials, such as members of Congress, Provincial Governors, and City and Municipal Mayors; (iii) Department Secretaries and other officials of Cabinet rank; (iv) and the personal or confidential staff of the enumerated officials."[29]

B. Root Causes

1. Individual Causes

Individual causes are "attributed to weak moral fiber and distorted values among bureaucrats, such as materialism, lack of integrity and nationalism."[30]

2. Organizational Causes

One of the major causes of corruption in many offices and organizations is office politics. In particular, these causes refer to deficiencies in the bureaucratic apparatus such as low salary or inadequate compensation levels of public servants, poor recruitment and selection procedures as well as red tape in

20. *Supra* 8 at 15.
21. *Id.* at 16.
22. Urusal, *supra* 6 at 93.
23. *Ibid.*
24. *Ibid.*
25. *Ibid.*
26. *Ibid.*
27. *Id*. at 94-95.
28. *Ibid.*
29. *Ibid.*
30. Nelson Nogot Moratalla, Graft and Corruption: The Philippine Experience, *available at* http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN019122.pdf (last accessed 28 October 2009).

the government. It also includes poor working conditions and facilities in public offices and dependence of employees on patronage with superiors and colleagues.[31]

It is not uncommon in government agencies for a superior to employ his or her own confidants and team of advisers. The persons employed may be relatives, friends, classmates or associates. The appointee expectedly becomes a loyal follower of the appointing official. The "*padrino* system" likewise occurs in government offices. Instances abound where promotions are based on right connections rather than on seniority or merit. Equally rampant is the "*compadre* system" whereby a subordinate takes his superior to be the godfather of his son expecting to reap benefits such as promotion or salary increase as a result of the relationship.[32]

3. Societal Causes

Society may itself contribute to corruption as a norm in the workplace. These may include the difficulty of proving cases of corruption in court and lack of political will to pursue a fight against graft and corruption.[33]

C. Effects

Corruption has intense consequences on individuals, firms, social sectors, and the progress and safety of the society. Experts find corruption to be damaging in various manners, such as the following:

1. "Corruption impedes Economic Growth"[34]

The most significant impact of corruption on growth is the reduction of investments. Economists have shown that improvements in the corruption index play a vital role in affecting the result of growth rates.[35]

In the Philippines, the devastation brought by corruption on economic development is evident. Exaction from corrupt officials is a major cause in raising the costs of business.[36] As a result, businesses lower the standards of production or increase the price of goods and services in order to compensate for the amount of money wasted on bribes.

2. Corruption worsens Poverty[37]

To reiterate, the costs of corruption are borne by the less fortunate sectors of society. "Corruption in textbook procurements means that poor students don't have books; kickbacks from public works contracts mean poor farmers will not have roads for transporting their produce; and under-the-table commissions from the purchase of vaccines mean poor children becoming prone to disease."[38]

Even if the less fortunate receive inadequate services, they remain obliged to contribute to government funds thru indirect taxes. On the other hand, the rich who bribe revenue officials are able to evade income taxes.[39] When the budget for procuring goods and services is inflated by graft, and tax revenues are low because of widespread corruption in the tax-collection system, the government has no choice but to raise more taxes and cut spending.[40]

Social spending on services that benefit the poor is unduly lessened, so the poor are caught up deeper in despair. Money that should be spent on more important projects, *i.e. clinics or schools,* are diverted to

31. Alan R. Cañares, CORRUPTION : THE PHILIPPINE EXPERIENCE, Office of the Deputy Ombudsman for the Military and Other Law Enforcement Offices.
32. Prevention of Graft and Corruption, *available at* http://www.livinginthephilippines.com/prevention_of_graft_and_corruption.html (last accessed 28 October 2009).
33. *Supra* 31.
34. *Investigating Corruption*, *supra* 8 at 17.
35. *Ibid.*
36. *Id*. at 18.
37. *Ibid.*
38. *Ibid.*
39. *Ibid.*
40. *Id.* at 19.

insignificant infrastructure projects where kickbacks are prevalent. Corruption undeniably drains resources available for advancement, distorts access to services for poor communities, and weakens public confidence in the government capacity to serve the poor.[41]

3. "Corruption damages Political Legitimacy and stunts Democracy"[42]

Government officials may neglect their public duties to promote general welfare as they busy themselves to their corrupt activities. Manifestations of prevalent corrupt practices in the bureaucracy are: "(1) below standard public infrastructures; (2) decreased business investments; (3) rising unemployment; (4) increased incidence of criminality; and (5) low morale of the civil service and the military."[43]

As a result, corruption shatters the faith of citizens to their political leaders, government and even to democracy. Citizens begin to be too inquisitive and mistrust the intentions of those in authority.[44]

4. "Corruption endangers Public Order and Safety"

Corruption results in disregard of rules and subversion of formal processes For instance, corruption in the judiciary suspends the rule of law, so that criminals and lawbreakers are free to operate with impunity. Corruption in the police force facilitates the activities of syndicates involved in drugs, theft, gambling, smuggling, prostitution and kidnapping, making cities and communities unsafe.[45] Some police officers have been providing "protection" to syndicates, thus making themselves part of these syndicates.[46]

Thai scholar Pasuk Phongpaichat's description of the "syndication" of police corruption in Thailand also applies in the Philippine setting, to wit:

> Corruption within the police force is held to be sustained by regular redistribution of revenues from corruption widely through the police force itself and through other related institutions. It is sustained also by a subculture which strengthens the group loyalty of those involved, legitimizes the acceptance of revenues from corruption as supplementary income and binds together vertical networks of bosses and subordinates who share the tasks of collecting and redistributing revenue. The values of group loyalty and hierarchy which underlie this subculture are first nurtured in the police cadet school. They are further reinforced at work by the examples of other police officers and the pressure from superiors and peers involved in the corruption networks. Not all policemen are involved in these networks. But the proportion which is corrupt is large enough to maintain the syndicate.[47]

5. "Corruption causes Bureaucratic Inefficiency and Demoralization"[48]

Corruption results in awful services. When government officials and personnel employ unreasonable impediments in the completion of transactions for "grease" money, the delivery of services is delayed. Bureaucratic red tape results and public service is gravely affected.[49]

D. Statistics

Aware of its duty to the public, the Philippine government continues to play an active role in combating the proliferation of corrupt practices.

41. *Ibid.*
42. *Ibid.*
43. Urusal, *supra* 6 at 10.
44. Investigating Corruption *supra* 8 at 18.
45. *Ibid.*
46. *Ibid.*
47. *Id,*(*citing* Phongpaichit, Pasuk and Sungsidh Piriyarangsan. 1994. *Corruption and Democracy in Thailand.* Chiang Mai: Silk-worm Books).
48. *Id*. at 22.
49. *Ibid.*

The presentation below illustrates the number of responses from the government on corrupt practices.

Table 1[50]

	Target (2006)	Actual (March 2009)
Ombudsman Conviction Rates	40%	73.42%
Ombudsman Cases Successfully Mediated	450	688
Revenue Integrity Protection Service or 'Lifestyle Checks" Cases Filed	116	140
Suspended by Ombudsman thru Revenue Integrity Protection Service	35	38
Run After the Tax Evaders cases filed with Department of Justice (DOJ)	116	117
Run After The Smugglers cases filed with DOJ	61	95
Run After The Smugglers cases filed with the Court of Tax Appeals (CTA)	28	33

Table 2[51]
Number of Complaints Received by the OMB, 2006 to 2008

No. of complaints received per calendar year	2008	2007	2006
Complaints received annually	13,225	10,824	13,602
Monthly Average (annual no. of complaints divided by 12 months)	1,102	902	1,134
Daily Average (monthly ave. no. of complaints divided by 22 working days)	50	41	52

50. Philippine-US Partnership in Fighting Corruption: Indicators from the Millennium Challenge Account- Philippine Threshold Program, 1 June 2009, *available at* http://www.philippineembassy-usa.org/UPDATE43.pdf (last accessed 27 October 2009).
51. Marking Milestones, the 2008 Annual Report of the Office of the Ombudsman, *available at* http://www.ombudsman.gov.ph/docs/statistics/Annual%20Report%202008.pdf (last accessed 29 October 2009).

Table 3 [52]
List of high ranking officials dismissed, suspended and prosecuted by the OMB (as of March 2009) [53]

Preventive Suspension	Suspended without Pay	Dismissed from Public Service	Under Prosecution
• DPWH Asst. Secretary • Municipal Mayors • City and Municipal Treasurers • BIR Regional Director • BIR Chief Revenue Officer • BOC Deputy District Collector • Register of Deeds • Commanding General, Infantry Division, Philippine Army • Army Brigadier General • Presidents of State Colleges and Universities	• Agriculture Undersecretary/ Presidential Assistant • Municipal Mayor • Navy Lt. Commodore • Presidents of State Colleges and Universities • DepEd District Supervisor • DPWH District Engineers • BOC Intelligence Officers • BIR Revenue District Officers • BIR Examiners • State College Administrator	• Municipal Mayor • DENR-LMB Asst. Director • Register of Deeds • DA-Fisheries and Aquatic Resources Bureau Regional Director • BIR Regional Director • BIR Revenue District Officers • DPWH Regional Directors • State College President • DepEd School Principals	• DOJ Secretary • DOTC Secretary • DOF Undersecretary • Governors • City and Municipal Mayors • NHA Manager • NEDA Regional Director • PNP Provincial Directors • DOJ Prosecutors • Philippine Navy Flag Officers

E. Philippine Constitution and Laws

The Philippine legal system is replete with constitutional provisions and pertinent laws combating graft and corruption. For easier reference, they shall be discussed in the following sequence:

1. Pertinent provisions in the 1987 Philippine Constitution;
2. Provisions in the Revised Penal Code relating to crimes committed by public officers;
3. Specific Anti-Graft Laws, namely: (i) the Anti-Graft and Corrupt Practices Act;[54] (ii) the Code of Conduct and Ethical Standards for Public Officials and Employees;[55] (iii) the Civil Service Law;[56] (iv) the Forfeiture of Unlawfully Acquired Property;[57] (v) the Anti-Money Laundering Act;[58] and, (vi) the Plunder Law.[59]

52. *Id.*
53. *Id.*
54. Republic Act No. 3019 (1960).
55. Republic Act No. 6713 (1989).
56. Presidential Decree 807.
57. Republic Act 1379 (1955).
58. Republic Act 9160 (2001), as amended by Republic Act 9194 (2003).
59. Republic Act 7080 (1991).

1. The 1987 Philippine Constitution

Significant constitutional provisions strengthening the government's power to combat corruption are found in Article XI "Accountability of Public Officials" vis-à-vis Article II "State Policies". These include the following:

a. It is a state policy to maintain honesty and integrity in the public service and to take positive and effective measures against graft and corruption;[60]
b. It is a state policy to adopt and implement a policy of full public disclosure of all its transactions involving public interest, subject to reasonable conditions prescribed by law;[61]
c. Declaring that the anti-graft court, the Sandiganbayan, shall continue to function and exercise its jurisdiction[62] over civil and criminal cases involving graft and corruption;
d. Creating the independent Office of the Ombudsman[63] to investigate any public official or government agency for acts or omissions which are illegal, unjust, improper or inefficient; to determine the causes of such acts; to recommend the elimination; and to observe high standards of ethics and efficiency;
e. The State has the authority to recover unlawfully acquired properties;[64]
f. The State requires public officers to declare under oath their assets, liabilities and net worth upon assumption of office, and as may be required by law;[65]
g. Prohibiting the President from appointing his/her spouse or relatives within the 4th civil degree as members of the Constitutional Commissions, Ombudsman, Secretaries or under-Secretaries, Chairmen or heads of bureaus or offices, including government corporation and their subsidiaries;[66]
h. Requiring public officers and employees to lead modest lives and act with patriotism and justice;[67]
i. Making "bribery," "graft and corruption" and "betrayal of public trust" as grounds to impeach the President, Vice-President, members of the Supreme Court, members of the Constitutional Commissions and the Ombudsman;[68]
j. Prohibiting government-owned or controlled bank or financial institution from extending loans or other financial accommodations for any business purpose to the President, Vice-President, members of the Supreme Court, members of the Constitutional Commissions, and the Ombudsman;[69]
k. Prohibiting the enactment of a law that exempts any entity of government or its subsidiary, or any investment of public funds, from the audit of the Commission on Audit.[70] The COA examines government income and expenditures.
l. Creating the Civil Service Commission that promotes responsive public service as a career. Its anti-corruption function involves promoting public accountability, enforcing ethical standards and behavior, and conducting values orientation workshops.

2. The Revised Penal Code[71] on Crimes Committed by Public Officers

The Revised Penal Code enumerates certain crimes that a public officer may commit.

60. Sec. 27, Art. II, 1987 Constitution.
61. Sec. 28, *ibid.*
62. Sec. 4, Art. XI, 1987 Constitution.
63. Sec. 5, *ibid.*
64. Sec. 15, *ibid.*
65. Sec. 17, *ibid.*
66. Sec. 13, Art. VII, 1987 Constitution.
67. Sec. 1, *supra* 62.
68. Sec. 2, *ibid.*
69. Sec. 16, *ibid.*
70. Sec. 3, Art. IX-D, *ibid.*
71. The Revised Penal Code of the Philippines (Act No. 3815, as amended). It took effect on January 1, 1932.

a. *Malfeasance and Misfeasance in Office* are classified into:

(i) Dereliction of duty,[72] which includes: knowingly rendering unjust judgment; judgment rendered through negligence; unjust interlocutory order; malicious delay in the administration of justice; negligence in prosecution of offenses; betrayal of trust by an attorney; and
(ii) Bribery,[73] which includes direct bribery; indirect bribery; qualified bribery; and corruption of public officials.

b. *Frauds and Illegal Exactions and Transactions*[74] including frauds against the public treasury; other frauds; prohibited transactions; and possession of prohibited interest by a public officer.

c. *Malversation of Public Funds or Property*[75] including failure of accountable officer to render accounts; failure of a responsible public officer to render accounts before leaving the country; illegal use of public funds or property; and failure to make delivery of public funds or property.

d. *Infidelity of Public Officers* is classified into:

(i) Infidelity of public officers[76] including the crimes of conniving with or consenting to evasion; and evasion through negligence;
(ii) Infidelity in the custody of documents[77] including the crimes of removal, concealment or destruction of documents; officer breaking seal and opening of closed documents; and
(iii) Revelation of secrets[78] including the crimes of revelation of secrets by an officer; and public officer revealing secrets of private individual.

e. *Other Offenses or Irregularities by Public Officers* are classified as follows:

(i) Disobedience, refusal of assistance and maltreatment of prisoners[79] including the crimes of open disobedience; disobedience to order of superior officer when said officer was suspended by inferior officer; refusal of assistance; refusal to discharge elective office; and maltreatment of prisoners;
(ii) Anticipation, prolongation and abandonment of the duties and powers of public office[80] including the crimes of anticipation of duties of a public office; prolonging performance of duties and powers, and abandonment of office or position;
(iii) Usurpation of powers and unlawful appointment,[81] including the crimes of usurpation of legislative powers; usurpation of executive functions; usurpation of judicial functions; disobeying request for disqualification; orders or requests by executive officers to any judicial authority; and unlawful appointments, and;
(iv) Abuses against chastity.[82]

72. Arts. 204-209, Title Seven, *ibid*73 Arts 210-212, *ibid.*
74. Arts. 213-216, *ibid*.
75. Arts. 217-222, *ibid*.
76. Arts. 223-225, *ibid*.
77. Arts. 226-228, *ibid*.
78. Arts. 229-230, *ibid*.
79. Arts. 231-236, *ibid.*
80. Arts. 236-238, *ibid.*
81. Arts. 239-244, *ibid*.
82. Art. 245, *ibid.*

3. Other Laws on Graft and Corruption

(a) **Republic Act 3019** or the **Anti-Graft and Corrupt Practices Act**[83] has the most comprehensive enumeration of corrupt practices of public officers. These include the following:

(i) Persuading, inducing or influencing another public officer to perform an act constituting a violation of rules and regulations duly promulgated by competent authority or an offense in connection with the official duties of the latter, or allowing himself to be persuaded, induced, or influenced to commit such violation or offense;
(ii) Directly or indirectly requesting or receiving any gift, present, share, percentage, or benefit, for himself or for any other person, in connection with any contract or transaction between the Government and any other part, wherein the public officer in his official capacity has to intervene under the law;
(iii) Directly or indirectly requesting or receiving any gift, present or other pecuniary or material benefit, for himself or for another, from any person for whom the public officer, in any manner or capacity, has secured or obtained, or will secure or obtain, any Government permit or license, in consideration for the help given or to be given, without prejudice to Section thirteen of this Act;
(iv) Accepting or having any member of his family accept employment in a private enterprise which has pending official business with him during the pendency thereof or within one year after its termination;
(v) Causing any undue injury to any party, including the Government, or giving any private party any unwarranted benefits, advantage or preference in the discharge of his official administrative or judicial functions through manifest partiality, evident bad faith or gross inexcusable negligence. This provision shall apply to officers and employees of offices or government corporations charged with the grant of licenses or permits or other concessions;
(vi) Neglecting or refusing, after due demand or request, without sufficient justification, to act within a reasonable time on any matter pending before him for the purpose of obtaining, directly or indirectly, from any person interested in the matter some pecuniary or material benefit or advantage, or for the purpose of favoring his own interest or giving undue advantage in favor of or discriminating against any other interested party;
(vii) Entering, on behalf of the Government, into any contract or transaction manifestly and grossly disadvantageous to the same, whether or not the public officer profited or will profit thereby;
(viii) Directly or indirectly having financial or pecuniary interest in any business, contract or transaction in connection with which he intervenes or takes part in his official capacity, or in which he is prohibited by the Constitution or by any law from having any interest;
(ix) Directly or indirectly becoming interested, for personal gain, or having a material interest in any transaction or act requiring the approval of a board, panel or group of which he is a member, and which exercises discretion in such approval, even if he votes against the same or does not participate in the action of the board, committee, panel or group;
(x) Knowingly approving or granting any license, permit, privilege or benefit in favor of any person not qualified for or not legally entitled to such license, permit, privilege or advantage, or of a mere representative or dummy of one who is not so qualified or entitled; and,
(xi) Divulging valuable information of a confidential character, acquired by his office or by him on account of his official position to unauthorized persons, or releasing such information in advance of its authorized release date.

83. Sec. 3, Republic Act No. 3019 (1960).

R.A. 3019 also contains provisions in reference to private individuals. The said law prohibits persons who have family or close personal relations with a public official to take advantage thereof by requesting or receiving gifts or pecuniary advantage from persons who have business transactions with such public official.[84] It also prohibits the spouse or any relative within the 3rd civil degree of the President, Vice-President, the Senate President and the Speaker of the House of Representatives to intervene in any business or transaction with the Government, subject to certain exceptions.[85]

(b) **Republic Act 6713** or the **Code of Conduct and Ethical Standards for Public Officials and Employees**[86] also declares the following as prohibited acts and transactions:

(i) *Financial and material interest.* — Public officials and employees shall not, directly or indirectly, have any financial or material interest in any transaction requiring the approval of their office.

(ii) *Outside employment and other activities related thereto.* — Public officials and employees during their incumbency shall not:

1. Own, control, manage or accept employment as officer, employee, consultant, counsel, broker, agent, trustee or nominee in any private enterprise regulated, supervised or licensed by their office unless expressly allowed by law;
2. Engage in the private practice of their profession unless authorized by the Constitution or law, provided, that such practice will not conflict or tend to conflict with their official functions; or
3. Recommend any person to any position in a private enterprise which has a regular or pending official transaction with their office.

(iii) *Disclosure and/or misuse of confidential information.* — Public officials and employees shall not use or divulge, confidential or classified information officially known to them by reason of their office and not made available to the public, either:

1. To further their private interests, or give undue advantage to anyone; or
2. To prejudice the public interest.

(iv) *Solicitation or acceptance of gifts.* — Public officials and employees shall not solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan or anything of monetary value from any person in the course of their official duties or in connection with any operation being regulated by, or any transaction which may be affected by the functions of their office.

As to gifts or grants from foreign governments, the Congress consents to:

1. The acceptance and retention by a public official or employee of a gift of nominal value tendered and received as a souvenir or mark of courtesy;
2. The acceptance by a public official or employee of a gift in the nature of a scholarship or fellowship grant or medical treatment; or
3. The acceptance by a public official or employee of travel grants/expenses for travel taking place entirely outside the Philippines of more than nominal value if such acceptance is appropriate or consistent with the interests of the Philippines and permitted by the head office, branch or agency to which he belongs.

84. Sec. 4, *ibid.*
85. Sec. 5, *ibid.*
86. Became effective in 1989.

(c) The **Civil Service Law**[87] enumerates the grounds for disciplinary action of government personnel, to wit:

(i) Dishonesty; Oppression; Neglect of duty; Misconduct; Disgraceful and immoral conduct; Being notoriously undesirable; Discourtesy in the course of official duties; and Inefficiency and incompetence in the performance of official duties;

(ii) Receiving for personal use of a fee, gift or other valuable thing in the course of official duties or in connection therewith, when such are given in the hope or expectation of favorable or better treatment[88]; Conviction of a crime involving moral turpitude; Improper or unauthorized solicitation of contributions from subordinates and by teachers or school officials from school children;

(iii) Violation of existing Civil Service Law or rules, or reasonable office regulations; Falsification of official document; Frequent unauthorized absences or tardiness in reporting for duty, loafing or frequently unauthorized absence during regular office hours; Habitual drunkenness; and Gambling;

(iv) Refusal to perform official duty or render overtime service; Disgraceful, immoral or dishonest conduct prior to entering service; Physical or mental incapacity or disability due to immoral or vicious habits; Borrowing money by superior officers from subordinates or lending by subordinates to superior officers; Lending money at usurious rates of interest; Willful failure to pay just debts or willful failure to pay taxes due to the government;

(v) Contracting loans of money or other property from persons with whom the office of the employee concerned has business relations; Pursuit of private business, vocation or profession without the permission required by Civil Service rules; Insubordination; Engaging directly or indirectly in partisan political activities by one holding a non-political office;

(vi) Conduct prejudicial to the best interest of the service; Lobbying for personal interest or gain in legislative halls and offices without authority; Promoting the sale of tickets in behalf of private enterprises that are not intended for charitable or public welfare purposes and even in the latter cases if there is no prior authority; Nepotism.

(d) **Republic Act 1379** or the law on **Forfeiture of Illegally Acquired Wealth**[89] declares as forfeited any property found to have been unlawfully acquired by any public officer or employee after appropriate judicial proceedings. The Ombudsman has the authority to investigate and initiate the proper action for the recovery of ill-gotten and /or unexplained wealth of public officials or employees.[90]

(e) **Republic Act 9160**, as amended, or the **Anti-Money Laundering Act of 2001**[91] **("AMLA")** defines the term "money laundering" as a crime whereby the proceeds of an unlawful activity are transacted, to make them appear as originating from legitimate sources. A crime under this law is committed by any person who knowingly transacts monetary instrument or property from the proceeds of unlawful activities. Among the unlawful activities under the AMLA, as

87. Title I-A, Book V, Executive Order No. 292, Administrative Code of 1987.
88. "Moral turpitude includes everything which is done contrary to justice, honesty, modesty, or good morals." (*In Re: Basa*, 41 Phil 275, 7 December 1920).
89. Became effective in 1955.
90. Section 15, Republic Act 6770 or the Ombudsman Act.
91. Became effective in 2001.

amended, are the commission of the acts under Section 3, paragraphs b,[92] c,[93] e,[94] g,[95] h[96] and i[97] of Republic Act 3019 or the Anti-Graft and Corrupt Practices Act as well as Plunder under Republic Act 7080, as amended.

(f) **Republic Act 7080**, as amended, or the **Plunder Law**[98] punishes any public officer who, by himself or in connivance with members of his family, relatives by affinity or consanguinity, business associates, subordinates or other persons, amasses, accumulates or acquires ill-gotten wealth through a combination or series of overt criminal acts as described in Sec. 1(d) of the law in the aggregate amount of at least Seventy-Five Million Pesos (P75,000,000.00).

F. Remedies

There are a number of remedies available against abuses of public officials including the forfeiture of their unlawfully acquired property. These are: (a) impeachment; (b) recall; (c) civil action for damages; (d) administrative disciplinary action; (e) criminal complaint; (f) special civil action; (g) general election;[99] (h) forfeiture under RA 1379; and (i) civil forfeiture under RA 9160, as amended.

a. *Impeachment*

It is a procedure provided by the Constitution[100] for removing the following government officials: President, the Vice-President, the members of the Supreme Court, the members of the Constitutional Commissions, and the Ombudsman. The grounds for impeachment are: culpable violation of the Constitution, treason, bribery, graft and corruption, other high crimes, and betrayal of public trust.

b. *Recall of Local Elective Officials*

Recall is a process whereby a registered voter removes an elective local official on the basis of loss of confidence.[101]

c. *Civil Action to Claim Damages*

Philippine laws incorporate provisions that make public officials liable for damages in instances when they commit bad faith, malice or gross negligence. The Administrative Code of 1987 explicitly provides that "a public officer shall not be civilly liable for acts done in the performance of his official duties, unless there is a clear showing of bad faith, malice or gross negligence."[102] Also, "any public officer, who, without just cause, neglects to perform a duty within a period fixed by law or regulation, or within

92. "Directly or indirectly requesting or receiving any gift, present, share, percentage, or benefit, for himself or for any other person, in connection with any contract or transaction between the Government and any other party, wherein the public officer in his official capacity has to intervene under the law."
93. "Directly or indirectly requesting or receiving any gift, present or other pecuniary or material benefit for himself or for another, from any person for whom the public officer, in any manner or capacity, has secured or obtained, or will secure or obtain, any Government permit or license, in consideration for the help given or to be given, without prejudice to Section thirteen of this Act."
94. "Causing any undue injury to any party, including the Government, or giving any private party any unwarranted benefits, advantage or preference in the discharge of his official, administrative or judicial functions through manifest partiality, evident bad faith or gross inexcusable negligence. This provision shall apply to officers and employees of offices or government corporation charged with the grant of licenses or permits or other concessions."
95. "Entering, on behalf of the Government, into any contract or transaction manifestly and grossly disadvantageous to the same, whether or not the public officer profited or will profit thereby."
96. "Directly or indirectly having financial or pecuniary interest in any business, contract or transaction in connection with which he intervenes or takes part in his official capacity, or in which he is prohibited by the Constitution or by any law from having any interest."
97. "Directly or indirectly becoming interest, for personal gain, or having a material interest in any transaction or act requiring the approval of a board, panel or group of which he is a member, and which exercises discretion in such approval, even if he votes against the same or does not participate in the action of the board; committee, panel or group.
Interest for personal gain shall be presumed against those public officers responsible for the approval of manifestly unlawful, inequitable, or irregular transactions or acts by the board, panel or group to which they belong."
98. As amended by Republic Act 7659.
99. Ursal *supra* note 6 at 235.
100. Art. XI, 1987 Philippine Constitution.
101. Secs. 69-75, R.A. No. 7160 (1991)
102. Sec. 38, Book I, Chapter 9.

a reasonable period if none is fixed, shall be liable for damages to the private party concerned without prejudice to such other liability as may be prescribed by law."[103]

Heads of departments or superior public officers, however, shall not be civilly liable for the wrongful acts, omissions of duty, negligence, or misfeasance of their subordinates, unless they have actually authorized by written order the specific act or misconduct complained of.[104]

On the other hand, subordinate public officers or employees shall be civilly liable for acts done by them in good faith in the performance of their duties. But they shall be liable for willful or negligent acts done by them which are contrary to law, morals, public policy and good customs even if they acted under orders or instructions of their superiors.

The Civil Code of the Philippines also provides recourse against abuses or neglect of duty of public officials or employees. Under the Civil Code, any person suffering material or moral loss because a public servant or employee refuses or neglects, without just cause, to perform his official duty may file an action for damages and other relief against the latter, without prejudice to any disciplinary administrative action that may be taken.[105] Moreover, a violation by any public officer or employee of the constitutional rights and liberties of another person, shall entitle the latter to damages.[106]

d. *Administrative Disciplinary Action*

An administrative action against a public officer or employee is the common and most frequently used remedy resorted to by an aggrieved party.[107]

To avail of this remedy, a complaint may be initiated with the *Civil Service Commission* or with the Department Secretaries and heads of agencies, instrumentalities, provinces, cities and municipalities which have jurisdiction to investigate and decide on the disciplinary action against the subject officers and employees.[108]

With regard to elective and appointive government officials, except those removable only by impeachment, an administrative complaint may also be filed against them with the *Ombudsman*.

Another remedy is to file a complaint with the *Presidential Anti-Graft Commission*. The latter has the authority to investigate administrative complaints against presidential appointees in the government occupying the positions of assistant regional director, or equivalent rank and higher, as well as those classified as Salary Grade "26" and higher[109]

e. *Criminal Complaint*

A criminal complaint may be brought for an offense in violation of *R.A. 3019* (*Anti-Graft and Corrupt Practices Act*), as amended; *R.A. 6713* (*Code of Conduct and Ethical Standards for Public Officials and Employees); Title VII Chapter II, Section 2*[110] *of the Revised Penal Code (Act No. 3815 [1932]); R.A. 7080 (Plunder),* as amended, and for other offenses committed by public officers and employees in relation to their office.[111]

f. *Special Civil Action*

Special Civil Actions like *certiorari,* prohibition and *mandamus* may be invoked by victims of grave abuse of discretion amounting to lack or in excess of jurisdiction; and unlawful neglect to perform a duty by any government official or body exercising judicial, quasi-judicial or ministerial function.[112]

103. *Ibid.*
104. *Ibid.*
105. Section 27, Civil Code.
106. Section 32, *Ibid.*
107. *Id*. at 253.
08. *Ibid*.
109. Sec. 4, Executive Order No. 12 (2001), as amended.
110. Bribery.
111. Ursal *supra* note 6 at 260.
112. *Id*. at 262.

g. *Election*

Citizens may not be aware that during elections, the fate of the elective officials is in their hands. The citizenry has the capacity to evict from power abusive politicians whom they perceive can no longer serve the common good.[113]

h. *Forfeiture under RA 1379*

Ill-gotten, unexplained and unlawfully acquired wealth of public officers and employees shall be forfeited in favor of the State after appropriate judicial proceedings. The proper action for the recovery of such ill-gotten, unexplained or unlawfully acquired wealth shall be initiated by the Office of the Ombudsman.[114]

i. *Civil Forfeiture under RA 9160, as amended*

Property, monetary instrument and or proceeds representing, involving, or relating to an unlawful activity or a money laundering offense under RA 9160, as amended, shall be forfeited in favor of the State after appropriate judicial proceedings. Among the unlawful activities provided in the law are RA 3019 (*Anti-Graft and Corrupt Practices Act*) and RA 7080 (*Plunder Law*). The petition for civil forfeiture shall be initiated by the Anti-Money Laundering Council through the Office of the Solicitor General.

G. Challenges[115]

Despite the passage of numerous anti-graft laws in the Philippines and ratification of the *UN Convention Against Corruption,*[116] the perception that cases filed against corrupt officials and employees do not succeed still persists.[117] There are also numerous reports that graft and corruption are highly pervasive in this country.

The Philippine government must maintain both long-term and short-term resolutions on the issue of corruption. Values formation is the key to a long-term victory. It develops citizens and public officials to become honest and trustworthy individuals. The government must also seek short term solutions to lessen, if not to eradicate, the effects of graft and corruption.[118]

"Short Term: Demonstrate Crime Doesn't Pay"[119]

Anti-graft and corruption laws must be strictly implemented and task force and agencies made to defeat graft and corruption must efficiently function in order to win the battle against theft in the government.[120]

"Strict Accountability and Oversight"[121]

The *Commission on Audit,* being the entity in charge of financial accountability and legality of government operations, must expose graft and corruption by all means. Individuals composing the said commission must be able to reveal the cause and the persons behind the diminishing funds of the government. Notably, it is their duty to endure pressure from individuals or syndicates protecting or conducting activities detrimental to the government.[122]

1113. *Id*. at 264.
114. *Supra* 90.
115. Gary W. Elliott, Antidote for Philippine Corruption, Philippine Anti-Graft Institution, But Integrity is Lacking, *available at* http://philippines.suite101.com/article.cfm/antidote_for_philippine_corruption, (last accessed 28 October 2009).
116. Convention Against Corruption, December 14, 2005.
117. Llanesca T. Panti, Ira Karen Apanay, Crisis, elections feed graft: Corruption' brutal' to poor - UN, *available at* http://www.undp.org.ph/?link=news&news_id=171&fa=2 (last accessed 29 October 2009).
118. *Ibid.*
119. *Ibid.*
120. *Ibid.*
121. *Ibid*.
122. *Ibid*.

"Prosecution and Punishment"[123]

The *Ombudsman* must work hand in hand with the *Commission on Audit* in investigating officials and employees. Furthermore, the *Sandiganbayan*[124] should grant clemency under very strict guidelines. The government must sustain its zeal in prosecuting offenders.[125]

While "asset forfeiture can be an effective tool to recover assets connected to crime, it should not be used as an alternative to criminal prosecution when a jurisdiction has the ability to prosecute the violator. In other words, criminals should not be allowed to avoid prosecution by pointing to the asset forfeiture regime as the mechanism for seeking redress for crimes that have been committed. Forgoing a criminal prosecution, when available, in return for asset forfeiture has the appearance of a violator buying his or her way out of prosecutions, convictions, and forfeiture. Thus, criminal prosecutions should be pursued whenever possible to avoid the risk that prosecutors, courts and the public would view disgorgement of assets as a sufficient sanction when criminal laws have been violated."[126]

"Restoring Stolen Assets"[127]

One of the biggest challenges in fighting corruption is the recovery of public properties or moneys unlawfully acquired. As reported by the *Philippine National Police,* authorities are having a difficult time retrieving properties or moneys which were obtained thru corruption.

In relation to this concern, it is important to note that the anti-graft law provides for confiscation of unexplained wealth. Now, to resolve the issue, the Philippine government must aggressively pursue recovery of public funds, whether within the country or not.[128]

"Long Term: Values Formation"[129]

The most effective means of defeating corruption is probably the values formation. However, the metamorphosis does not happen in a short period of time. This long-term solution works by changing socio-cultural norms thru instilling new values. The problem with this though is that there "exists a conflict between traditional values relating to 'obligation toward kinship, friendship, and primary groups,' common in the rural and tribal contexts, and values necessary for nation building." Values formation, or reformation, must engender a view of government posts as positions to serve the public, and not as a means for personal profit.[130]

After all, "public office is a public trust;" and public officers -- who are not at all times accountable to the people -- are called upon to "serve them with utmost responsibility, integrity, loyalty, and efficiency."[131]

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123. *Ibid*.
124. A special court in the Philippines created under Presidential Decree 1606. Its jurisdiction covers cases involving public officials occupying positions classified as salary grade "27" and higher. It is presently composed of a Presiding Justice and fourteen (14) Associate Justices who sit in five (5) Divisions of three (3) Justices each in the trial and determination of cases. Its rank is equivalent to the Court of Appeals.
125. *Ibid.*
126. Greenberg, et al., Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture, The International Bank for Reconstruction and Development/The World Bank 2009, p. 29.
127. *Ibid.*
128. *Ibid*
129. *Ibid.*
130. *Ibid.*
131. Section 1, Article XI, 1987 Philippine Constitution..

II. CIVIL FORFEITURE AS A REMEDY

A. Defining Civil Forfeiture under the AMLA[132]

Forfeiture is defined as the "divestiture of property without compensation. It is the loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty. In contrast to *seizure* which is merely an act or an instance of taking possession of a person or property by legal right or process, forfeiture entails the instantaneous transfer of title to another, such as the government, a corporation, or a private person.[133]

Civil forfeiture, in the context of the AMLA, may be defined as the divestiture in favor of the State of monetary instrument, property and/or proceeds representing, involving, or relating to an unlawful activity or a money laundering offense under the said Act.

In enacting the AMLA, the Philippine Congress declared money laundering as a criminal offense and provided for civil forfeiture as an "appropriate remedy for the seizure and forfeiture to the State, without the necessity of conviction or prosecution in a criminal offense, of monetary instrument, property or proceeds involved in or related to unlawful activity or money laundering offense as defined in the law."[134]

B. Philippine Constitution and Other Laws

There are constitutional and other legal provisions relating to seizure and forfeiture of property:

1. The 1987 Philippine Constitution

The Philippine Constitution provides that "no person shall be deprived of life, liberty or property without due process of law."[135] "Due process has both a procedural and a substantive aspect. As a substantive requirement, it is a prohibition of arbitrary laws; because if all that the due process clause required were proper procedure, then life, liberty or property could be destroyed arbitrarily provided proper *formalities* are observed. As a procedural requirement, it relates chiefly to the mode of procedure which government agencies must follow in the enforcement and application of laws. It is a guarantee of *procedural fairness.*"[136]

2. The Revised Penal Code[137]

The Revised Penal Code ("RPC") provides that "every penalty imposed for the commission of a felony shall carry with it the forfeiture of the proceeds of the crime and the instruments or tools with which it was committed. Such proceeds and instruments or tools shall be confiscated and forfeited in favor of the Government, unless they be the property of a third person not liable for the offense, but those articles which are not subject of lawful commerce shall be destroyed."[138]

3. Republic Act 3019 or the Anti-Graft and Corrupt Practices Act

RA 3019 provides that any public officer or private person committing any of the unlawful acts or omissions enumerated in Sections 3 (Corrupt Practices of Public Officers), 4 (Prohibition on Private Individuals), 5 (Prohibition on Certain Relatives) and 6 (Prohibition on Members of Congress) thereof shall

132. *Supra* 92.
133. *Black's Law Dictionary,* West Publishing Company, 8th Ed., 1999.
134. Justice Jose C. Vitug, et al., A Summary of Notes and Views on the Rule of Procedure in Cases of Civil Forfeiture, Asset Preservation and Freezing of Monetary Instrument, Property, or Proceeds Representing, Involving, or Relating to an Unlawful Activity or Money Laundering Offense under Republic Act no. 9160, as amended, Central Book Supply, Inc., Quezon City, Philippines, 2006, [hereinafter "Rule of Procedure, etc.").
135. Section 1, Article III.
136. Joaquin G. Bernas, S.J., The 1987 Philippine Constitution A Reviewer-Primer, 4th Edition, 2002
137. *Supra* 70.
138. Revised Penal Code, Article 45, Section III, Chapter III..

be "punished with imprisonment for not less than one year nor more than ten years, perpetual disqualification from public office, and *confiscation or forfeiture in favor of the Government of any prohibited interest and unexplained wealth manifestly out of proportion to his salary and other lawful income.*"[139]

4. Republic Act 1379 or the Law on Forfeiture of Illegally Acquired Wealth

Under this law, "whenever any public officer or employee has acquired during his incumbency an amount of property which is manifestly out of proportion to his salary as such public officer or employee and to his other lawful income and the income from legitimately acquired property, said property shall be presumed *prima facie* to have been unlawfully acquired.[140]

"If the respondent is unable to show to the satisfaction of the court that he has lawfully acquired the property in question, then the court shall declare such property, *forfeited* in favor of the State, and by virtue of such judgment the property aforesaid shall become property of the State."[141]

5. Republic Act 7080 or the Plunder Law

As discussed, this involves "any public officer who, by himself or in connivance with members of his family, relatives by affinity or consanguinity, business associates, subordinates or other persons, amasses, accumulates or acquires ill-gotten wealth through a combination or series of overt or criminal acts as described in the law, in the aggregate amount or total value of at least Seventy-five million pesos (P75,000,000.00)."[142]

"The court shall declare any and all ill-gotten wealth and their interests and other incomes and assets including the properties and shares of stock derived from the deposit or investment thereof *forfeited* in favor of the State."[143]

6. The Civil Code of the Philippines[144]

a. *Unjust Enrichment*

Article 22 of the Civil Code provides that "every person who through an act of performance by another, or any other means, acquires or comes into possession of something at the expense of the latter without just or legal ground, shall return the same to him." This is the principle of unjust enrichment which requires two conditions: (i) that a person is benefited without a valid basis or justification, and (ii) that such benefit is derived at another's expense or damage.[145]

The principle of unjust enrichment, which involves the acquisition of any material possession or benefit by a person who is not entitled thereto, differs from the concept of civil forfeiture under the AMLA as the latter involves the forfeiture of monetary instrument, property or proceeds representing, involving, or relating to an unlawful activity or a money laundering offense.

b. *Implied Trust*

"Trusts are either express or implied. While express trusts are created by the intention of the trustor or of the parties, implied trusts come into being by operation of law. Implied trusts are those which, without being expressed, are deducible from the nature of the transaction as matters of intent or which are superinduced on the transaction by operation of law as matters of equity, independently of the particular intention of the parties."[146]

"Implied trusts may either be resulting or constructive trusts, both coming into being by operation

139. RA 3019, Section 9; Emphasis supplied.
140. RA 1379, Section 2.
141. *Id,* Section 6.
142. RA 7080, Section 2, as amended.
143. *Ibid.*
144. Republic Act 386 (1949).
145. *Privatization and Management Office v. Legaspi Towers 300, Inc.,* G.R. No. 147957, 22 July 2009, citing *Car Cool Philippines, Inc. v. Ushio Realty and Development Corporation,* G.R. No. 138088, January 23, 2006.
146. *Philippine National Bank v. Court of Appeals,* G.R. No. 97995, 21 January 1993.

of law. xxx *Resulting trusts* are based on the equitable doctrine that valuable consideration and not legal title determines the equitable title or interest and are presumed always to have been contemplated by the parties. They arise from the nature or circumstances of the consideration involved in a transaction whereby one person thereby becomes invested with legal title but is obligated in equity to hold his legal title for the benefit of another. On the other hand, *constructive trusts* are created by the construction of equity in order to satisfy the demands of justice and prevent unjust enrichment. They arise contrary to intention against one who, by fraud, duress or abuse of confidence, obtains or holds the legal right to property which he ought not, in equity and good conscience, to hold."[147]

Title V, Chapter III of the Civil Code enumerates instances when an implied trust is created, viz:

(i) There is an implied trust when property is sold, and the legal estate is granted to one party but the price is paid by another for the purpose of having the beneficial interest of the property. The former is the trustee, while the latter is the beneficiary. However, if the person to whom the title is conveyed is a child, legitimate or illegitimate, of the one paying the price of the sale, no trust is implied by law, it being disputably presumed that there is a gift in favor of the child.[148]

(ii) There is also an implied trust when a donation is made to a person but it appears that although the legal estate is transmitted to the donee, he nevertheless is either to have no beneficial interest or only a part thereof.[149]

(iii) If the price of a sale of property is loaned or paid by one person for the benefit of another and the conveyance is made to the lender or payor to secure the payment of the debt, a trust arises by operation of law in favor of the person to whom the money is loaned or for whom its is paid. The latter may redeem the property and compel a conveyance thereof to him.[150]

(iv) When land passes by succession to any person and he causes the legal title to be put in the name of another, a trust is established by implication of law for the benefit of the true owner.[151]

(v) If two or more persons agree to purchase property and by common consent the legal title is taken in the name of one of them for the benefit of all, a trust is created by force of law in favor of the others in proportion to the interest of each.[152]

(vi) When property is conveyed to a person in reliance upon his declared intention to hold it for, or transfer it to another or the grantor, there is an implied trust in favor of the person whose benefit is contemplated.[153]

(vii) If an absolute conveyance of property is made in order to secure the performance of an obligation of the grantor toward the grantee, a trust by virtue of law is established. If the fulfillment of the obligation is offered by the grantor when it becomes due, he may demand the reconveyance of the property to him.[154]

(viii) When any trustee, guardian or other person holding a fiduciary relationship uses trust funds for the purchase of property and causes the conveyance to be made to him or to a third person, a trust is established by operation of law in favor of the person to whom the funds belong.[155]

147. *O'Laco v. Co Cho Chit,* G.R. No. 58010, 31 March 1993; emphasis supplied.
148. Article 1448.
149. Article 1449.
150. Article 1450.
151. Article 1451.
152. Article 1452.
153. Article 1453.
154. Article 1454.
155. Article 1455.

(ix) If property is acquired through mistake or fraud, the person obtaining it is, by force of law, considered a trustee of an implied trust for the benefit of the person from whom the property comes.[156]

The powers of public officers occupying a position akin to corporate directors are power in trust. "He who is in such fiduciary position cannot serve himself first and his *cestuis* second. xxx He cannot manipulate the affairs of his corporation to their detriment and in disregard of the standards of common decency. He cannot, by the intervention of a corporate entity violate ancient precept against serving two masters. xxx He cannot utilize his inside information and strategic position for his own preferment. He cannot violate rules of fair play by doing indirectly through the corporation what he could not do so directly. He cannot use his power for his personal advantage and to the detriment of the stockholders and the creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements. For that power is at all times subject to the equitable limitation that it may not be exercised for the aggrandizement, preference, or advantage of the fiduciary to the exclusion or detriment of the *cestuis*."[157]

7. Uniform Rules on Administrative Cases in the Civil Service[158]

The rules shall be applicable to all cases brought before the Civil Service Commission and other government agencies, except where a special law provides otherwise.[159]

The penalty of *forfeiture of retirement benefits* is provided as an accessory to administrative penalties.[160] For example, the penalty of dismissal shall carry with it that of cancellation of eligibility, *forfeiture of retirement benefits*, and the perpetual disqualification from reemployment in the government service, unless otherwise provided in the decision.[161]

C. Ancillary Remedies

The AMLA provides for other remedies ancillary to a civil forfeiture. These are the remedies of: (i) Freeze Order; and, (ii) Bank Inquiry.

1. Freeze Order

Under Section 10 of the AMLA, as amended, the Court of Appeals, upon application *ex parte* by the Anti-Money Laundering Council ("AMLC") through the Office of the Solicitor General, and after determination that probable cause exists that any monetary instrument or property is in any way related to an unlawful activity, may issue a freeze order which shall be effective for twenty (20) days. The freeze order may be extended for a maximum period of six (6) months.[162]

2. Bank Inquiry

Section 11 of the AMLA authorizes the AMLC to inquire into or examine any particular deposit or investment with any banking institution or non-bank financial institution upon order of any competent court in cases of violation of the AMLA, when it has been established that there is probable cause that the deposits or investments are related to an unlawful activity or a money laundering offense. No court order is required in cases involving the unlawful activities of Kidnapping for Ransom under Article 267 of the Revised Penal Code, as amended, Violations under Republic Act 9165 or the Comprehensive Drugs Act of 2002, and Hijacking and other violations under Republic Act 6235, destructive arson and murder as

156. Article 1456.
157. *Gokongwei v. Securities and Exchange Commission,* G.R. No. L-45911, 11 April 1979.
158. Resolution 99-1936, published in *The Manila Standard,* 11 September 1999.
159. *Id,* Section 2.
160. *Id*, Section 57.
161. *Id*, Section 58.
162. *Supra* 133, Section 53 (b).

defined under the Revised Penal Code, as amended, including those perpetrated by terrorists against non-combatant persons and similar targets.

An application for bank inquiry is filed with the regional trial court which has jurisdiction over the case. In *Republic of the Philippines v. Eugenio, et al,*[163] the Supreme Court declared that bank inquiry proceedings may not be done *ex parte*; hence, prior notice and hearing are required.

D. Procedure

1. Venue

An action for civil forfeiture may be instituted by the Republic of the Philippines, through the AMLC, represented by the Office of the Solicitor General ("OSG"), by filing a petition[164] in any regional trial court of the judicial region where the monetary instrument, property, or proceeds representing, involving, or relating to an unlawful activity or to a money laundering are located. If, however, all or any portion of the monetary instrument, property, or proceeds is located outside the Philippines, the petition may be filed in the regional trial court in Manila or of the judicial region where any portion of the monetary instrument, property, or proceeds is located, at the option of the petitioner.[165]

The petition shall be filed directly with the executive judge of the regional trial court, or, in his absence, the vice-executive judge or, in their absence, any judge of the regional trial court of the same station. He shall act on the petition within twenty-four (24) hours after its filing.[166]

2. Contents of the Petition, Notice and Service

The petition for civil forfeiture shall be verified and shall contain: (a) the name and address of the respondent; (b) a description with reasonable particularity of the monetary instrument, property, or proceeds, and their location; (c) the acts or omissions prohibited by and the specific provisions of the AMLA, as amended, which are alleged to be the grounds relied upon for the forfeiture of the monetary instrument, property, or proceeds; and, (d) the reliefs prayed for[167] including the issuance of a provisional asset preservation order and an asset preservation order.

Notice of the petition shall be given to respondents in the same manner as service of summons under the Rules of Court.[168] Where the respondent is an unknown owner or his whereabouts are unknown and cannot be ascertained by diligent inquiry, service may, by leave of court, be effected by publication of the notice of the petition in a newspaper of general circulation in such places and for such time as the court may order. Should the cost of publication exceed the value or amount of the property to be forfeited by ten (10) percent, publication shall not be required.[169]

3. Confidentiality

The logbook where the petition is entered shall be kept strictly confidential and maintained under the responsibility of the executive judge. Contempt of court shall be imposed on any person, including court personnel, who discloses, divulges or communicates to anyone, directly or indirectly, in any manner or by any means, the fact of the filing of the petition, its contents and its entry in the logbook except those authorized by the court.[170]

4. Comment or Opposition

The respondent shall file a verified comment or opposition, not a motion to dismiss the petition,

163. G.R. No. 174629, 14 February 2008.
164. Rule of Procedure, etc., Section 2, Title II.
165. *Id*, Section 3, Title II.
166. *Id*, Section 5, Title II.
167. *Id,* Section 4, Title II.
168. *Id,* Section 8, Title II.
169. *Ibid.*
170. *Id,* Section 7, Title II.

within fifteen (15) days from service of notice or within thirty days from publication.[171] Failure to do so shall authorize the court to hear the case *ex parte* and render such judgment as may be warranted by the facts alleged in the petition and its supporting evidence.[172]

5. Provisional Asset Preservation Order ("PAPO")

Where the judge executive judge of the regional trial court, or, in his absence, the vice-executive judge or, in their absence, any judge of the regional trial court of the same station has determined that probable cause exists on the basis of the allegations of a verified petition sufficient in form and substance, with a prayer for the issuance of an asset preservation order, the court may issue *ex parte* a PAPO effective immediately and for a period of twenty (20) days from service to the concerned parties, forbidding any transaction, withdrawal, deposit, transfer, removal, conversion, concealment or other disposition of the subject monetary instrument, property, or proceeds.[173]

6. Asset Preservation Order ("APO")

Within the twenty-day period of effectivity of the PAPO, the court shall conduct a summary hearing at which the respondent may for good cause show why the PAPO should be lifted. The court shall determine within the same period whether the PAPO should be modified or lifted or an APO should issue, and act accordingly.[174]

The APO shall: (a) issue in the name of the Republic of the Philippines represented by the AMLC; (b) state the name of the court, the case number and title, and the subject order; and (c) require the sheriff or any proper officer to serve a copy thereof upon the respondent or any person acting on his behalf, and upon the covered institution or government agency.[175]

The asset preservation order shall be served personally by the sheriff or other proper officer designated by the court in the manner set forth in the rules. If personal service is not practicable, the order shall be served in any other manner which the court may deem expedient.[176]

When authorized by the court, service may be effected upon the respondent or any person acting in his behalf and upon the treasurer or other responsible officer of the covered institution or the head of the covered government agency, by facsimile transmission (fax) or electronic mail (e-mail). In such cases, the date of transmission shall be deemed to be *prima facie* the date of service. The asset preservation order shall be enforceable anywhere in the Philippines.[177]

Should the court issue an APO, the respondent may raise in a motion or in the comment or opposition grounds for its discharge. The following grounds for discharge of the APO may be raised: (a) the order was improperly or irregularly issued or enforced; (b) any of the material allegations in the petition, or any of the contents of any attachment to the petition thereto, or its verification, is false; and (c) the specific personal or real property ordered preserved is not in any manner connected with the alleged unlawful activity.[178]

(i) *Guidelines in Serving the APO*

For perishable property, the petitioner may file a verified motion praying for the sale at public auction of said perishable property. If the court grants the motion, the sale shall be conducted in the manner as property sold under execution.[179] Written notice must be given, before the sale, by posting of the time and place of the sale in three (3) public places, preferably in conspicuous areas of the municipal or city hall, post office and public market in the municipality or city where the perishable property is located and where

171. *Id,* Section 9, Title II.
172. *Id*, Section 10, Title II.
173. *Id,* Section 11, Title III.
174. *Id,* Section 12, Title III.
175. *Id,* Section 13, Title III.
176. *Id*, Section 14, Title III.
177. *Ibid.*
178. *Id*, Section 17, Title III
179. *Id*, Section 19, Title IV..

the sale is to take place, for such time as may be reasonable, considering the character and condition of the property. The proceeds shall be deposited with the Clerk of Court to be disposed of according to the final judgment of the court.[180]

For real property, there shall be: (a) no physical seizure thereof; (b) no eviction of the owner thereof and/or occupants therein; (c) notice of the APO to the owner/s thereof, if known, and the occupant/s therein; and (d) posting of a copy of the APO in a conspicuous place on the real property.[181]

Upon verified motion, a receiver may be appointed by the court under such terms and conditions as the court may deem proper in the following instances:

(a) When it appears that the party applying for the appointment of a receiver has an interest in the property or fund and that such property or fund is in danger of being lost, removed or materially injured;
(b) When it appears that the property is in danger of being wasted or dissipated or materially injured;
(c) After judgment, to preserve the property during the pendency of an appeal, or to dispose of it according to the judgment or to aid execution when the execution has been returned unsatisfied or the judgment obligor refuses to apply his property in satisfaction of the judgment, or otherwise to carry the judgment into effect; and
(d) Whenever in other cases it appears that the appointment of a receiver is the most convenient and feasible means of administering or disposing of the property in litigation.[182]

7. Pre-trial and Trial

Pre-trial is mandatory.[183] It is a procedural device intended to clarify and limit the basic issues between the parties. Failure of the petitioner or counsel to appear at the pre-trial conference shall be cause for dismissal of the petition. The dismissal shall be with prejudice, unless otherwise ordered by the court. A similar failure on the part of the respondent or counsel shall be cause to allow the petitioner to present its evidence *ex parte* and the court to render judgment on the basis thereof.[184]

The rules on amicable settlement, mediation and other alternative mode of dispute resolution shall not apply.[185]

No prior criminal charge, pendency of or conviction for an unlawful activity or money laundering offense is necessary for the commencement or the resolution of a petition for civil forfeiture.[186]

Any criminal case relating to an unlawful activity shall be given precedence over the prosecution of any offense or violation under the AMLA, as amended, without prejudice to the filing of a separate petition for civil forfeiture or the issuance of an asset preservation order or a freeze order. Such civil action shall proceed independently of the criminal prosecution.[187]

The trial shall proceed in accordance with the applicable provisions of the Rules of Court.[188]

8. Factors in determining Preponderance of Evidence

In rendering judgment, the court may consider the following factors to determine where lies the preponderance of evidence:

(a) That the monetary instrument, property, or proceeds are represented, involved, or related to an unlawful activity or a money laundering offense:

180. *Ibid.*
181. *Id*, Section 20, Title IV.
182. *Id*, Section 21, Title IV.
183. *Id*, Section 22, Title V.
184. *Id,* Section 24, Title V.
185. *Id*, Section 26, Title V.
186. *Id*, Section 27, Title VI.
187. *Id*, Section 28, Title VI.
188. *Id*, Section 29, Title VI.

(1) If the value or amount involved is not commensurate with the business, financial or earning capacity of the person;
(2) If any transaction indicates a clear deviation from the profile or previous transactions of the person;
(3) If a person opens, maintains or controls an account with a covered institution not in his own name or registered business name unless authorized under existing law;
(4) If a person has structured transactions in order to avoid being the subject of reporting requirements under Republic Act No. 9160, as amended; or
(5) If any transaction exists that has no apparent underlying legal or trade obligation, purpose or economic justification;

or

(b) That the monetary instrument, property, or proceeds, the sources of which originated from or are materially linked to monetary instruments, properties, or proceeds used in the commission of an unlawful activity or money laundering offense, are related to the said unlawful activity or money laundering offense.[189]

9. Judgment and Appeal

The court shall render judgment within thirty (30) days from submission of the case for resolution. It shall grant the petition if there is preponderance of evidence in favor of the petitioner and declare the monetary instrument, property, or proceeds *forfeited* to the State or, in appropriate cases, order the respondent to pay an amount equal to the value of the monetary instrument or property and adjudge such other reliefs as may be warranted.[190]

An aggrieved party may appeal the judgment to the Court of Appeals by filing within fifteen (15) days from its receipt a notice of appeal with the court which rendered the judgment and serving a copy upon the adverse party.[191]

10. Claims against Forfeited Assets

Where the court has issued an order of forfeiture of the monetary instrument or property in a civil forfeiture petition for any money laundering offense defined under the AMLA, as amended, any person who has not been impleaded nor intervened claiming an interest therein may apply, by verified petition, for a declaration that the same legitimately belongs to him and for segregation or exclusion of the monetary instrument or property corresponding thereto. The verified petition shall be filed with the court which rendered the order of forfeiture within fifteen (15) days from the date of finality of the order of forfeiture, in default of which the said order shall be executory and bar all other claims.[192]

Within fifteen (15) days after notice, petitioner shall file a comment admitting or denying the claim specifically, and setting forth the substance of the matters which are relied upon to support the admission or denial. If the petitioner has no knowledge sufficient to enable it to admit or deny specifically, it shall state such want of knowledge. The petitioner in its comment shall allege in offset any fees, charges, taxes and expenses due to it. A copy of the comment shall be served on the claimant.[193]

The court may, without hearing, issue an appropriate order approving any claim admitted or not contested by the petitioner.[194]

Upon the filing of a comment contesting the claim, the court shall set the claim for hearing within thirty (30) days with notice to all parties.[195]

189. *Id*, Section 31, Title VI.
190. *Id*, Section 32, Title VI.
191. *Id*, Section 34, Title VI.
192. *Id,* Section 34, Title VII b.
193. *Id,* Section 38, Title VII.
194. *Id,* Section 39, Title VII.
195. *Id,* Section 40, Title VII.

The court shall issue a final order on the contested claim within thirty (30) days from submission.[196] An appeal to the Court of Appeals may be taken by filing within fifteen (15) days from receipt of the order a notice of appeal with the court which rendered the order and serving a copy upon the adverse party.[197]

E. Statistics

The following shows the number of civil forfeiture cases filed in court relative to the unlawful activities involving graft and corruption as well as the amount of money or property subject of forfeiture:

Table 4[198]
List of Civil Forfeiture Cases filed based on Unlawful Activity related to Graft and Corruption
As of October 2009

Unlawful Activity or Violation under the AMLA	Number of Civil Forfeiture Cases filed in Court
Violation of Republic Act 3019 or the Anti-Graft and Corrupt Practices Act	8
Violation of Republic Act 6713 or Conduct and Ethical Standard for Public Officials and Employees	3
Violation of Republic Act 7080 or the Plunder Law	1

F. Strengths and Challenges

In Jeffrey Simser's article on *Civil Forfeiture Practices in Other Common Law Jurisdictions,*[199] citing an article by Anthony Kennedy, he posed this question: *Is the legislative response of civil forfeiture proportional to an existing societal problem?* To this protean question, the response was: Civil forfeiture is a proportional and necessary response to a societal problem. Much is true in the Philippine anti-money laundering regime. The non-conviction based forfeiture is a response to a compelling state interest --- that of removing illicit assets from circulation and taking away from the criminal the benefits of his crime.

Section 12 of the AMLA contains provisions for the recovery of proceeds of crime. This can occur as a result of the conviction of a person for a criminal offense or as a result of a civil forfeiture order. In relation to civil forfeiture, paragraph 12(a) of the AMLA states:

> Civil forfeiture. – When there is a covered transaction report made, and the court has, in a petition filed for the purpose ordered seizure of any monetary instrument, or property, in whole or in part, directly or indirectly, related to said report, the Revised Rules of Court on civil forfeiture shall apply.

The procedure in the prosecution of civil forfeiture made reference to the Revised Rules of Court on civil forfeiture. At the time of the enactment of AMLA in 2003, however, there was no specific rule on civil forfeiture. The Office of the Solicitor General was then constrained to utilized relevant provisions

196. *Id,* Section 41, Title VII.
197. *Id,* Section 42, Title VII.
198. Case Records, Lorenzo Tanada Division, Office of the Solicitor General.
199. Paper presented as background to a Best Practices Roundtable discussion at the Court Procedures in Money Laundering and Civil Forfeiture Conference in Manila on April 28, 2005.

and remedies to ensure that civil forfeiture cases may nonetheless be prosecuted. Temporary restraining orders and writs of preliminary injunction were resorted to in order that property or monetary instruments may not be disposed, removed or dissipated during the pendency of the proceedings. Eventually, the AMLC, the OSG and representatives of the *Supreme Court Committee on Revision of Rules* drafted rules for consideration by the Supreme Court. The draft rules became the working draft for the *Rules of Civil Procedure in Cases of Civil Forfeiture, Asset Preservation and Freezing of Monetary Instrument, Property, or Proceeds Representing, Involving, or Relating to an Unlawful Activity or Money Laundering Offense Under Republic Act No. 9160, as Amended,* which was adopted by the Supreme Court as A.M. No. 05-11-04-SC. The *Rules on Civil Procedure, etc.* took effect on 15 December 2006.

The salient features of the rules are:

(a) The proceeding for civil forfeiture is *sui generis*[200]

Explaining the nature of civil forfeiture in the Philippines, the *Committee on the Revision of the Rules of Court* adopted the best aspects of actions *in personam, in rem* and *quasi in rem,* and integrated them into the rule to ensure compliance with the Constitutional provision that no person shall be deprived of property without due process of law in both substantive and procedural aspects.[201]

As an action *in personam*, the rules require that notice shall be served on respondent personally. But, where the respondent is designated as an unknown owner or his whereabouts are unknown, service of notice may be by publication (action *in rem*). While at the first instance, it appears that the action is directed against specific persons (by personal service of notice to them), it actually seeks judgment against the thing or property (petition can proceed against the property of an unknown owner).

For practical purposes, however, publication is not required when "the cost of publication exceeds the value or amount of the property to be forfeited by ten percent (10%)."[202]

(b) Petition for civil forfeiture is filed directly with the executive judge of the Regional Trial Court to ensure confidentiality of the proceeding in the meantime that a PAPO has not been issued.[203]

The petition may be filed in any regional trial court of the judicial region where the monetary instrument, property, or proceeds representing, involving, or relating to an unlawful activity or to a money laundering offense are located. In the event that all or any portion of the monetary instrument, property, or proceeds is located outside the Philippines, the petition may be filed in the regional trial court in Manila or of the judicial region where any portion of the monetary instrument, property, or proceeds is located, at the option of the petitioner.[204]

(c) PAPO is issued *ex-parte* upon determination that probable cause exists that the monetary instrument, property, or proceeds are *in any way* related to an unlawful activity under the AMLA.[205]

(d) The PAPO, which is effective immediately, forbids the property owner or any covered institution or government agency from making any transaction, withdrawal, deposit, transfer, removal, conversion, concealment or other disposition of the monetary instrument, property or proceeds subject of the petition. This also insures that the monetary instrument, property or proceeds will not be concealed, altered, destroyed or will not diminish in value or rendered worthless by persons in control of such monetary instrument, property or proceeds.[206]

200. Vitug, *supra* 124.
201. *Id*. at pp. 6-7.
202. Rules on Civil Forfeiture, etc., Section 8.
203. *Id*, Sections 5, 6 and 7.
204. *Id,* Section 3.
205. *Id*, Section 11.
206. Vitug, *Supra* 124 at 39.

(e) Respondent has the burden to show cause why the PAPO should be lifted; otherwise, an APO is issued.[207]

(f) A PAPO is valid only for twenty (20) days. Within the twenty-day period, the court shall conduct summary hearing. At this point since the court has issued a PAPO *ex parte* on the finding of the existence of probable cause, the burden of evidence is shifted to the respondent to show why it should be modified or lifted.[208]

(g) No prior charge, pendency or conviction for an unlawful activity or money laundering offense is necessary for civil forfeiture.[209] Section 27 of the Rules explicitly provides that there is no need of a prior charge or conviction for any predicate crime or money laundering offense under AMLA. The monetary instrument, property or proceeds shall be forfeited in favor of the State if there is preponderance of evidence showing that these are involved in or related to an unlawful activity or a money laundering offense as defined in the law.[210]

(h) Specific factors have been enumerated which the court may consider in determining where lies preponderance of evidence.[211]

(i) Procedure on claims against forfeited assets has been incorporated.[212]

The provisions on claims against forfeited assets are designed to give an opportunity to a *bona fide* claimant, not a party to nor an intervenor in the case, to claim an interest in the forfeited asset or property if the same "legitimately belongs" to him. Section 35 of the Rules provide that such claim can be filed *only* after an order of forfeiture has already been issued.

The Rules provide:

> Sec. 35. *Notice to file claims*. – Where the court has issued an order of forfeiture of the monetary instrument or property in a civil forfeiture petition for any money laundering offense defined under Section 4 of Republic Act No. 9160, as amended, any person who has not been impleaded nor intervened claiming an interest therein may apply, by verified petition, for a declaration that the same legitimately belongs to him and for segregation or exclusion of the monetary instrument or property corresponding thereto. The verified petition shall be filed with the court which rendered the order of forfeiture within fifteen days from the date of finality of the order of forfeiture, in default of which the said order shall be executory and bar all other claims.

That indeed, an order of forfeiture is a condition *sine qua non* before a claim can be made has been confirmed in *Bedayo, et al. v. Court of Appeals:*[213]

> Intervention before Order of Forfeiture, Improper:
>
> To begin with, RTC, Manila, Branch 32, in its assailed April 20, 2004 Order, granted petitioners' Petition and Motion for the Release of Funds by

207. *Id*, Section 12.
208. *Supra* 40 at p. 40-41.
209. *Id*, Section 27.
210. Vitug, *Supra* 124 at 63.
211. *Id*, Section 31; As discussed under D (vii) herein.
212. *Id*, Sections 35-42, Title VII.
213. G.R. 169031-32, 26 September 2005.

treating the same as a "third party claim that should be categorized under Rule 60 of the Revised Rules of Court on Replevin," specifically Section 7 thereof.

The rules on replevin, however, require the posting of a bond to answer for whatever damage that may be incurred by the adverse party in the event the order of release or delivery is adjudged erroneous. Issuing an order of replevin despite absence of a bond is perilous as it might render nugatory the judgment in the civil forfeiture proceeding.

On a more crucial point, Civil Case No. 03-107306 of RTC, Manila, Branch 32, from whence the assailed orders sprung, is an action for "Forfeiture of Assets" filed by the Republic of the Philippines, through the Anti-Money Laundering Council. The complaint was anchored on the civil forfeiture provision of Republic Act 9160, as amended, which makes no categorical, much less a fleeting reference to the rules on replevin. On this score alone, the Orders assailed in the consolidated petitions for certiorari in CA-G.R. SP. Nos. 87159 and 87406 must be struck down.

Section 12 (b) of RA 9160 provides the proper procedure for claims on forfeited assets:

> "Sec.12. Forfeiture Provisions. –
>
> (b) Claim on Forfeited Assets .- Where the court has issued an order of forfeiture of the monetary instrument or property in a criminal prosecution for any money laundering offense defined under Section 4 of this Act, the offender or any other person claiming an interest therein may apply, by verified petition, for a declaration that the same legitimately belongs to him and for segregation or exclusion of the monetary instrument or property corresponding there to . The verified petition shall be filed with the court which rendered the judgment of conviction and order of forfeiture, within fifteen (15) days from the date of the order of forfeiture, in default of which the said order shall become final and executory. This provision shall apply in both civil and criminal forfeiture."

The quoted provision recites in detail what must be followed by any person who may have a legitimate claim over monetary instrument or property forfeited. The procedure applies to criminal, as well as civil forfeiture. As it is, petitioners did not even attempt to comply with Sec. 12 (b), supra, of Ra 9160. **Worse, and as borne by the records, there is not even an order of forfeiture yet, which is a condition sine qua non before a petition for segregation of funds may be filed.** To say the least, it is beyond the court's comprehension why the Manila RTC failed to appreciate the clear and unmistakable mandate of Sec. 12 (b) of Ra 9160. In fine, the appellate court correctly nullified the Order dated 20 April 2004 and all other subsequent challenged Orders issued by the Manila RTC, Branch 32, in its Civil Case No. 03-107306.

(j) The ancillary remedy of Freeze Order is made effective for a maximum period of six (6) months. The said period is intended to provide the AMLC the opportunity to finish its investigation and when evidence so warrant, file the necessary forfeiture proceedings. Experience, however, teaches that in complex and intricate cases, the six (6) month period is insufficient to conclude an extensive investigation more so, as instances abound where the related order of bank inquiry is obtained by AMLC only a few days before or even beyond the effectivity of a freeze order.

(k) Relatedly, the notice and hearing requirement in the ancillary remedy of bank inquiry pose

a difficulty in the expeditious completion of financial investigations. In cases where there are several respondents, the bank inquiry proceedings become protracted thereby setting a drawback in terms of the sufficiency of evidence for the filing of a civil forfeiture case.

(l) A freeze order granted by the Court of Appeals may be appealed. Such an appeal, however, does not stay the enforcement of a decision or ruling on the freeze order.[214]

G. Recent Supreme Court Doctrines involving the AMLA

1. Republic v. Glasgow, et al., (G.R. No. 170281, January 18, 2008)

Venue for Complaint of Civil Forfeiture:

On November 15, 2005, this Court issued A.M. No. 05-11-04-SC, the Rule of Procedure in Cases of Civil Forfeiture, Asset Preservation, and Freezing of Monetary Instrument, Property, or Proceeds Representing, Involving, or Relating to an Unlawful Activity or Money Laundering Offense under RA 9160, as amended (Rule of Procedure in Cases of Civil Forfeiture). The order dismissing the Republic's complaint for civil forfeiture of Glasgow's account in CSBI has not yet attained finality on account of the pendency of this appeal. Thus, the Rule of Procedure in Cases of Civil Forfeiture applies to the Republic's complaint. Moreover, Glasgow itself judicially admitted that the Rule of Procedure in Cases of Civil Forfeiture is "applicable to the instant case."

Section 3, Title II (Civil Forfeiture in the Regional Trial Court) of the Rule of Procedure in Cases of Civil Forfeiture provides:

> *Sec. 3. Venue of cases cognizable by the regional trial court. — A petition for civil forfeiture shall be filed in any regional trial court of the judicial region where the monetary instrument, property or proceeds representing, involving, or relating to an unlawful activity or to a money laundering offense are located; provided, however, that where all or any portion of the monetary instrument, property or proceeds is located outside the Philippines, the petition may be filed in the regional trial court in Manila or of the judicial region where any portion of the monetary instrument, property, or proceeds is located, at the option of the petitioner. (emphasis supplied)*

Under Section 3, Title II of the Rule of Procedure in Cases of Civil Forfeiture, therefore, ***the venue of civil forfeiture cases is any RTC of the judicial region where the monetary instrument, property or proceeds representing, involving, or relating to an unlawful activity or to a money laundering offense are located.*** *Pasig City, where the account sought to be forfeited in this case is situated, is within the National Capital Judicial Region (NCJR). Clearly, the complaint for civil forfeiture of the account may be filed in any RTC of the NCJR. Since the RTC Manila is one of the RTCs of the NCJR, it was a proper venue of the Republic's complaint for civil forfeiture of Glasgow's account.*

214. *Supra* 186, Section 57.

Summons by Publication Proper in Civil Forfeiture case:

In Republic v. Sandiganbayan, this Court declared that the rule is settled that forfeiture proceedings are actions in rem. While that case involved forfeiture proceedings under RA 1379, the same principle applies in cases for civil forfeiture under RA 9160, as amended, since both cases do not terminate in the imposition of a penalty but merely in the forfeiture of the properties either acquired illegally or related to unlawful activities in favor of the State.

As an action in rem, it is a proceeding against the thing itself instead of against the person. In actions in rem or quasi in rem, jurisdiction over the person of the defendant is not a prerequisite to conferring jurisdiction on the court, provided that the court acquires jurisdiction over the res. Nonetheless, summons must be served upon the defendant in order to satisfy the requirements of due process. ***For this purpose, service may be made by publication as such mode of service is allowed in actions in rem and quasi in rem.***

In this connection, Section 8, Title II of the Rule of Procedure in Cases of Civil Forfeiture provides:

> *Sec. 8. Notice and manner of service. — (a) The respondent shall be given notice of the petition in the same manner as service of summons under Rule 14 of the Rules of Court and the following rules:*
>
> *1. The notice shall be served on respondent personally, or by any other means prescribed in Rule 14 of the Rules of Court;*
>
> *2. The notice shall contain: (i) the title of the case; (ii) the docket number; (iii) the cause of action; and (iv) the relief prayed for; and*
>
> *3. The notice shall likewise contain a proviso that, if no comment or opposition is filed within the regulatory period, the court shall hear the case ex parte and render such judgment as may be warranted by the facts alleged in the petition and its supporting evidence.*
>
> *(b) Where the respondent is designated as an unknown owner or whenever his whereabouts are unknown and cannot be ascertained by diligent inquiry, service may, by leave of court, be effected upon him by publication of the notice of the petition in a newspaper of general circulation in such places and for such time as the court may order. In the event that the cost of publication exceeds the value or amount of the property to be forfeited by ten percent, publication shall not be required. (emphasis supplied)*

2. Republic v. Eugenio, et al., (G.R. No. 174629, February 14, 2008)

Bank inquiry proceedings not *ex-parte*:

That the AMLA does not contemplate ex parte proceedings in applications

for bank inquiry orders is confirmed by the present implementing rules and regulations of the AMLA, promulgated upon the passage of R.A. No. 9194. With respect to freeze orders under Section 10, the implementing rules do expressly provide that the applications for freeze orders be filed ex parte, but no similar clearance is granted in the case of inquiry orders under Section 11. These implementing rules were promulgated by the Bangko Sentral ng Pilipinas, the Insurance Commission and the Securities and Exchange Commission, and if it was the true belief of these institutions that inquiry orders could be issued *ex parte* similar to freeze orders, language to that effect would have been incorporated in the said Rules. **This is stressed not because the implementing rules could authorize ex parte applications for inquiry orders despite the absence of statutory basis, but rather because the framers of the law had no intention to allow such *ex parte* applications.**

x x x

Without doubt, a requirement that the application for a bank inquiry order be done with notice to the account holder will alert the latter that there is a plan to inspect his bank account on the belief that the funds therein are involved in an unlawful activity or money laundering offense. Still, the account holder so alerted will in fact be unable to do anything to conceal or cleanse his bank account records of suspicious or anomalous transactions, at least not without the whole-hearted cooperation of the bank, which inherently has no vested interest to aid the account holder in such manner.

Accounts prior to AMLA, Open for Inquiry:

Prior to the enactment of the AMLA, the fact that bank accounts or deposits were involved in activities later on enumerated in Section 3 of the law did not, by itself, remove such accounts from the shelter of absolute confidentiality. Prior to the AMLA, in order that bank accounts could be examined, there was need to secure either the written permission of the depositor or a court order authorizing such examination, assuming that they were involved in cases of bribery or dereliction of duty of public officials, or in a case where the money deposited or invested was itself the subject matter of the litigation. The passage of the AMLA stripped another layer off the rule on absolute confidentiality that provided a measure of lawful protection to the account holder. **For that reason, the application of the bank inquiry order as a means of inquiring into records of transactions entered into prior to the passage of the AMLA would be constitutionally infirm, offensive as it is to the *ex post facto clause.***

Still, we must note that the position submitted by Lilia Cheng is much broader than what we are willing to affirm. She argues that the proscription against ex post facto laws goes as far as to prohibit any inquiry into deposits or investments included in bank accounts opened prior to the effectivity of the AMLA even if the suspect transactions were entered into when the law had already taken effect. The Court recognizes that if this argument were to be affirmed, it would create a horrible loophole in the AMLA that would in turn supply the means to fearlessly engage in money laundering in the Philippines; all that the criminal has to do is to make sure that the money laundering activity is facilitated

through a bank account opened prior to 2001. Lilia Cheng admits that "actual money launderers could utilize the ex post facto provision of the Constitution as a shield" but that the remedy lay with Congress to amend the law. We can hardly presume that Congress intended to enact a self-defeating law in the first place, and the courts are inhibited from such a construction by the cardinal rule that "a law should be interpreted with a view to upholding rather than destroying it.

H. Case Studies

Several cases have been filed against erring public officials and employees seeking to forfeit their bank deposits and other real and personal properties which are believed to be materially linked to the predicate offenses of violation of RA 3019, RA 7080 and RA 1379.

1. The Airport Controversy

Respondents are government officials and other individuals who facilitated the awarding of a US$350M government contract involving the construction of an international airport. The contract was eventually nullified by the Supreme Court for being anomalous.

Finding probable cause that there was a violation of R.A. 3019, the AMLC filed an application to inquire into or examine the bank deposits of the respondents.

The RTC initially granted the application for inquiry, but later ordered its suspension when one of the respondents appeared and questioned the inquiry on several constitutional grounds. Hearings were thereafter conducted.

In particular, said respondent averred that before an inquiry may be allowed, the person/s subject of the inquiry must be convicted of the predicate crime alleged. Also, respondent invoked the right to privacy and due process.

The Supreme Court ruled that *Notice and Hearing* are pre-requisites in a *Petition for Bank Inquiry*.

2. The Stealing Soldiers

Respondents are military officials charged under R.A. 3019 and R.A. 1379.

The assets of respondents were garnished pursuant to R.A. 1379. The AMLC proceeded with its own investigation and acquired a *Bank Inquiry Order*. Thereafter, the AMLC proceeded with the filing of a *Petition for Freeze Order* which was subsequently granted by the Court of Appeals.

The respondents questioned before the Supreme Court the Republic's motion for an extension of the freeze order, arguing, among others, that there is no necessity for a freeze order considering that an *Order* of garnishment was already issued by the *Sandiganbayan*.

The Supreme Court denied the petition.

The AMLC, through the OSG, proceeded with the filing of a civil forfeiture case before the appropriate regional trial court which eventually issued a PAPO and APO.

The bottom line is that remedies under RA 1379 are mutually exclusive to the remedies provided under the AMLA.

3. The Embattled Prosecutor

Respondent is a State Prosecutor charged with violation of Section 5, in relation to Sections 3(ee) and 92 of R.A. 9165,[215] as well as, Section 3(b) and (e) of R.A. 3019.

Finding probable cause that violations under R.A. 9165 and R.A. 9160, as amended, were committed, the AMLC filed a petition for the issuance of a freeze order which was granted by the Court of Appeals.

On the basis of Section 11 of R.A. 9160, as amended, the AMLC conducted a bank inquiry

215. Comprehensive Drugs Act of 2002.

sans a court authority.

Accordingly, a petition for civil forfeiture was filed with R.A. 3019 as the predicate offense. The same is pending before the regional trial court. A PAPO and APO were eventually issued.

The bottom line is that no court order for bank inquiry is required in cases involving the unlawful activities of Violations under Republic Act 9165 or the *Comprehensive Drugs Act of 2002*.

4. The Syndicated Schemes

During the last quarter of 2008, a group of companies composed of, among others, rural banks, pre-need companies and real estate companies abruptly closed down and ceased operations. In the aftermath, allegations abounded that illicit activities and fraudulent transactions -- ranging from misappropriation of funds, misrepresentation, and falsification of documents -- amounting to syndicated estafa and violations of the Securities Regulation Code ("SRC"), had been egregiously carried out by respondents (the aforesaid group of companies and their officers and directors) against unsuspecting depositors, investors, policy holders and other credulous individuals.

The AMLC conducted an independent investigation and discovered that respondents committed: (i) the crime of syndicated estafa by employing various fraudulent and devious schemes (*Double-Your-Money Scheme, Motor Cycle Loan and Investment Loan Program*); (ii) violations of Sections 8 and 26 of the SRC; and (iii) violation of Section 16 of the SRC in relation to Pre-Need Rules 34.1 and 35.5 of the New Rules on the Registration and Sale of Pre-Need Plans.

Four (4) *Ex-Parte Petitions for the Issuance of a Freeze Order* covering numerous bank accounts, insurance policies and vehicles were filed before the Court of Appeals. Accordingly, the Court of Appeals issued several freeze orders over the aforementioned bank accounts, assets and properties, which all expired on 13 October 2009.

Before the expiration of the freeze orders or on 20 April 2009, an *Application for Bank Inquiry and/or Examination* was filed before the appropriate regional trial court. It was only on 10 November 2009 that the RTC released an Order allowing the inquiry and/or examination of the bank accounts.

Meanwhile, on 26 October 2009, a petition for civil forfeiture was filed before the appropriate regional trial court and a Provisional Asset Preservation Order was subsequently issued. No Asset Preservation Order has yet been issued.

Notably, the application for bank inquiry was granted and issued after the expiration of the freeze orders. Hence, the petitioner was constrained to file a petition for civil forfeiture based on available evidence and before the bank inquiry could be completed.

I. Conclusion

The Philippines has put forward anti-money laundering provisions which, though still imperfect, show great potential for success. The law may have been enacted with idealism as stimulant, the implementation thereof puts into proper perspective the positive direction being taken by the Philippines in the global fight against money laundering. Indeed, the challenges are enormous yet the hurdles are met with enthusiasm and ingenuity. The subsequent issuance of the *Rules on Civil Forfeiture, etc.,* while demanding, is likewise motivating. The bottom line therefore is that the issues are diverse as they are sometimes complicated.

The cases pending before the trial courts will be the source of emerging jurisprudence on the Philippine anti-money laundering regime and non-conviction based civil forfeiture. Although developing jurisprudence may take time, the Philippines can learn from the experiences of other non-conviction based civil forfeiture regimes.

RECOVERY OF THE MARCOS ASSETS

*Dr. Jaime S. Bautista**

This paper tells of the Philippines' recent experience abroad in its efforts to recover the ill-gotten wealth of former President Ferdinand E. Marcos, his family, and his close business associates and the challenges which the Philippines continues to face despite the judgments obtained in Switzerland, the United States, and the Philippines as bases for the forfeiture of the Marcos ill-gotten wealth.

I. MARCOS CASE IS CLASSIC CASE IN ASSET RECOVERY

You may recall that in 1986, the Philippines requested mutual legal assistance from Switzerland to recover the alleged Marcos ill-gotten wealth at a time when there was no case law in Switzerland to guide this effort. The Marcos case has, therefore, been described as the classic case in asset recovery.

Here, I wish to stress that the right to asset recovery is a fundamental principle of the UN Convention against Corruption (UNCAC) because the right to asset recovery is the major deterrent to high level corruption.

The relative success of the Philippines in recovering some of the Marcos ill-gotten wealth can be credited to a number of factors:

Firstly, President Corazon C. Aquino in the first law that she passed (Executive Order No.1) created the Presidential Commission on Good Government (PCGG), giving it the special mandate to recover all ill-gotten wealth of the Marcoses and his close associates whether located in the Philippines or abroad. This was followed by Executive Order No. 2 which empowered the PCGG to freeze said assets and to appeal to foreign governments wherein such assets are located to take similar measures. Executive Order No. 14 authorized the PCGG to file civil and criminal cases with the anti-graft court, the *Sandiganbayan*, which was given the exclusive original jurisdiction over these cases.

Secondly, there was in place a number of government institutions to assist the PCGG. Thus, Executive Order No. 14 provides that the PCGG shall be assisted by the Office of the Solicitor General and other government agencies in filing and prosecuting all cases investigated by it. The other agencies included the Office of the Special Prosecutor in the Ombudsman assisting in criminal cases and the Central Bank of the Philippines which assisted in freezing bank accounts.

Thirdly, there were laws to prosecute corruption such as Republic Act No. 1379, "An Act Declaring Forfeiture In Favor of the State Any Property Found To Have Been Unlawfully Acquired By Any Public Officer or Employee and Providing For the Proceedings Therefore", which was enacted as early as 1955, and Republic Act No. 3019, the "Anti-Graft and Corrupt Practices Act", passed in 1960 before Mr. Marcos became president. There was also the existence of the *Sandiganbayan.*

Moreover, the Philippines had the good fortune of recovering Marcos diaries and documents left behind in Malacanang, the presidential palace, when the Marcos family fled Manila. These documents revealed the existence of secret bank deposits in Switzerland and other financial centers. In addition, the Philippine government recovered Marcos documents confiscated by the US Customs in Hawaii when Mr. Marcos arrived in Honolulu. These documents included reports of business transactions received by Mr. Marcos from his close associates.

The PCGG's strategy in recovering Marcos ill-gotten wealth was to give priority to recovery of assets

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* Vice Chairman, International Law Association, Philippine Chapter. Dr. Jaime S. Bautista was called to fulfill official duties in the U.S.A on 9 December; therefore, Mr. Levy V. Mendoza, Director of Presidential Commission on Good Government, delivered the following paper on his behalf.

abroad because these are easier to dispose of and dissipate. PCGG's first action was to file civil actions in the United States to recover several buildings in New York City. In Switzerland, the PCGG requested mutual legal assistance to recover bank deposits and securities.

II. MARCOS DEPOSITS IN SWITZERLAND OF CRIMINAL PROVENANCE

After a long and tedious process, the Swiss Federal Supreme Court ruled there was little doubt about the criminal provenance of the secret Marcos accounts and securities hidden in the Swiss banks. It ordered that they be transferred to the Republic of the Philippines, subject to certain conditions and that their disposition be determined by a final enforceable judgment of the competent Philippine court.[1]

Among the conditions was that these accounts and securities be placed under escrow with the Philippine National Bank and that they could be reinvested only in banks with Standard & Poor's "AA" rating.[2]

In 1998, Switzerland turned over to the Republic of the Philippines, as the requesting state, the bank deposits worth some US$ 627 million, in accordance with the decisions of the Swiss Federal Supreme Court, acting as an administrative court.

In 2000, Switzerland turned over two stock certificates of Arelma S.A., representing the entire ownership of Arelma. This is a Panamanian entity created by Mr. Marcos which had opened a deposit with Merrill Lynch in New York. The transfer by Switzerland of the stock certificates to the Republic of the Philippines was made under the same conditions as the bank deposits.

The Swiss Federal Supreme Court dismissed the appeals of the Marcos foundations to prevent the transfer of the bank deposits to the Republic of the Philippines, ruling that these foundations were mere creations of Marcos and under his control, that they had participated in his bad faith, and that they had not contested this finding and could not show an acquisition in good faith independent of Marcos.[3]

The Swiss Federal Supreme Court also dismissed the petition of the Pimentel class of human rights claimants to be admitted to the proceedings and enforce their judgment against Mr. Marcos on the ground that they are creditors without proprietary rights and that, as human rights victims their remedy was to present their claims before the probate proceedings for Mr. Marcos' personal liability or file a claim for damages against the Republic for the wrong committed by its organs.[4]

III. HAWAII JUDGMENT AGAINST MARCOS ESTATE

The Pimentel class of human rights claimants had obtained from the U.S. district court for Hawaii an award of some US$ 2 billion for compensatory damages and exemplary damages against Mr. Marcos for his personal liability for human rights violations, plus attorneys' fees. The awardees consisted of 134 named claimants and some 10,000 unnamed claimants.[5]

The Philippine Government had intervened in this suit in Hawaii by waiving former President Ferdinand E. Marcos' personal immunity as a former head of state but it did not thereby waive its rights to the Marcos ill-gotten wealth. The Hawaii court's award was against the estate of Mr. Marcos, and not against the Philippine Government.

Worthy of note is the compromise agreement between the Marcoses and the Pimentel class, whereby

1. *Federal Office for Police Affairs vs Aquamina Corporation, Panama* (regarding request for mutual Assistance for the Republic of the Philippines), 10 December 1997.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Multi-District Litigation* (*"MDL"*) Case No. 840 (D. Hawaii).

the Marcoses were released from all criminal and civil liability in exchange for the payment of US$150 million to be taken from the Swiss bank deposits under litigation in the forfeiture case in the Philippines. The compromise was to be in full settlement of the Hawaii judgment. It was approved by Judge Manuel Real of the US District Court of Hawaii.

The *Sandiganbayan*, however, rejected the compromise agreement as having no statutory or constitutional justification. Among the reasons, the *Sandiganbayan* noted that the law provides that the ill-gotten wealth of the Marcoses are to be used for funding the Comprehensive Agrarian Reform Program, and that it would be illegal to use these assets for the payment of a judgment debt against the Marcoses. In the words of the *Sandiganbayan,* "the Republic cannot compensate its own citizens for the grave injury done to them and then release from any liability the one or the ones responsible for that grave injury." The *Sandiganbayan* also noted that the attorney's fees claimed was more than US $41 million or more than one quarter of the compromise award, plus other expenses.[6]

Also worthy of note is that there are pending bills in both the Philippine Senate and the House of Representatives to pass the human rights compensation bills which would amend the Comprehensive Agrarian Reform law.[7]

IV. SWISS FEDERAL SUPREME COURT DISMISSED PIMENTEL CLASS PETITION

The Swiss Federal Supreme Court ruled against the claim of the human rights claimants, noting that civil attachments cannot in general prevent a restitution in proceedings for mutual assistance, and that, in this particular case, the civil attachments were obtained after the blocking of the accounts in the legal assistance proceedings and after it had already granted in principle the return of the assets to the Republic of the Philippines.[8]

The Court further ruled that the human rights claimants could not proceed against the blocked bank accounts on the basis of human rights violations because there is no connection between the graft offenses which probably generated the assets in Switzerland and the claims of the creditors (Pimentel c1ass).[9]

Neither from the UN Pact II nor from the UN Agreement against Torture is it possible to derive any right of the victims to attach certain assets for previous compensation. Therefore, the victims of the Marcos regime as a matter principle are obliged to either present their claim in the probate proceedings if they want to assert Ferdinand Marcos' personal liability for the human rights violations committed during his tenure, or they have to claim damages from the Republic for the wrongs committed by its organs.[10]

V. US DISTRICT COURT'S ORDER TO SWISS BANKS TO TRANSFER ASSETS TO PIMENTEL CLASS VIOLATES SWITZERLAND'S SOVEREIGNTY

The Swiss banks also opposed the return of the bank deposits to the Republic of the Philippines on the ground that they could be held in contempt by the US District Court for disobeying its order to transfer the assets to the Pimentel class.[11]

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6. *Republic of the Philippines vs. Ferdinand E. Marcos, et al.* Civil Case No. 0141.
7. *Cf.* House Bill 3756 and S.B. 1532.
8. Supra, note 1.
9. Id. and *Josepito C. Segui and other petitioners vs. Estate of Ferdinand Marcos,* Decision of the Swiss Federal Supreme Court 1A.81/1998/kls.
10. Id
11. *Supra*, note 1. .

The Swiss Federal Court noted that the US Court of Appeals for the Ninth Circuit in the case of In Re Credit Suisse[12] dated 3 December 1997 had already decided that the Order was at variance with the decision of Switzerland to block the accounts upon the request of the Republic of the Philippines and that it, therefore, violated the Act of State of Doctrine, and that the US District Court had been further directed to refrain from taking any further action with respect to these assets.[13]

Furthermore, the Swiss Federal Supreme Court noted that even if the US Ninth Circuit had not ruled in this sense, a refusal of the Philippine request because of the injunctions issued in the United States would have been impossible for fundamental reasons. The Court noted that the injunctions seek to defeat a legal assistance measure which had been validly ordered by the Swiss authorities and that Switzerland has repeatedly intervened with the United States authorities and courts, pointing out that Swiss mutual measures must take priority and that unilateral measures of American courts to force Swiss companies within Switzerland to deliver the blocked accounts to the United states constituted a breach of Swiss sovereignty.[14]

VI. PHILIPPINE JUDGMENT IS AN *IN REM* JUDGMENT

In compliance with the conditions of the Swiss Federal Supreme Court, the PCGG representing the Republic of the Philippines filed a petition for forfeiture against Marcos assets, under the Forfeiture Law in relation to Executive Orders Nos 1, 2, 14, 14-A for violations of the Anti-Graft Law in Civil Case No. 0141. The petition covered, among others, the bank deposits and the Arelma shares. On 15 July 2003, the Philippine Supreme Court, after long delays due in great part to delaying tactics by the Marcoses, granted the forfeiture of the bank deposits.[15] On 18 November 2003, the Supreme Court en banc denied the Marcos' motion for reconsideration and ruled that the forfeiture judgment was a judgment *in rem*.[16] This judgment was limited to the bank deposits and did not include the Arelma shares. Switzerland has acknowledged the validity of the Philippine judgment.

VII. US NINTH CIRCUIT HAS RULED THAT PHILIPPINE JUDGMENT WAS PROTECTED BY ACT OF STATE DOCTRINE

The Pimentel class human rights claimants then sought to pursue contempt and discovery proceedings in the US District Court for Hawaii against the Philippine National Bank to prevent it from enforcing the Philippine judgment. PNB thus filed for mandamus with the US Ninth Circuit to restrain the district court. In issuing the mandamus, the US Ninth Circuit held in the case of *In Re Philippine National Bank*:[17]

> "There is no question that the judgment of the Philippine Supreme Court gave effect to the public interest of the Philippine government. The forfeiture action was not a mere dispute between private parties; It was an action initiated by the Philippine government pursuant to its "statutory mandate to recover property allegedly stolen from the treasury." In re Estate of Ferdinand Marcos Human Rights Litig., 94 F.3d at 546. We have earlier characterized the collection efforts of the Republic to be governmental. Id. The subject matter of the forfeiture action thus qualifies for treatment as an act of state."

12. *Credit Suisse vs. United State District Court for the Central District of California,* 130 F.3d 1342.
13. *Id*.
14. *Supra*, note 1.
15. *Republic v. Sandiganbayan*, G.R. No. 152154, July 15, 2003.
16. *Republic v. Sandiganbayan*, G.R. No. 152154, November 18, 2003.
17. *In re Philippines National Bank vs. United States District Court for the District of Hawaii Respondent, Maximo Hilao; Estate of Fernand Marcos; Imelda Marcos; Fernand R. Marcos Jr. Real Parties in Interest*, 397 F.3d 768.

The mandamus vacated the district court's order and directed it from refraining from any further action against PNB in this action or any other action involving any of the funds that were the subject of the decision of the Philippine Supreme court dated July 15, 2003.

VIII. REPUBLIC PLEADS SOVEREIGN IMMUNITY IN INTERPLEADER PROCEEDINGS

In 2000, Merrill Lynch filed for interpleader before the US District Court presided by Judge Manuel Real because of the conflicting claims of the Pimentel class, among others.

In Singapore, the Pimentel class also filed a claim with WestLB, one of the banks in Singapore where PNB deposited all the accounts it held in escrow, in compliance with Switzerland's condition that it could re-invest these funds only in banks with Standard & Poors "AA" rating. All the other banks had complied with title Philippine judgment forfeiting the accounts in favor of the Republic. WestLB also complied, except for the accounts that had not matured.

WestLB filed for interpleader but did not implead the Republic of the Philippines. The Republic filed motion to intervene but only to invoke its sovereign immunity. The Republic of the Philippines/PCGG also pleaded sovereign immunity in the interpleader for the Arelma assets filed by Merrill Lynch.

IX. US SUPREME COURT DECISION UPHOLDS SOVEREIGN IMMUNITY

In the United States, the US District Court presided by Judge Manuel Real recognized the Republic's/PCGG's sovereign immunity but proceeded to dismiss them from the case. In the absence of the Republic/PCGG, he proceeded with the case and awarded the Arelma assets to the Pimentel class of human rights claimants.

The Ninth Circuit reversed the decision, holding that the Republic/PCGG are entitled to sovereign immunity and are required parties, and entered a stay pending the *Sandiganbayan*'s decision.

Judge Real, however vacated the stay, holding that the litigation in the *Sandiganbayan* could not determine entitlement to the Arelma assets. The Ninth Circuit affirmed. The Republic/PCGG filed for certiorari. Recognizing the importance of the issue of sovereign immunity, the US Supreme Court granted the Certiorari and ordered the US Government to present its views.

The US Government represented by the State Department and the US Solicitor General duly supported the Philippines' position that the interpleader be dismissed and that the issue of the ownership of the assets should be determined by the Philippine courts. The US Supreme Court after oral arguments dismissed the interpleader, ruling that the lower courts erred in not giving sufficient weight to sovereign immunity when they awarded the assets to the human rights claimants.

The Court stated that it is clear that an analysis of joinder cases "instruct us that, where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is potential to injury to the interests of the absent sovereign." The US Supreme Court noted that: "The entities' (Republic of the Philippines and its agency, the Presidential Commission on Good Government) claims arise from historically and politically significant events for the Republic and its people, and the entities' have a unique interest in resolving matters related to Arelma's assets."[18]

The Philippines' case was greatly assisted by the authoritative replies of the US Deputy Solicitor General in answer to a number of issues raised by the Justices of the US Supreme Court:

18. *Republic of the Philippines et al vs. Pimentel, Temporary administrator of Estate of Pimentel. Deceased et al.* 12 June 2008.

- With respect to the requirement of due process and the right to intervene in the *Sandiganbayan,* the claimants are unsecured judgment creditors. In the reverse situation, if they were suing as creditors of a criminal defendant in forfeiture proceedings brought by the United States in US courts, they would typically have no standing to intervene. But if they do intervene, they would have no rights superior to the US because they would not be bona fide purchasers and they would not be without knowledge of the illegal conduct.

- As to whether the Republic was inconsistent in supporting the litigation in Hawaii against former President Ferdinand E. Marcos, and then preventing the class claimants from enforcing judgment against the Arelma assets, the Republic was in exactly the same position as the US would be if the US filed a brief in this Court saying that a former Government official did not have qualified immunity and could be sued in his personal capacity, or that the Westfall Act did not protect him, but that would in no way be a representation by the US that the judgment against that officer could be satisfied out of assets of the United States including assets that the United Slates might be seeking to recover from the defendant.

X. REPUBLIC EXPECTED COMITY FROM SINGAPORE COURTS

In the interpleader case filed by WestLB bank, the Republic of the Philippines did not immediately intervene and it asked to be impleaded after two years, when the lower court did not approve PNB's application for *forum non conveniens*.

The Republic did not immediately intervene because it expected comity from the Singapore courts. The Philippine Supreme Court had rendered an *in rem* judgment forfeiting the funds to the Republic. The Swiss Government had recognized the validity of the Philippine judgment and emphasized the importance of giving validity to the legal assistance that Switzerland had provided to the Republic of the Philippines. The US Ninth Circuit Court had recognized the forfeiture judgment as an act of state and ordered the district court to stop from interfering.

Singapore's Foreign Sovereign Immunity Act provides that its courts can recognize the sovereign immunity of a foreign state even though the foreign state does not appear in the proceeding in question.

XI. SINGAPORE PROCEEDINGS APPEAR TO RUN COUNTER TO CURRENT TRENDS ILL MULTI-LATERAL CO-OPERATION

The High Court stated it was satisfied that the Republic of the Philippines had established sufficient standing to apply to stay the proceedings, citing the test applied in *Juan Ysmael & Co. Inc vs Government of the Republic of Indonesia.* This is similar to the rationale of the decision of the US Supreme Court in the Arelma case. But the High Court further ruled that the Philippines had submitted to the jurisdiction of the court through implied waiver even though the Republic had expressly declared that it was intervening solely to plead its sovereign immunity and was not submitting to the jurisdiction of the forum.

Pending appeal of this judgment to Singapore's Court of Appeal, Switzerland forwarded an Aide Memoire to Singapore's Ministry of Foreign Affairs, upon the request of the Philippine Government.

The Aide Memoire informed the Ministry of the legal assistance provided by Switzerland to the Philippines, and emphasized the importance of close cooperation between governments in dealing with the recovery of illicit assets. The Aide Memoire concluded:

> "..... The proceedings before the Court of Appeals of Singapore appear to run counter to the current trends in multilateral cooperation represented by the

> Convention and by Switzerland's own prior actions in assisting the Philippines and could make future inter-governmental cooperation in such matters more complicated.
>
> Switzerland trusts upon the willingness of other countries to acknowledge the legal property of the Republic of the Philippines in accordance with the decisions of the Swiss Federal Supreme Court to hand over these assets to the Republic of the Philippines."

It is apparent that the Singapore Court of Appeal was unaware of the concerns conveyed by Switzerland in this Aide Memoire when it issued its decision establishing a new doctrine that sovereign immunity cannot cover intangibles such as choses in action.

Thus, the court did not have the benefit of considering the new dimension of international cooperation in recovery of ill-gotten assets due to corruption and the full legal implications of mutual legal proceedings as sovereign acts of both the requested state and the requesting state. This explains, in my view, the treatment by the Court of Appeal of the Marcos ill-gotten assets as a proceeding between private litigants and failed to give cognizance to the Philippines' sovereign interests and recognize the legal effects of the transfer of possession of the bank accounts from the requested state to the requesting state.

The High Court now has all the information before it to have a fuller appreciation of the sovereign claim of the Republic of the Philippines. Hopefully, the court will now be able to consider an early dismissal of the claims of the Pimentel class and the Marcos foundations, based on a number of grounds, including the Act of State or Comity, estoppel and forum shopping, prescription, and lack of legal personality.

A different decision would be incomprehensible. The Singapore courts would have to invalidate the judgment of the Philippine Supreme Court, defeat the legal assistance provided by Switzerland to the Philippines and ignore the judgments of the US Courts of Appeal and the US Supreme Court for these courts to decide to hand over the Marcos ill-gotten assets to the Pimentel class.

With respect to the Marcos foundations, practitioners familiar with the Marcos case are surprised that the foundations are still in the picture especially because the return of the assets to the foundations would partake of money-laundering.

XII. UNCAC RESOLUTION TO REMOVE BARRIERS TO ASSET RECOVERY: SIMPLIFY AND PREVENT ABUSE OF LEGAL PROCEEDINGS

The Conference of the States Parties to the United Nations Convention, bearing in mind that the return of assets is one of the main objectives and a fundamental principle of the United Nations Convention against Corruption and that States parties to the Convention are obligated to afford one another the widest measure of cooperation and assistance in that regard, issued a far-reaching Resolution on Asset Recovery at its third session recently held at Doha on 9-13 November 2009.

This UNCAC Resolution, sponsored by many countries including the Philippines, encourages States parties to eliminate or reduce the barriers to asset recovery by, among others, taking measures to simplify and prevent the abuse of legal proceedings.[19]

19. Doha Resolution on Asset Recovery, paragraph 10.

XIII. CONCLUSION

The litigation to recover the Marcos ill-gotten assets hidden in Switzerland begun in 1986, more than two decades ago and should not be prolonged any longer by third party claims.

It is respectfully submitted that, as suggested by the abovementioned Swiss Aide Memoire, the pending interpleader in Singapore is an abuse and misuse of judicial proceedings by the Pimentel class, which want to have another bite at the cherry, after failing in the Swiss proceedings and the US proceedings, as well as by the Marcos foundations which have no legal or beneficial interest in the assets.

As the financial center in Southeast Asia, Singapore's long awaited ratification of the United Nations Convention against Corruption will show its commitment to UNCAC and display its goodwill to its neighbors and its partners in the region

CORRUPTION: THE CASE IN CAMBODIA

*Vathanak Sina Neang**

I. DEFINING CORRUPTION

Corruption may be defined as the abuse of public position for personal gain or for the benefit of an individual or group to whom one owes allegiance. Corruption occurs when a public official accepts, solicits, or extorts a payment, or when private agents offer a payment to circumvent the law for competitive or personal interest (CSD, 2002:72). Corruption is a two-way process, involving members of both the public and private sector, or a "giver" and a "taker" who are engaged in illegal, illegitimate and unethical action.

II. FORMS OF CORRUPTION

Corruption takes a variety of forms: bribery, nepotism, patronage, theft of state assets, evasion of taxes, diversion of revenue and electoral fraud. The theft of state assets by officials in charged of the stewardship, and manipulation or violation of electoral laws regarding campaign finance and voting is also considered as corruption.

Distinction should be made between "greased" corruption which is payment made to or sought by public official for performing their legal duties, or sought for illegal action. Distinctions are officials and "grand" corruption, which is practiced by senior officials obtaining large benefit for themselves.

Corruption should be "individual" or "collective" according to the number of people involved. Further, it should be classified as "systematic" and "non-systematic" according to the degree whether the corruption was planned and purposely organized. In Cambodia, usually promoting someone to a high government position is connected to his/her contribution in own party's interest, so sometimes the corruption is seen to have a chain and cyclical character.

III. FACTORS AFFECTING CORRUPTION

In general, it can be said that corruption flourishes where the institutions of government are weak, where a government's policy and regulatory regime provide scope for, where oversight institutions (parliament, judiciary, civil society) are marginalized or corrupted themselves. It must be stressed that the causes of corruption are highly contextual, rooted in a country's political development, legal development, social history, bureaucratic traditions, economic conditions and policies. Therefore, efforts needed to combat corruption tend to vary from one country to another.

(a) Political Factors: Corruption levels are linked to the strength of civil society, freedom and independent of the press. Furthermore, for Cambodian
context, due to the fact that the government is formed and influenced by political parties, so the objectives and political strategies play a dominant role in getting and spending their resources. Sometime, the corruption cycle seems to be appeared from time to time and becomes systematic.

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(b) Legal and Ethical factors: A major factor that linked to corruption is the quality of the country legal system, to the existence of effective anti-corruption laws and to the capacity to enforce laws. The corruption also takes place where the ethical value was neglected by the people, for instance, people who commit corruption neglect their dignity and follow their egoism.

(c) Bureaucratic factors: In setting with higher regulatory and bureaucratic interventions in the economy, the incidence of corruption tends to be higher. Where government imposes a large number of rules and regulations, there is greater opportunity for public officials to exploit or subvert them. As discretion increases and accountability declines, the potential for corruption grows.

(d) Salary factors: Where the wages of public servants are low or there exists a large disparity between public and private sector wages, public servant are more tempted to engage in corrupt practices.

(e) Economic factors: Corruption is more likely to proliferate where government creates monopolistic economic setting.

IV. CONSEQUENCES OF CORRUPTION

The endemic corruption has severe consequences for the quality of governance and efforts to attain sustainable development. Corruption is a form of public theft. In stead of acting "grease", corruption serves as a kind of "sand" in the gears of public policy decision-making.

A. Political Consequences

Corruption is insidious, attacking the quality of governance and national stability by undermining the legitimacy of the political process. It fosters contempt for the public service and leads to cynicism about politics. It distorts decision-making, resulting in the wrong projects, prices and contractors, substandard delivery, and promoting of corruption at lower levels. Corruption in the election has also serious consequences. Because of the election campaigns are expensive, candidates and parties rely on funding from wealthy individuals or corporations.

B. Economic Consequences

Corruption compromises the achievement of sustainable development objectives. Bribery results in additional business costs, a burden to small entrepreneurs, and the allocation of the country's human capital and talent. The continuous attention demanded of business by corrupt officials also threatens economic productivity.

Corruption distorts the fair rules of competition. A majority of firms doing business in Cambodia identified unfair or informal competition as at least a moderate problem. Of a variety of potential practices of competitors evaluated that the competitors conspiring to make them in unfair and difficult situation in competitions, such as limit of their access to market and suppliers, competitors, some perceived that the government does not treat firms equally.

Corruption becomes focused on the highest bribe, thereby denying the public advantage of a competitive marketplace.

The poor bear the heaviest burden in such situation, reinforcing gaps between rich and poor. Corruption results in tax evasion and significant losses of revenue for the State. It slows direct foreign and domestic investment because it is perceived as a form of taxation. Corruption causes major misallocation of scarce resources. Instead of meeting basis needs such as food, health and education, resources are sometimes used to finance purely prestige projects with no economic value. In short, the corruption is at root of under-development and poverty.

C. Social Consequences

The political and economic consequences have significant social impact. The corruption demoralizes the population and leads to a lack of confidence on the State Institutions. If it is allowed to expand, corruption erodes political legitimacy. Corruption also causes unequal distribution of public assets and funds to different social class. Very often the poor are the victim of the corruption. Unfortunately, many Cambodian (84%) treat bribery as the normal way of life in their country (CSD, 1998:38).

In brief, uncontrolled corruption also undermines the credibility of democratic institutions and works against good governance. It is the most visible consequences are poor public services, increased social polarization, disinvestments and exclusion.

Corruption on its most basic level is the diversion of public finance and material resources away from the public use for which they are intended. Corruption is simply the private benefit of a few powerful officials at the expense of the people. Money that should go to the treasury in order to provide for the people, through corruption is instead going into the pockets of the senior officials.

In a speech at the conference on Corruption and its impact on National Reconstruction and Reconciliation, Finance Minister estimated that the state as losing up to USD 100 million a year to corruption, primarily because of illegal logging, rubber exportation and fishing (CSD, 1995). Other sources are skeptical that the above assessment was quite low and put the cost at $ 300 million (CSD, 2002:58).

Corrupt practices are responsible for a catalogue of environmental disasters, in particular the destruction of Cambodia's forests – natural resources which the country can, but ill afford to lose. In 1997, the International Monetary Fund canceled $ 60 million in loans to Cambodia because of corruption tin the timber industry. Taking its lead from the IMF, The World Bank declined to renew its budgetary support. Over three years, that support had amounted to roughly $ 85 million (Reuters, 9/23/97).

After discovering that large quantity of rice reportedly worth more than a million dollars was stolen, the WFP alerted the government of the scandal. Many people, including its staffs and government officials involved in this fraud. The WFP has halted new Food for work activities until it can implement safeguards against corruption. Prime Minister Hun Sen agreed to reimburse the WFP for it losses (Cambodia Daily, 9/08/2004).

Recently, the World Bank's report revealed that the pervasive corruption, a suffocating bureaucracy and weak law enforcement are crippling the growth of private business, rending them uncompetitive globally economy. Roughly, 80 percent of 800 firms surveyed in the report acknowledged that "the necessity of paying bribes," which eats up an averages of 5.2 percent of total sales revenue –more than double the amount paid by their counterparts in Bangladesh, Pakistan and China. The report is also mentioning "Trade facilitation practices in Cambodia stand out in having high official and unofficial costs, delays, uncertainty and discretion – a critical problem for a country that must rely on exports for growth. In addition to corruption fees, the report found, firms also pay in time wasted through bureaucratic delays. The complaints of businesses regarding overlapping and time-consuming governmental procedure need to be thoroughly examined, and when these complaints must be justified and corrected.

V. CORRUPTION CASE

In order to start a business in Cambodia, business owner needs to have licenses from different governmental organizations and local authority. Every place where they ask for the services usually takes long time to process the request. The total cost of this process is carried out by an entrepreneur acting alone is about US$ 1500, and the total time required is around 94 days. The cost which include unofficial fees is very high. Unfortunately, registered firms in urban areas paid three times more informal fees than unregistered firms. Formal registered firms spend more time dealing with public official.

Import and export processing, involving a multiplicity of steps, introduce substantial delays, uncertainty, and discretion into the process of trading goods. If they purchases machines, tools or raw materials from abroad, they need or don't need to pay tax according to the conditions that they export their products or not. To get their imported machines, raw materials from the port warehouses, business firms

need to fill and present many documents. The port authority, Customs official, and Camcontrol have to check the goods imported. In each request these government officials to verify the bills, the transaction is formed. Garment factories, responsible for more than 90 percent of the country's exports, typically hire brokers to clear goods from Camcontrol, trade preference and Customs. To bring a 40-foot container from the seaport of Sihanouk Ville to Phnom Penh, a factory has to pay around US$800, half of which is hidden cost whereas in Vietnam it costs $US 200, in China it cost $US 350, in Indonesia it costs $US 320, in Malaysia it costs $US 300, in Sri Lanka it costs $US 484, in Madagascar it costs $US380 (Materials from the 6th private sector forum).

Trading firms reported that border police and veterinary and phyto-sanitary office also carry out their own inspections. So each step involves delays, formal costs and informal payments. Customs clearance by itself imposes substantial delays and great variation, and hence, unpredictability. On average, firms report that import take 6.5 days and great variation, exports take 4.5 days. However, this timing is variable. Clearance at the port of Sihanouk Ville involves, for Customs purpose only, twelve steps, which mainly consist in visiting, sometimes repeatedly, key officials. Importer must see during the clearance (i) Customs headquarters, (ii) twice the chief of Customs at Sihanouk ville, (iii) twice the chief of port Customs, and (iv) twice his deputy; two different positions are responsible for affixing stamps on the declarations. Each step may involve long waits and negotiations. All cargo that is neither sealed nor pre-inspected by SGS is submitted to a routine X-ray scan (with very limited rates of detection of irregularities), after which a decision is made whether or not to inspect the shipment. All goods taken out of the port can be re-examined at the gate (World Bank report, 2004: 18-19)

After the production, the garment factories additionally need to have Certificate of Origin from the trade preference department of Ministry of Commerce. Department needs to inspect goods before issuing the above certificate. During the inspections money regularly exchanges hands. It cost them from $150 to $170 and half of which is hidden costs. Then they have to transport container full of finished garment back to the seaport. The outbound cost is about 880 $US, as they need to accommodate additional inspection (Materials from the 6th Government – private sector Forum).

Cambodian firms are subject to an unusually high number of inspections, averaging 16 per year.

Officials usually do not see something wrong with their practices. "It's not bribery, it's more like sympathy. Some small thing to sustain the life of the inspectors." But the cost of doing business in Cambodia is not similar for all. Companies with links to "senior officials" pay less for inspections. Paying at least 5.5 percent of business annual revenues in unofficial fees could be just too high for many (Phnom Penh Post, June 4-17, 2004).

VI. MEASURES TAKEN BY THE ROYAL GOVERNMENT OF CAMBODIA

The Royal Government completed some other activities to cope with corruption:

In 1996, three customs officials were suspended for a document-forging scheme in which they undervalued imported vehicles so they pockets the difference in import duties, which amounted to hundreds of thousands of dollars. Later, Second Prime Minster Hun Sen warned 1,000 to 2,000 customs officials that they risked losing their jobs if they continued cheating the country out of badly of needed tax revenues (Associated Press, 10/17/1997).

In 1999, Prime Minister Hun Sen told a forum that Customs officials who demand bribes would be fired. He added, *"Mr. Customs has to stop disturbing investors. Customs is the king of corruption"* (Cambodia Daily, 3/27-28/04).

Recently, Prime Minister Hun Sen said in a strongly worded speech at CDC: "*If we don't ban corruption, we will lose investment and we will die*". The premier also announced several "concrete measures" to streamline the import-export documentation process in an effort to reduce corruption and make the garment industry more competitive. From 1 September 2004, the Customs and Excise Department and Camcontrol will conduct joint inspections. Also, the cost of registering a business at Commerce Ministry will drop from $615 to $177 and the time spent on paperwork will be cut from 30 days to 10 days

(Cambodia Daily, 8/21-22/2004).

- Facing the invasive corruption, the government agreed that it must do more to improve the investment climate by tackling the high cost of business, bureaucratic red tape and corruption. During pre-CG meeting, Prime Mister Hun Sen responded to the donors' concerns, declaring *"war" on corruption*, legal and judicial reform and public administration reform. He announced that he would force his ministers to answer questions from the National Assembly once a week. He threatened *to bring to court any official who do not change their corrupt activities* (Cambodia Daily, 9/11-12/2004).

- At the National Conference on Strengthening Good Governance Poverty Alleviation and Development on 14 December 2004, Prime Minister said that the tax revenue amounts to mere 7.5 percent o the government's budget compared to 8.6 percent in Laos. He announced that in an effort to generate greater tax revenue and impose stricter rule in the bureau he would remove the Finance Ministry's tax department director from his post. In addition, the premier announced to offer incentives to those who apprehend smugglers (Cambodia Daily, 15/12/2004).

- Addressing at the National Health Congress on 03 March 2005, Prime Minister announced an emergency campaign by using *"iron fist"* of judicial reform, vowing to re-arrest hundreds of armed robbers who bribes their way out of jail and to arrest of corrupt judges and prosecutors (Cambodia Daily, 04/03/2005).

Report on corruption in Cambodia Page 6 of □ The Commerce Minister Cham Prasidh, 14 March 2005, vowed to resign at the end of the year if by that time corruption still plagues the taxation and regulation of the garment industry. He added, "*in order to help the garment sector to survive, we must cut all the under-the-table costs,*" "*How can I still be a commerce minister if the garment industry dissolves?*" Last month on February, Prime Minister Hun Sen laid out a 12-step plan aimed primarily at ending corruption affecting export industries. The plan focused on simplifying customs procedures and eliminating opportunities for bribe-taking (Cambodia Daily, 14/03/2005).

Speech at the close of the Ministry of Interior's annual conference on 17 March 2005, Prime Minster Hun Sen warned that police, military, court, and government officials will be punished if they are caught conspiring with those who run the sex trade. He said, "Regardless if you are wearing star ranks, even moon, you will be remove". (Cambodia Daily, 18/03/05)

Besides warning, blaming and promising made by the Prime Minister, the government has achieved many concrete measures such as:

- Establishment of National Assembly-Senate Relations and Inspection
- Set up the National Auditing Authority, an independent public institution shall report directly to the National Assembly, Senate and the Royal Government for information purpose.
- Establishment of "Priority Mission Group" (PMG) with technical assistant of ADB
- Acceleration of legal and judicial reform program
- Completion of the Governance Action Plan (GAP): the eight priority areas such as the Legal and Judicial Reform, Administrative Reform, Decentralization and Local Governance, Public Finance Reform, Anti-Corruption, Gender equity, Demobilization and Reform of the Armed Force, and the Reform of Natural Resources Management.
- The government subsequently drafted its own legislation concerning anti-corruption
- Set up regular forum between investors and government officials

The government launched the Rectangular Strategy acknowledging good governance and fighting corruption are quite important.

VII. ACTION TAKEN BY STAKEHOLDERS TO FIGHT CORRUPTION

A. The National Assembly and Senate

The National Assembly had adopted Law on Audit and Civil Servant Statute Law.

B. Political Parties

In Cambodia, during the 1998 and the 2003 election campaign, anti-corruption measures were featured in every major party's political platform.

C. International Organizations and Donor Countries

They asked the Government to submit the Anti-corruption draft law to the National Assembly by June 2003, and urged the Government to endorse the Anti-corruption Action Plan for the Asia and Pacific, which already been adopted by seventeen other Asian and Pacific government in Tokyo in 2001.

1. Civil Society

Many non-profit organizations play a crucial role n combating corruption. Among them, Center for Social Development (CSD) actively organizes conferences, seminars, publishes and distributes journals and brochures educated how to deter corruption.

2. Citizenship

From time to time the people complaint about the local authority, police or soldiers who ask the bribe when the people transport their farm product to the markets.

3. The Press

The press from time to time publish stories on corrupt cases.

VIII. CONDITIONS FOR A SUCCESSFUL ANTI-CORRUPTION CAMPAIGN

Now it is recognized that in order to fight corruption successfully, there are seven crucial factors, as follows:

(i) Will

It must have strong a political will to deal with this problem.

(ii) Law

It must be a strict law defining clear offenses, showing the value of community, power for effective investigation, and rules of evidence for a fair prosecution for those who accused of corruption.

(iii) Strategy

To fight corruption it must have a clear, full and consistent strategy which consists of three significant components:

- Effective law enforcement,
- Deterring corruption by elimination of loopholes which may cause both grand and greased corruption,
- Deterring corruption by educating and encouraging the public people to contribute and fight corruption.

(iv) Facilitating Activities

In order to make the above components effective, it must have the facilitating activities.

(v) Resources

Leaders have to recognize that to fight corruption successfully it depends upon both human and

financial resources.

(vi) Public Support

The authorities are not able to fight corruption without contribution of people, so all the communities should join from the start.

(vii) Patience

Everyone should be aware that to gain success in fighting corruption it takes times and may cause hurt. Furthermore, when the measures are taken, they shall be under a continuous supervision. As a result, the commitment needs a long period of times and resources for anti-corruption in which permanent expenditure of annual national budget is required.

ANTI-MONEY LAUNDERING MEASURES TO FREEZE, CONFISCATE AND RECOVER PROCEEDS OF CORRUPTION IN THE INDONESIAN PERSPECTIVE

*Yanuar Utomo**

I. INTRODUCTION

Combating money laundering has been a primary concern for Government of Indonesia (GOI) since the economic and political crises erupted in 1997. The GOI paid more attention in eradicating such criminal activities, both because of our domestic needs and to meet our international commitments. It is deemed necessary to eradicate those criminal acts because the domestic crises occurred mainly due to corruption, collusion and nepotism -- fundamental weaknesses that are basically homegrown problems.

Moreover, money laundering is not only a national crime but also a transnational crime, therefore it has to be eradicated, among other things by engaging in regional or international cooperation through bilateral or multilateral forums. Internationally, the prevention of the criminal offenses of money laundering has been promoted by the establishment of a task force known as The Financial Action Task Force (FATF) on Money Laundering by the G-7 Summit held in Paris on July 1989. Indonesia is yet a member of FATF, but has been a member of the Asia Pacific Group on Money Laundering (APG), an international cooperation organization established in 1997 to cooperate with FATF in the Asia Pacific regions.

With regards to the links between corruption and money laundering issues as mentioned above, many initiatives have been developed. Several initiatives and products of the United Nations in general and of *United Nation Office on Drugs and Crime* (UNODC) in particular are relevant to the links between corruption and money laundering. As it may be aware that the UNODC has developed the *United Nations Convention against Corruption* (UNCAC), which has been signed by 106 countries.

The UNCAC obliges Member States in its Article 14 to institute a comprehensive domestic regulatory and supervisory regime for banks, non-bank financial institutions, and other bodies particularly susceptible to money laundering to deter and detect all forms of money laundering. Moreover, UNCAC obliges Member States to establish as criminal offences the laundering of the proceeds of corruption, as well as to consider the establishment of the offence of concealment or continued retention of property, which is the result of any of the offences established in accordance with UNCAC.

This paper will present the nature of the crime of money laundering, the anti-money laundering measures, the Indonesia's perspective on anti money laundering measures, and the links between corruption and money laundering.

II. THE CRIME OF MONEY LAUNDERING

In plain words, money laundering is a process where cash or property that has been obtained or derived from illegal or criminal activities is converted into a seemingly legitimate source.

Money Laundering is then a process used by people (usually criminals) to conceal the illegal origin of money derived from criminal activities, like corruption, drug trafficking, smuggling, fraud, embezzlement, and so on. Money launderers attempt to conceal or disguise the source or origin of their illegal money with the gainful and commercial intent of legalising them so that these proceeds can be seen as legitimate sources.

Why do people launder money then?

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The money launderer wants to distance or separate himself from the criminal activity that generates illegal profits that it will be hard to prosecute the key organizers who are involved in the illegal activities.

A. Money Laundering Processes

Money laundering involves three stages:

1. Placement

This process involves the physical disposal of the illegally obtained cash or property proceeds. The physical entry of bulk cash or illegally obtained funds is achieved via placement into the financial or trading systems.

2. Layering This process separates the illegal proceeds from their illegitimate source through a series of transactions (banking or payment transaction), where such transactions create the appearance of anonymity, and obscure the audit trail.

3. Integration

Integration is last stage of cleaning the "dirty" money. In this process, the illegal proceeds are placed or 'mixed' with the other normal, legitimate transactions or deposits. Such transactions now become normal business or legitimate funds/proceeds circulating and in use in the actual economy

III. THE ANTI-MONEY LAUNDERING MEASURES

A. Reporting Parties

1. Revised FATF Recommendation 13 & 16:

If a financial institution suspects or has reasonable grounds to suspect that funds are the proceeds of a criminal activity, or are related to terrorist financing, it should be required, directly by law or regulation, to report promptly its suspicions to the financial intelligence unit (FIU).

The report requirements also apply to all designated non-financial businesses and professions, subject to the following qualifications:

(i) Lawyers, notaries, other independent legal professionals and accountants should be required to report suspicious transactions when, on behalf of or for a client, they engage in a financial transaction in relation to the activities described in Recommendation 12(d).
Countries are strongly encouraged to extend the reporting requirement to the rest of the professional activities of accountants, including auditing.

(ii) Dealers in precious metals and dealers in precious stones should be required to report suspicious transactions when they engage in any cash transaction with a customer equal to or above the applicable designated threshold.

(iii) Trust and company service providers should be required to report suspicious transactions for a client when, on behalf of or for a client, they engage in a transaction in relation to the activities referred to Recommendation 12(e). Lawyers, notaries, other independent legal professionals, and accountants acting as independent legal professionals, are not required to report their suspicions if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege.

2. Indonesian Context

Law No.15 year 2002 concerning the Crimes of Money Laundering as amended by Law No.25 year 2003 (AML Law) says Reporting Parties shall be Financial Service Providers (FSP), which are any person providing services in the financial field or other services in relation to finance, including but not limited to banks, financial institutions, securities companies, mutual fund managers, custodians, trust agents,

depository and settlement agencies, foreign exchange traders, pension funds, insurance companies and the post office.

In the near future, they will be expanded to include DNFBPs, such as lawyers, notaries, accountants, real estate agents, and so on.

B. Exception of Bank Secrecy

1. Revised FATF Recommendation 4

Countries should ensure that financial institution secrecy laws do not inhibit implementation of the FATF Recommendations

2. Indonesia Context

Article 14 AML Law clearly stipulates that the reporting obligations of Providers of Financial Services which are banks shall be exempted from bank secrecy provisions as contained in laws regulating bank secrecy.

C. Safe Harbour

1. Revised FATF Recommendation 14

Financial institutions, their directors, officers and employees should be:

(i) Protected by legal provisions from criminal and civil liability for breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, if they report their suspicions in good faith to the FIU, even if they did not know precisely what the underlying criminal activity was, and regardless of whether illegal activity actually occurred.

(ii) Prohibited by law from disclosing the fact that a suspicious transaction report (STR) or related information is being reported to the FIU.

2. Indonesian Context

Article 15 AML Law stipulates that no civil or criminal action can be brought against Providers of Financial Services, their officials and their employees for carrying out of reporting obligations as required by Law

D. Special Protection for Witnesses and Reporting Parties

Article 40 Indonesian AML Law stipulates that any person reporting a suspicion that the crime of money laundering may have occurred shall be provided with special protection by the state against possible threats endangering the person, their life, their family and/or their assets.

The Government Regulation No.57 Year 2003 and Chief of Indonesia National Police Decree No.17 Year 2005 shall be implementing regulations.

E. Financial Intelligence Unit (FIU)

1. Revised FATF Recommendation 26 & UNCAC Art.58

Countries should establish an FIU that serves as a national centre for the receiving (and, as permitted, requesting), analysis and dissemination of STR and other information regarding potential money laundering or terrorist financing. The FIU should have access, directly or indirectly, on a timely basis to the financial, administrative and law enforcement information that it requires to properly undertake its functions, including the analysis of STR.

2. The Egmont Group definition of FIUs

A central, national agency responsible for receiving, (and as permitted, requesting), analyzing and disseminating to the competent authorities, disclosures of financial information concerning suspected

proceeds of crime and potential financing of terrorism or required by national legislation or regulation, in order to combat money laundering and terrorism financing.

F. Financial Analysis

Financial analysis is the second element of the core functions of an FIU after receiving report.

The main purpose of analysis is to establish whether the data contained in the reports, substantiated as necessary by the FIU, provide a sufficient basis to warrant transmitting the file for further investigation or for prosecution (as the case may be).

The analytical process starts with the receipt of a report, continues with the collection of additional related information, goes through different forms of analysis, and ends with either a detailed file concerning a money-laundering case that is forwarded to the law enforcement authorities or prosecutors or the reaching of a conclusion that no suspicious activity was found.

G. Investigation

Investigation is obtaining of information that has relevance in criminal proceedings.

1. Revised FATF Recommendation 27

Countries should ensure that designated law enforcement authorities have responsibility for money laundering and terrorist financing investigations. Countries are encouraged to support and develop, as far as possible, special investigative techniques suitable for the investigation of money laundering, such as controlled delivery, undercover operations and other relevant techniques.

2. Indonesia Context

(i) Proactive Data Gathering (Pre-Investigation)

With its initiative, INTRAC would gather the financial information involving the suspected persons in particular cases. The provided information may lead to the Proactive Investigation.

(ii) Proactive Investigation

The police investigators or the prosecutors would then conduct the investigation based on the PPATK's referrals.

H. Access to Customers' Information

1. Revised FATF Recommendation 28

When conducting investigations of money laundering and underlying predicate offences, competent authorities should be able to obtain documents and information for use in those investigations, and in prosecutions and related actions. This should include powers to use compulsory measures for the production of records held by financial institutions and other persons, for the search of persons and premises, and for the seizure and obtaining of evidence.

2. Indonesia Context

When conducting investigation, prosecution and examination before the courts of money laundering crimes, Article 33 Indonesian AML Law authorizes investigators, public prosecutors or judges request information from Providers of Financial Services regarding Assets of any persons reported by the PPATK, a suspect, or a defendant for the purpose of the court proceedings.

I. Asset Tracing

Asset tracing is an essential part of financial investigation. The objectives of this activity are:

- To trace the proceeds of crime, Analysis of legal sources of wealth compared to the assets;
- To secure the order of value based confiscation;

- To determine what the suspected person has to prove that has been legally obtained (when reversed burden of proof);
- To calculate the size of the proceeds;
- To determine the level of the fine

J. Asset Recovery

1. Revised FATF Recommendation 38

There should be authority to take expeditious action in response to requests by foreign countries to identify, freeze, seize and confiscate property laundered, proceeds from money laundering or predicate offences, instrumentalities used in or intended for use in the commission of these offences, or property of corresponding value. There should also be arrangements for coordinating seizure and confiscation proceedings, which may include the sharing of confiscated assets.

2. UNCAC Art. 51, 55 & 57

The return of assets is a fundamental principle of anti-money laundering regime, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard.

3. Special Cooperation

UNCAC Art.56 allows State Party to forward information on proceeds of offences without prior request (spontaneous), which might assist the receiving State Party in initiating or carrying out investigations, prosecutions or judicial proceedings.

4. Forfeited Asset Sharing

UNCAC Art.57 stipulates that 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.

5. Indonesian Context

Law No.1 year 2006 concerning Mutual Legal Assistance art. 57 clearly stipulates the arrangement of forfeited asset sharing with other State Party on bilateral basis.

In line with UNCAC art.58, INTRAC/PPATK was established at 2002 as Indonesian FIU. The PPATK became the Egmont FIU since June 2004 and has been conducting the international cooperation on the basis of either MoU or reciprocity.

The well-known case of Hendra Rahardja gives us an example of facilitating a MLA. In the case of the exhaustion of legal remedies in Australia with regard to the Extradition request and the fact that Hendra Rahardja died in Sydney on 26 January 2003, Indonesia and Australia agreed to develop other cooperation under the Treaty of Mutual Legal Assistance in Criminal Matter between the two countries and to create a Joint Task Force to identify and recover proceeds of the money laundering crimes of Hendra Rahardja and his associates in Australia. The recovered asset brought back to Indonesia was in amount of +/- AUD600,000.

IV. MUTUAL LEGAL ASSISTANCE

A. Revised FATF Recommendation 36-37

Countries should rapidly, constructively and effectively provide the widest possible range of mutual legal assistance in relation to money laundering and terrorist financing investigations, prosecutions, and related proceedings.

Countries should, to the greatest extent possible, render mutual legal assistance notwithstanding the absence of dual criminality. Where dual criminality is required for mutual legal assistance or extradition, that requirement should be deemed to be satisfied regardless of whether both countries place the offence within the same category of offence or denominate the offence by the same terminology, provided that both countries criminalise the conduct underlying the offence.

B. Article 14 & 46 UNCAC

Administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering have the ability to cooperate and exchange information at the national and international levels.

Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings.

C. Indonesia Context

Article 44 & 44A Indonesia AML Law:

For the purpose of preventing and eradicating money laundering, MLA can be undertaken with other countries through bilateral or multilateral forums in accordance with prevailing laws and regulations.

MLA Agreement/Treaty with Government of the Republic of Indonesia or under principles of reciprocity.

MLA includes, among other things, collecting evidence and statements from person, providing evidence in the form of documents, searching for and freezing the proceeds of crime, and others.

Indonesia MLA Law:

Law No.1 Year 2006 concerning Mutual Legal Assistance enacted by 3 March 2006:

- Legal basis for MLA request
- Central authority : Dept. of Law & HR
- Technical Procedure for MLA request
- Forfeited asset sharing arrangement

V. LINKS BETWEEN CORRUPTION AND MONEY LAUNDERING

In general, three principle areas of cross-over between corruption and money laundering have been identified:

- Corruption generates enormous profits to be laundered;
- Corruption facilitates many money laundering and terrorist financing methods and supports predicate criminal activities; and
- Systemic corruption undermines the effectiveness of legislative, regulatory and enforcement anti money laundering measures.

Given the condition above-mentioned, several initiatives and products of the United Nations in general and of *United Nation Office on Drugs and Crime* (UNODC) in particular are relevant to the links between corruption and money laundering. As it may be aware that the UNODC has developed the *United Nations Convention Against Corruption* (UNCAC), which has been signed by 106 countries.

The UNCAC obliges Member States in its Article 14 to institute a comprehensive domestic regulatory and supervisory regime for banks, non-bank financial institutions, and other bodies particularly susceptible to money laundering to deter and detect all forms of money laundering. Moreover, UNCAC obliges Member States to establish as criminal offences the laundering of the proceeds of corruption, as well as to consider the establishment of the offence of concealment or continued retention of property, which is the result of any of the offences established in accordance with UNCAC.

A. Indonesia Context

- Corruption and money laundering are criminalized under Indonesian Law.

- AML Law clearly stipulates that corruption is one (and the first) of predicate crimes, which its proceeds of crime to be laundered.
- Anti corruption agency (KPK) and Financial Intelligence Unit (PPATK/INTRAC) have been established and have very close cooperation.
- The INTRAC/PPATK and the KPK have signed the Memorandum of Understanding (MoU) in 29 April 2004. The coverage of MoU includes, among other things, sharing information, Liaison Officer assignment, and joint training.
- Most of the essential investigating cases by KPK rely on the financial information provided by PPATK. Some of those cases have been charged by the court.

VI. FINAL WORDS

The anti money laundering measures should be established and strengthened to reduce the degree of crimes in general and corruption in particular.

For country that corruption is a serious problem, anti corruption law as well as anti money laundering law must be available. The nation shall criminalize both corruption and money laundering offence. In addition, in AML Law, corruption shall be one of predicate crimes, which its proceeds of crime to be laundered. In addition, to effectively eradicate the crime of corruption and money laundering, country shall have anti corruption agency and financial intelligence unit, in which both agencies shall have very close cooperation.

VII. THE INDONESIAN FINANCIAL TRANSACTION REPORTS AND ANALYSIS CENTRE ("PPATK")

The PPATK (Indonesian Financial Transactions Reporting and Analysis Centre) is an independent body that reports directly to the President and became fully operational on 20 October 2003. The PPATK is Indonesia's Financial Intelligence Unit (FIU) and as such will be the pivotal agency in the anti-money laundering regime. PPATK is lead by a Head appointed under the authority of the Act. The Head is assisted by four Deputy Heads comprising Deputy Head of Analysis, Research and Inter Agency Cooperation, Deputy Head of Legal and Compliance, Deputy Head of Technology and Information, and Deputy Head of Administration. The responsibilities of the Head and Deputy Heads have been set out at a high level in Presidential Decree No. 81 Year 2003 concerning the Organizational Structure and Working Procedure of the PPATK.

A. Duties and Powers

Article 26 of Law No. 15 Year 2002 concerning the Crime of Money Laundering as amended by Law No. 25 Year 2003 states that in implementing its functions, the PPATK shall have the following duties:

1) To collect, maintain, analyse and evaluate information obtained by the PPATK in accordance with this Law;
2) To monitor records in the exempt registry prepared by Providers of Financial Services;
3) To prepare guidelines of procedures for reporting of suspicious financial transactions;
4) To provide advice and assistance to relevant authorities concerning information obtained by the PPATK in accordance with the provisions of this Law;
5) To issue guidelines and publications to Providers of Financial Services concerning their obligations as set forth in this Law or in other prevailing laws and regulations, and to assist in detecting suspicious customer behavior;

6) To provide recommendations to the Government concerning measures for the prevention and eradication of money laundering;
7) To report to the Police and the Public Prosecutor's Office the results of analyses of financial transactions which indicate money laundering;
8) To prepare and provide reports regarding the results of analyses of financial transactions and other activities once every 6 (six) months to the President, the House of Representatives (DPR) and to agencies authorized to supervise Providers of Financial Services.
9) To provide information to the public concerning its institutional performance, to the extent that such disclosure is not contrary to the provisions of this Law.

Article 27 of Law No. 15 Year 2002 concerning the Crime of Money Laundering, as amended by Law No. 25 Year 2003, states that in executing its duties, the PPATK shall have the following powers:

1) To request and receive reports from Providers of Financial Services;
2) To request information concerning the progress of investigations or prosecutions of money laundering that have been reported to investigators or public prosecutors;
3) To audit Providers of Financial Services for compliance with the provisions of this Law and guidelines for reporting financial transactions;
4) To grant exemptions from the reporting obligation for Cash Financial Transactions referred to in Article 13(1)(b).

To implement its duties and powers, Presidential Decree No. 81 Year 2003 concerning the Organizational Structure and Operational Procedures of the PPATK and the Presidential Decree No. 82 Year 2003 concerning the PPATK's Authorities were enacted, both of which were issued on 3 November 2003.

B. Attribution

It is commonly acknowledged that FIU may range from units conducting a sort of intelligence tasks (such as tapping phone calls) to units that just do some paper work (documentation review). In this regards, as mandated by the money laundering Law and the Presidential Decree No. 82 Year 2003 concerning the PPATK's Authorities, PPATK is attributed by administrative power only, among other things are as follows:

- To request and receive reports, Suspicious Transaction Reports and Cash Transaction Reports, from Financial Service Providers;
- To request additional information from Financial Service Providers, in case reports provided by Financial Service Providers are not reliable enough;
- To request assistance and information from domestic and foreign agencies for its purposes in analyzing any suspicious financial transaction in preventing and eradicating the crimes of money laundering;

and many other administrative powers.

Therefore, in term of conducting its function as FIU, PPATK is not attributed by investigative powers and other intelligence duties, such as tapping phone calls, doing under cover, on-site investigative, and others.

C. Type of Reports Filed to INTRAC/PPATK (Indonesian FIU)

1. Suspicious Transaction Reports (STRs)

Suspicious Financial Transactions shall be financial transactions:

- deviating from the profile, characteristics or the usual transaction patterns of the customer concerned;
- by customers that can be reasonably suspected to be conducted for the purpose of avoiding reporting of the transactions; or
- whether or not completed using assets that are reasonably suspected to constitute the proceeds of crime.

2. Cash Transaction Reports (CTRs)

Cash Financial Transactions shall be withdrawals, deposits or entrustments on a cash basis or using other monetary instruments, utilizing Providers of Financial Services, to a cumulative total of Rp.500,000,000.00 (five hundred million rupiah) or more or an equivalent amount in another Currency (approx.USD55,000), made either in one transaction or in several transactions within 1 (one) business day.

D. Cross Border Cash Carrying Reports (CBRs)

Any person taking cash into or out of the territory of the Republic of Indonesia in the amount of Rp 100 million or more, or the equivalent in another currency (approx.USD11,000), must report to the Directorate General of Customs and Excise.

The Directorate General of Customs and Excise must report the information received within 5 (five) days to the PPATK/INTRAC.

MEASURES TO FREEZE, CONFISCATE AND RECOVER PROCEEDS OF CORRUPTION, INCLUDING PREVENTION OF MONEY-LAUNDERING

*Xaysana Souliyavong**

I. COUNTER-CORRUPTION ORGANISATION

A. Status and Role

The counter-corruption organisation is a State organisation that has the role to prevent and counter corruption within the country by assigning to the State Inspection Authority at central level and state inspection authorities at provincial level to implement [this task]. The counter-corruption organisation is an investigation organisation and performs its duties independently.

B. Organisational Structure

The organisational structure of the counter-corruption organisation consists of:

1. [Counter-corruption organisation] at central level;
2. [Counter-corruption organisation] at provincial level.

The counter-corruption organisation at the central level has a status equal to a ministry. The head of such organisation is appointed and removed by the same procedure as a member of the government.

The counter-corruption organisation at the provincial level has a status equal a provincial division. The head of the counter-corruption organisation at the provincial level is appointed or removed by the head of the counter-corruption organisation at the central level, after coordination with the provincial governor, city mayor, or chief of special zone.

The supporting mechanism of such organisation shall comply with general regulations on public administration.

C. Rights and Duties of the Counter-Corruption Organisation at Central Level

The counter-corruption organisation at the central level has the following main rights and duties: policies, directives, plans, laws, regulations, and measures

1. To studyrelating to the prevention and countering of corruption, and thereafter to submit to the government for consideration;
2. To direct and inspect the implementation of activities relating to the prevention and countering of corruption within the entire country;
3. To conduct activities to prevent and counter corruption among government staff within the entire country, especially government staff under the supervision and management of the central level and other government staff of organisations at the central level;
4. To conduct investigations into corruption by using measures that are defined in the law on criminal procedure;
5. [During the period] when the inspection has yet to be completed, to propose the temporary suspension [of a person under inspection] from his position or duty or [to propose that a person under inspection] not be removed, appointed, or have his job swapped;

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6. To liaise, coordinate, and cooperate with concerned sectors at the central and local level to perform its rights and duties;
7. To consider, decide, and use measures against the inspected person as provided in the laws;
8. To summarise the results of activities for the prevention and countering of corruption, and then to periodically report to the Prime Minister and the National Assembly Standing Committee;
9. To exercise such other rights and perform such other duties as provided by laws and regulations.

D. Rights and Duties of Counter-Corruption Organisations at Provincial Level

Counter-corruption organisations at the provincial level [each] have the following main rights and duties:

1. To implement policies, directives, plans, laws, regulations, and measures relating to the prevention and countering of corruption;
2. To conduct activities to prevent and counter corruption among government staff who are within the scope of its responsibility and are not under the supervision of the [counter-corruption organisation at the] central level;
3. To conduct investigations into corruption by using measures that are defined in the law on criminal procedure;
4. [During the period] when the inspection has yet to be completed, to propose the temporary suspension [of a person under inspection] from his position or duty or [to propose that a person under inspection] not or have his job swapped; be removed, appointed,
5. To liaise, coordinate, and cooperate with concerned sectors to perform its rights and duties;
6. To consider, decide, and use measures against the inspected person as provided in the laws;
7. To summarise the results of activities for the prevention and countering of corruption, and then to periodically report to the head of the counter-corruption organisation at the central level, the provincial governor, the city mayor, the chief of special zone, and the chairman of the members of the National Assembly in such constituency ;
8. To exercise such other rights and perform such other duties as provided by laws and regulations

II. OVERALL ANTI-CORRUPTION STRATEGY OF LAO PDR

Over recent years the implementation of new policies has achieved great results; the economy has developed; foreign relations have greatly improved; there has been an increase in domestic and foreign investment; and the GDP has increased by 7%. Under Lao PDR's comprehensive reform, the society has stabilized and striving to reach the national goals of: "rich people, a strong nation, and an equal and civilized society". We are now in a position where we can reduce unnecessary public expenditure, improve government service delivery to citizens and improve the living conditions of the population. However, achieving our national goals remains difficult. There are still many obstacles to overcome. Laos has just entered the free market economy, from a traditional centrally planned economy (which is characterized by a severe lack of laws). Because of the previous economic model and simultaneous lack of regulations, the country has become a breeding ground for corruption. The government understands that corruption poses a major threat to Lao PDR's poverty reduction plan and the nation's development. Corruption has caused major losses of state properties and created a general disrespect from the public towards the government.

A. National Strategy

Recognizing the damage caused by corruption, the government has issued various degrees, orders, regulations, instructions and law in order to prevent and eliminate malpractice within government offices.

1. Legal Instruments

At the national level, three of the priority key measures taken are: issuing rules and orders (i.e. the law on anti-corruption in 2005), establishing anti-corruption authorities and the public administration reform.

Important legal instruments have been adopted:

- Law on anti-corruption in 2005
  This law has been applied as a basic legal instrument for combating and preventing fraud and corruption.
  The Law on Anti Corruption clearly regulated measures for prevention of corruption. However, the implementation of this law is not effective. The coordination between the prosecutor offices and the state inspection authority at the central and local level is very poor. Only few and small cases of corruption reach the court. Many cases are solved by using the disciplinary measures.
- Law on State Inspection in 2007
  Law on State Inspection (2007) is newly adopted by the National Assembly and is an instrument for the implementation of the activities of State Inspection Authority to successfully carry out the inspection and investigation of corruption, including the creating rule on asset re-declaration.
- Party resolution on 14 prohibitions for high ranking officials- outlining activities that they must not be involved in corruptions; defining their responsibilities; and, specifying the accountability that falls under their political leadership.

- Set of civil service regulations clearly defined certain practices to combat corruption.
  For the rest of civil service a set of civil service regulations, clearly defined certain practices to combat corruption. For example, Article 32 states that civil servants can not partake in any business activities that represent a conflict of interest (i.e. a civil servant's member running a business in the sector under the civil servants management).
- The Prime Minister's Instruction No 016/PM (31 August 1998) on more thrifty and cost effective practices.
  The Prime Minister's Instruction No 016/PM(31 August 1998) informed the Ministers, the Governors of the Province and Mayor of the Vientiane Municipality, that they must educate public servants and Lao citizens on more thrifty and cost effective practices. The instruction included but was not exclusive to: saving time, saving money and material.
- The Decree No 95/PM (5th December, 1995) and the instruction from Minister of Finance has to be followed by civil servant's when procuring items or services (i.e. construction maintenance or repairing services).

B. Institutions Involved in Fighting Corruption

The main aim of the institutions involved in preventing and combating corruption is to increasingly strengthen the effectiveness of financial law and regulation; and improve State management through monitoring and controlling process. In the long run the government believes these organizations will help increase government revenue and improve internal auditing processes.

The government has indicated its commitment to strengthen its policies, regulations and practices in order to improve integrity within the government, this includes: ensuring the rule of law, improving the efficiency, effectiveness, accountability of the public service; and ensuring accountability of the management of foreign aid.

In order to achieve the above–mentioned goals the party and the government decided to establish the following organizations.

Today the main organizations in charge of auditing, inspection, monitoring, investigating and prosecuting corruption activities in Laos are: The Party Control Committee (PCC), The State Inspection Authority (SIA), the State Audit Office (SAO), the Department of Finance Inspection, the ministry of Finance and the Offices of the People's Prosecutor at the central and local level and National Assembly. The Department of Inspection exists in various ministries and the departments understate and party control,

at the provincial and district levels. In the central level the National Assembly supervises and monitors the executive and judiciary organization. The Office for Business Promotion supervises state owned enterprises and joint ventures.

1. Party Control Committee (PCC)

As Lao PDR is a one party system, all organizations are under the leadership of the Lao People's Revolutionary Party. The PCC was formerly the main inspection agency in Laos. It operates across all levels and branches of government, often with assistance of the State Inspection Authority. After the creation of the State Inspection Authority (SIA), and State Audit Office (SAO) the role of PCC changed its focus onto the party's activities. However, some legal and regulatory provisions still provide this organization with a dominant role.

2. State Inspection Authority (SIA)

The State Inspection Authority was established on May 30, 2001 by the decree of the Prime Minister No. 98/PM but was replaced by the new decree No 10/PM.

The State Inspection Authority (Anti-Corruption Authority) is attached to the Prime Minister Office and report directly to the Prime Minister and responsible for:

- fighting corruption in the bureaucracy;
- ensuring transparency and fairness in the management of public resources and;
- prevention and investigation of the corruption.

So far, The State Inspection Authority and other involved organizations have recorded great success in their duties and responsibility to combat corruption. Many serious cases of corruption have been discovered and sanctioned, primarily in the area of tax collection, wood extraction and import of vehicles. Those public servant's involved have been sanctioned/prosecuted accordingly.

In 2007-08 investigations in the fields of forestry, procurement, immigration, Business Bank and so on were undertaken and found that some organization and officials have misused the power and function more then the law is allowed and issued illegal permission for cutting trees 61, 184.92 m^3 without the permission from the government, issued permission on exporting woods 5,263.381 m^3 and violated so with the order and the pre-regulation. There was an implementation of an invalid permission for last year in coming year. There were also found that woods of totally 21,973.664 m^3 were illegal cut and smuggled. And there were 19,087.393 m^3 were confiscated. Some officials have corruption behaviors, swindle and embezzle State revenues. There were found that illegal Identification Card (ID) for the Foreigners were issued and renewed the Labor ID without the consultation with the State Employment Agency. At the Ministry of Public Security there were officials with accomplices violated the procurement regulation and caused harm for the State revenues. After conducting investigations of the targets mentioned above at the central and local level corruptions were found, corruptors were arrested and prosecuted. 25 persons were accused of corruption and sentenced; and 10 persons are standing under investigation.

3. State Audit Office (SAO)

SAO was set up by the Prime Minister's Decree No 174/PM (dated 5 August 1998). This was considered a major step towards strengthening the supreme audit function in Lao PDR. The SAO is responsible for auditing the accounts and certifying the appropriateness of the accounts of the organizations under State administration, in addition to, state owned enterprises, joint ventures and projects funded by the state budget or international grants and loans. It also inspects the implementation of State Budget that the National Assembly has adopted. This organization is also attached to the Prime Minister's Office and report directly to the Prime Minister.

4. Organ of the People's Prosecutors of the Lao PDR

The Organ of the People's Prosecutors of the Lao PDR is a Supervisory State Organ and responsible for monitoring and inspecting the proper und uniform adherence to laws by all ministries, ministry-equivalent

organizations, government organizations, Lao Front For National Construction, mass organizations, social organizations, local administrations enterprises, and citizens and for exercising the rights of prosecution.[1]

5. National Assembly

The National Assembly is theoretically a legislative body, and oversees the executive and judiciary organizations. The Commission on Economic and Financial Affairs oversees the preparation and implementation of the State budget. The National Assembly adopts, revises and oversees the implementation of the national annual budget.

C. Administrative Reform

The government, with the support of various international organizations, has undertaken many reform initiatives aimed at restructuring the state apparatus; improving government mechanisms, working conditions and administrative procedures; and minimizing the steps involved in granting licenses. The introduction of new reform initiatives are helping to minimize administrative paper work. The reduction of the extensive paperwork trail or number of "doors that people have to go through" is helping to minimize and eventually, eliminate conditions in which corruption can exist. Another major area of reform is the introduction of new mechanisms, such as auditing and inspection, which demand more open and accountable work practices.

The aim of the fore mentioned measures is to combat and eliminate corruption in across the bureaucracy efficiently. During the process reform, the government intends to build a bureaucracy of good and honest civil servants. New civil service recruits will be selected fairly through open examinations. Civil service managers will be elected and appointed through more open, equitable and democratic processes.

A major issue that currently exists is the poor salary, compensation and benefits for civil servants. To improve the overall administrative reform, the government intends to reform salaries and other compensations of civil servants to ensure that civil servants can maintain a decent standard of living.

III. INTERNATIONAL STRATEGY

A. International Legal Instruments

At the Intentional level, relevant legal instruments have been ratified or signed:

- The convention on anti-corruption has been signed in 2003.
  The Lao government has undertaken major efforts to improve the country's situation. The document compiled after the convention has been translated and disseminated amongst civil servants to create awareness and understanding of the convention. In conjunction with this, The Lao government has amended the domestic legal system to enable more international and regional integration. In the near future, the government will submit the convention to the National Assembly for ratification and disseminate the proposal to the donor community to gain support for ratification and implementation of this important convention.
- Convention on transnational organized crime and the three related protocols have been ratified.
- Follow up the implementation of the TOC, extraditions with neighboring countries such as Vietnam, Cambodia, Thailand and Myanmar have been signed.
- The mutual legal assistance in criminal and civil matter between Laos and The North Korea has been also signed.
- The Lao government has ratified the ASEAN convention on the mutual legal assistance in

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criminal matters.

- There are also none legally binding declarations of The China-ASEAN Prosecutors General Conference that has been agreed among other things on the international cooperation to fight transnational crimes.

IV. ANTI-CORRUPTION COOPERATIVE MECHANISMS

A. Overview

The Lao government takes important the international and domestic cooperation to fight corruption. Fighting corruption is still very complex, challenging and difficult to detect, and it is not only the work of single anti-corruption or of the public prosecutors alone, and it requires, first of all, determination and persistence of the political leadership and participation from citizens, including the cooperation and coordination with of relevant organizations involved in the anti-corruption. Although the Law is a major step forward, there is still a poor implementation of the law.

By strengthening the institutions the improving coordination amongst those organizations involved in monitoring corruption (i.e. the Audit Office, The State Inspection Authority for investigation and the People's Prosecutor's Offices for prosecution) we will be in a better position to discover and sanction corrupt people, and return public assets back to the state and Lao PDR citizens.

The service that public prosecutors deliver is standing in a chain with the work of investigation agencies, including anti-corruption agency. Investigation agencies and the public prosecutors need each other to exercise the right of investigation and prosecution. Without the cooperation from the investigation agencies our work can not effective be done.

The Organ of the People's Prosecutor of Lao PDR, compared to other organization such as of the police, it is a young organization and it is only 18 years old (9 January 1990-9 January 2008). In practices many investigating officers of the investigating agencies in the local level don't accept the role of prosecutors as supervisory state organ and exercising the rights of prosecution and make so with the cooperation between them difficult.

In the past after establishment of the Organ of the People's Prosecutor of Lao PDR in 1990 the coordination and cooperation between prosecutor and the police have been very poor. The reason is because of the lack of understanding on the role of the prosecutors at a whole and also because of the lack of law books. If they really have the laws there are only laws in old version.

B. Cooperative Mechanisms

Recognizing this situation, and with the support of the international organizations, a work to tighten the cooperation and coordination between prosecutors and the investigating Agencies has been started.

1. Mechanisms among Relevant Anti-Corruption Institutions

There are following cooperative mechanisms among the relevant anticorruption institutions:

1) The important cooperative mechanism is a so called, "Annual Justice Conference or meeting" of the relevant institutions organized at the central, provincial and district level. There are representatives from the National Assembly, office of the supreme people's prosecutor of Lao PDR, people's supreme court, the justice ministry, the public security ministry and senior officials from these organizations. The meeting provides and creates opportunities or all to raise issues and comments on how the law can be effectively implemented and their relations be improved. There is a place to discuss issues regarding the prevention, investigations, court trial and implementation of the judgments or sentence in civil and criminal matter. Importantly it is also that concerned ministries and institutions have to explain and to answer the questions and

critics of the public and of the members of the National Assembly about the implementation of law and they have to explain how they will and plan to do it better. This kind of the conference will be organized annually in the future and we will invite the state inspections authority to attend in order to strengthen the coordination and cooperation in combating corruption in the country.

2) Importantly it is a Joint training or seminar of the all relevant parties. A Joint training or seminar of the all relevant parties from prosecutors, investigating agencies, justice department, court and national assembly is organized to create an opportunity that they lean to know and to understand the role of each others, and at the same time build personal contact with each other. This kind of training is helping very well to strengthen the cooperation between public prosecutor and the investigating agencies.
3) Joint Agreements or Joint Statements are sometime needed to facilitate or to tighten our cooperation.
   There are for examples:
   - A Joint Agreement between the Supreme People's Prosecutors, the Minister of Public Security, and the Minister of the Public Health on the Medical Treatment for the sick Prisoners.
   - A Joint Agreement between the Supreme People's Prosecutors and the Minister of Public Security on the Amnesty for Prisoners.
   - A Joint Agreement between the Supreme People's Prosecutors and the Minister of Public Security on Juvenile Justice.
4) Printing and disseminating the laws books for the prosecutors and the investigating agencies have been started.
5) Awareness raising activities on the role of the prosecutors is part of all seminars and meeting when the prosecutors are invited to attend or when we organized such a seminar or workshop.

2. Participation of the Citizens

There are:

- Hot line during the ongoing session of the National Assembly is set up to create an opportunity for all to say their political opinion and issues regarding the implementation of the duties of governments and the government has to answer it officially;
- Opinion box of all state institutions has been created for the people that they can say and claim about the work of the government or of a specific official of a state institution.

The result of the implementation of the cooperative measures by the Lao government set above, the cooperation between prosecutors and the investigating agencies and with the public are improved and it make our easier and more effective.

3. International Cooperation Mechanisms

For international cooperation, there are following mechanisms:

The Lao government has attended:

- International conferences and meetings and a lot of seminars organized by the Association on Anti Corruption of International Corruption Authorities (IAACA)
- Five China-ASEAN Prosecutors General Conferences
- conferences organized by the Asia Crime Prevention Foundation (ACPF) and by Association of International Prosecutors (AIP)
- And other important international conferences in the field of crimes prevention and criminal justice.

The main objective of such mentioned above conferences and meetings and also the conference what

we do at UNAFEI today are not only to share our opinions on good governance and anti-corruptions, but importantly it aims at developing and strengthening the relations and cooperation between them to combat transnational crimes and of course, including international anti-corruption.

The five China-ASEAN Prosecutors General Conferences have been a great success. On the basis of the Joint Declaration signed in Kunming, People's Republic of China on 9 June 2004 the basically cooperation mechanism between Prosecutorial Organs of China and ASEAN Countries in cracking down transnational crimes have been established and effectively developed step by step.

Since the first conference, the judicial and prosecutorial cooperation, Bilateral meeting mechanism and The Cooperation on training has been broadly developed. On the basis of respecting state sovereignty and judicial independence, according to the principle of equality and reciprocity, the prosecutorial organizations of Lao PDR at the Central and Local Levels have initiated judicial cooperation with Central Prosecutorial Organization and some Prosecutorial organizations in the border to Socialist Republic of Vietnam, People's Republic of China (the People's Procuratorate of Yunan Province), and in the border to Thailand and have assisted neighbouring prosecutorial organizations to investigate crimes and to arrest suspects escaping into the border of Lao PDR. Many Lao Prosecutors have received a short term prosecutorial training in the Socialist Republic of Vietnam and in Yunan Province, People's Republic of China. The training of our prosecutors is very important to learn the legal system of foreign countries. It is not only helpful to deepen the friendship, but also helpful for our cooperation.

The multi-channelled communication, study and exchange of delegation with prosecutorial organizations of other countries was enhanced and developed. The delegations exchange has furthered the understanding, enhanced the friendship, so as to lay the good foundations for establishing the cooperation mechanism.

Based on the declarations of the conferences which it is aimed among other thing to facilitate the direct cooperation between prosecution services of the China and ASEAN prosecutorial organizations at the provincial levels that shared the border with each other and also according to the judicial cooperation conventions between the Lao government and the government of P.R of China and Vietnam a direct cooperation between them are established. There are exchange of the delegations and training of the prosecutors all country and also the joint training of the prosecutors at the orders of Laos and Vietnam is planning and we have discussing this issue with the Attorney General of the Kingdom of Thailand while a high ranking delegations of Thailand visited Laos in September this year.

C. Case Proceedings

If, after the inspection and investigation, there appears to be solid information and evidence , the counter-corruption organisation shall make a summary of the inspection result, complete the file of the case and then send it to the public prosecutor to consider bringing a prosecution in court.

In the event that the public prosecutor fails[,] without reason[,] to prosecute the case in court within 30 days from the date of receiving the case file, the counter-corruption organisation has the right to submit to the higher level of public prosecutor to consider and deal with the issue.

V. CONCLUSION

Lao government conducts relations and cooperates with foreign countries and international organisations on the prevention and countering of corruption[,] based on the laws and regulations of the Lao PDR in compliance with international conventions and agreements that the Lao PDR has signed and is a party to.

The use of measures to counter the corruption of any government staff who commits an offence [relating to corruption] is based on the severity of the offence. If it is a minor offence, there will be education measures and imposition of disciplinary [measures]; if it is a serious offence, it will be subject to legal proceedings as provided under the laws.

MEASURES TO FREEZE, CONFISCATE AND RECOVER PROCEEDS OF CORRUPTION, INCLUDING PREVENTION OF MONEY-LAUNDERING

*Chew Tham Soon**

I. INTRODUCTION

The development of a financial approach to investigations into criminal organizations has become one of the major concerns of investigative police departments and judicial authorities as well as international organizations such as the United Nations, the European Community and the ICPO-Interpol.

Financial measures could have an important role to play in taking powerful economic instruments out of the hands of dangerous people, preventing them from undertaking further similar activities and returning the proceeds of their illicit parasitic activities to society.

Imprisonment and fines have been found inadequate in deterring capital organizations, whilst seizure of assets curtails the financial ability of such groups to continue criminal operations. Assets may include money, property, businesses, cars, boats, or any item which have been involved in, or the products of, a criminal enterprise.

Assets seizure has emerged as one of the most powerful tools to break the back of criminal enterprise. Forfeiture, the ancient legal practice of government seizure of property used in criminal activity, may prove a particularly useful weapon against organized economic crime.

The consciousness of the fight against corruption as a result of its attendant ills on socioeconomic development of nations have risen in recent times. To minimize its incidence, respective countries have put in place anti-corruption agencies, backed by laws which are now being tailored to meet recommendations of the United Nation's Convention against Corruption (UNCAC), in terms of prevention, criminalization, international cooperation and assets recovery.

II. HOW IS MONEY LAUNDERING CONNECTED WITH SOCIETY?

Organized criminals who are involved in supplying goods and services to a co-operating public, and who utilize extortion, corruption and other techniques of intimidation, accumulate their profits through the commission of a series of criminal acts carried out by a number of different individuals over a substantial period of time, and involved in numerous territorial jurisdictions.

Corruption will play a central part in an organized criminal enterprise when it is required to allow the illegal market to operate smoothly. Corruption is more likely to occur in markets where the public regards provision of goods or services, such as prostitution, illegal gambling or drugs, and counterfeit products, as a mere misdemeanour. These are markets which traditionally been lucrative ones for organized crime, and the cash resources available to organized criminals allow them to corrupt others in order to protect and further their activities.

Organized crime can infiltrate financial institutions, acquire control of large sectors of the economy through investment, or offer bribes to public officials and, indeed, governments. The economic and political influence of criminal organizations can weaken the social fabric, collective ethical standards, and, ultimately, the democratic institutions of society. The criminal influence can undermine countries undergoing the transition to democratic systems. Most fundamentally, money laundering is inextricably linked to the underlying criminal activity that generated it. Laundering enables criminal activity to continue.

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III. HOW DOES FIGHTING MONEY LAUNDERING HELP TO FIGHT CRIME OR CORRUPTION?

Many governments have already established comprehensive anti-money laundering regimes. These regimes aim to increase awareness of the phenomenon both within the government and the private business sector, and then to provide the necessary legal or regulatory tools to the authorities charged with combating the problem.

Some of these tools include making the act of money laundering a crime; giving investigative agencies the authority to trace, seize and ultimately to confiscate criminally derived assets; and building the necessary framework for permitting the agencies involved to exchange information among themselves and with counterparts in other countries.

Money laundering is a threat to good functioning of a financial system. However, it can also be the Achilles heel of criminal activity. In law enforcement investigations into organized criminal activity, it is often the connections made through financial transaction records that allow hidden assets to be located and that establish the identity of the criminal and the organization responsible.

When criminal funds are derived from robbery, extortion, embezzlement or fraud, a money laundering investigation is frequently the only way to locate the stolen funds and restore them to the victims.

Most importantly, however, targeting the money laundering aspect of criminal activity and depriving the criminal his ill-gotten gains means hitting him where he is vulnerable. Without a usable profit, the criminal activity will not continue.

IV. THE DANGEROUS DRUGS (FORFEITURE OF PROPERTY) ACT 1988

The Dangerous Drugs (Forfeiture of Property) Act 1988, which was effective from 10 June 1988, empowers the court to forfeit property upon conviction for an offence of trafficking drugs or planting and cultivation of drugs. Where it is proved to the satisfaction of the court that the above offence has been committed, the court shall make an order for the forfeiture of all property which is the subject matter of that offence or which has been used for the commission of that offence, notwithstanding that no person may have been convicted of the offence. (Section 3 and Section 4 of the Act)

The public prosecutor, if he has reason to believe that any person is a *liable person*, he may apply in ex parte to the high court for an order of forfeiture of all the property of which such person is a holder and which the Public Prosecutor has reason to believe are illegal properties. The forfeiture of property shall be proceeded against:-

(a) every person
  (i) who has been convicted for an offence of using property for promoting, managing, establishing, or carrying on any act, activity or conduct or facility, assisting in the promotion, management, establishment or carrying on of the act, activities or conduct of trafficking, planting or cultivation of drugs.
  (ii) who is or was detained after the commencement of this Act pursuant to an order of detention or restriction made under any law in respect of any activities relating to or involving the trafficking in any dangerous drug.
  (iii) who holds, conceals, receives, or uses or causes or allows to be used, any illegal property knowing of having reason to believe the same to be illegal property.
(b) every relative of such person ;
(c) every associate of such person ;
(d) any holder whether or not a relative ;
(e) where a person referred to in para (a) is deceased, his personal representatives.

A. Powers of Freezing and Seizure

Section 16 of the Dangerous Drugs (Forfeiture of Property) Act 1988 provides power to any senior police officer to enter any premises and there search for, to search and arrest any person who is in or on such premises in whose possession any property liable to seizure or forfeiture, seize and detain any book or document found in or on such premises or on such person.

Sections 25 & 26 deals with the seizure of movable property by senior police officer, while section 28 deals with the seizure of immovable property by senior police officer.

There is also a special provision relating to seizure of a business by an order in writing issued by the designated police officer under section 27 of the Act.

B. Forfeiture of Property Seized

Section 32 of the Act deals with the forfeiture of property seized under this act where there is no prosecution for any offence under this law is instituted with regard to such property; and no claim in writing is made by any person that he is lawfully entitled to such property, the property shall become forfeited immediately upon the expiration of the said period of three months.

V. THE ANTI-MONEY LAUNDERING AND ANTI-TERRORISM FINANCING ACT 2001

The Anti-Money Laundering and Anti-Terrorism Financing Act 2001 was introduced in Malaysia on 15 January 2002 (Royal Assented on 25 June 2001) to provide for the offence of money laundering, the measures to be taken for the prevention of money laundering and terrorism financing offences and to provide for the forfeiture of terrorist property and property involved in, or derived from, money laundering and terrorism financing offences, and for matters incidental thereto and connected therewith.

Malaysia adopts a non-integrated approach for its anti-money laundering regime under the Anti-Money Laundering and Anti-Terrorism Financing Act 2001. The legal framework under the Act provides for multi-agency implementation by the Financial Intelligence Unit (FIU) in Bank Negara Malaysia (the central bank), the regulatory and supervisory authorities of reporting institutions, as well as the relevant law enforcement agencies.

It is the strategic objective of the government to disrupt and dismantle criminal organizations by depriving them of the use of the economic proceeds of their crime and of properties used to facilitate their crime.

The Anti-Money Laundering and Anti-Terrorism Financing Act 2001 shall apply to any serious offence, foreign serious offence or unlawful activity whether committed before or after the commencement date. The Act shall apply to any property, whether it is situated in or outside Malaysia.

Money Laundering means the act of a person who:-

(a). engages, directly or indirectly, in a transaction that involves proceeds of any unlawful activity;
(b). acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes, uses, removes from or brings into Malaysia proceeds of any unlawful activity ; or
(c). conceals, disguises or impedes the establishment of the true nature, origin, location. Movement, disposition, title of, rights with respect to, or ownership of, proceeds of any unlawful activity.
Where –
(aa) as may be inferred from objective factual circumstances, the person knows or has reason to believe, that the property is proceeds from any unlawful activity; or
(bb) in respect of the conduct of a natural person, the person without reasonable excuse fails to take reasonable steps to ascertain whether or not the property is proceeds from any unlawful activity.

Serious offence has been defined as:-

(a) any of the offences specified in the Second Schedule; or
(b) an attempt to commit any of those offences;
(c) the abetment of any of those offences.

A. Powers of Freezing and Seizure

Section 44 of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 provides power to an enforcement agency to issue an order freezing any property where he has reasonable grounds to suspect that an offence under section 4(1) has been committed, for duration of not more than ninety days.

Sections 45 & 46 deals with the seizure of movable property, while section 50 of the Act provides power to the Public Prosecutor, after the expiry of the order issued by the enforcement agency, to issue an order directing the financial institution not to part with, deal in, or otherwise dispose of such movable property or any part of it until the order is revoked or varied.

Section 51 of the Act deals with seizure of immovable property by issuing a Notice of Seizure by the Public Prosecutor. There is also a special provision relating to seizure of a business by an order in writing issued by the enforcement agency under section 52 of the Act.

B. Forfeiture of Property Seized

Section 55 of the Act provides power to the Court to make an order for the forfeiture of any property which is proved to the subject matter of the offence or to have been used in the commission of the offence or which is proved to be terrorist property where:-

(a) the offence is proved against the accused; or
(b) that no other person is entitled to the property as a purchaser in good faith for valuable consideration.

Section 56 of the Act, where there is no prosecution or conviction for an offence under section 4(1) of the Act, it provides power to the Court, upon application by the Public Prosecutor before the expiration of twelve months from the date of the freeze or seizure, to make an order for the forfeiture of the property if he is satisfied –

(a) that the property is the subject matter of or was used in the commission of an offence under Section 4(1) or a terrorism financing offence or is terrorist property ; and
(b) that there is no purchase in good faith for valuable consideration in respect to the property.

VI. THE MALAYSIAN ANTI-CORRUPTION ACT 2009

The Malaysian Anti-Corruption Act 2009 provides power to seize both movable and immovable property for which there are reasonable grounds to suspect to be the subject matter of an offence or evidence relating to the offence shall be liable to seizure.

A. Forfeiture of Property upon Prosecution for an Offence

In any prosecution for an offence under the Malaysian Anti-Corruption Act 2009, the court shall make an order for the forfeiture of any property which is proved to be the subject matter of the offence or to have been used in the commission of the offence where –

(a) the offence is proved against the accused ; or

(b) the offence is not proved against accused but the court is satisfied -
    (i) that the accused is not the true and lawful owner of such property; and
    (ii) that no other person is entitled to the property as a purchaser in good faith for valuable consideration.

B. Forfeiture of Property where there is no Prosecution for an Offence

Where in respect of any property seized under this Act there is no prosecution or conviction for an offence under this Act, the Public Prosecutor may, before the expiration of eighteen months from the date of the seizure, apply to a Sessions Court Judge for an order of forfeiture of that property if he is satisfied that such property had been obtained as a result of or in connection with an offence under this Act.

Where the Judge to whom an application is made under Subsection (1) is satisfied –

(c) that the property is the subject matter of or was used in the commission of an offence under this Act; and
(d) there is no purchase in good faith for valuable consideration in respect to the property,

he shall make an order for the forfeiture of the property.

VII. INTERNATIONAL COOPERATION ON EXTRADITION AND MUTUAL LEGAL ASSISTANCE

A. Extradition Act 1992

Malaysia has entered into treaties with many other countries to allow extradition. These are:

(i) Extradition Treaty between Great Britain and Siam, done at Bangkok on 4 March 1911.
(ii) Treaty between the Government of the Republic of Indonesia and the Government of Malaysia relating to Extradition, done at Jakarta on 7 June 1974.
(iii) Extradition Treaty between the Government of Malaysia and the Government of the United States of America, done at Kuala Lumpur on 3 August 1995.
(iv) Agreement between the Government of Hong Kong and the Government of Malaysia for the surrender of fugitive offenders, done at Hong Kong on 11 January 1995. Protocol supplementary to the agreement done on 1 November 2007.
(v) Treaty between the Government of Malaysia and the Government of Australia on Extradition done at Putrajaya, Malaysia on 15 December 2005.

B. Mutual Legal Assistance in Criminal Matters Act 2002

The object of this Act is for Malaysia to provide and obtain international assistance in criminal matters, including:

(a) the recovery, forfeiture or confiscation of property in respect of a serious offence or a foreign serious offence;
(b) the restraining of dealings in property, or the freezing of property, that may be recovered in respect of a serious offence or a foreign serious offence;
(c) the execution of requests for search and seizure;
(d) the identification or tracing of proceeds of crime and property and instrumentalities derived from or used in the commission of a serious offence or foreign serious offence.

Malaysia has entered into treaties with many other countries to provide and obtain mutual legal assistance for freezing, seizure, confiscation and forfeiture. There are:

(i) Treaty on mutual legal assistance in criminal matters (among like-minded ASEAN Member Countries), done at Kuala Lumpur on 29 November 2004, on 17 January 2006 (Myanmar and Thailand)
(ii) Treaty between the Government of Malaysia and the Government of Australia on mutual legal assistance in criminal matters, done at Putrajaya, Malaysia on 15 November 2005.
(iii) Treaty between the Government of Malaysia and the Government of the United States of America on mutual legal assistance in criminal matters, done at Kuala Lumpur on 28 July 2006.
(iv) Agreement between the Government of Malaysia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China concerning mutual legal assistance in criminal matters done at Hong Kong on 17 October 2006.

VIII. CONCLUSION

It is important to provide powers for the enforcement agency to seize and freeze the property of criminals for any confiscation order after conviction. A concerted attack on the economic structure of a criminal organization has the most chance of permanently disabling that organization. By undertaking an in-depth assessment of economics of a criminal organization, we will permit the courts to evaluate the criminal activities from the economic and financial vantage point of the criminals. The courts will then be in the position to reduce those criminals to the economic level that they occupied before they embarked on their criminal enterprise.

MEASURES TO FREEZE, CONFISCATE AND RECOVER PROCEEDS OF CORRUPTION, INCLUDING PREVENTION OF MONEY-LAUNDERING IN MYANMAR

*Lwin Lwin Than**

I. INTRODUCTION

Corruption poses a serious problem and affects each and every one of us. It is a fact that there are links between corruption and other forms of crime, including money-laundering. Corruption is no longer a local matter. It is a transnational phenomenon. To prevent, to control and to eradicate corruption is a responsibility of all of us. This is the reason why we meet here with hope of exploring ways and means of strengthening our legislation and criminal justice systems in the area of measures to freeze, confiscate and recover proceeds of corruption, including prevention of money-laundering.

II. MYANMAR LEGAL SYSTEM

The Myanmar legal system is closely akin to Indian legal system of the Common Law Legal Family. However, it is not a replica of the Common Law System since we have embodied in laws of Myanmar our national characteristics, especially in the area of Myanmar Customary Law. We have been developing our own Legal System for nearly one and a half centuries.

III. OFFICE OF THE ATTORNEY GENERAL (OAG)

The Office of the Attorney General (OAG) of the Union of Myanmar has been constituted under the Attorney General Law, 2001.Its predecessor was the Attorney General Law,1988.The present Attorney General Law grants the Attorney General wide –ranging powers including legislative drafting, legal translation, updating laws and amendments. Moreover, the OAG is responsible for giving legal advice on matters relating to international conventions and regional agreements, and also on matters of bilateral or multilateral treaties, memorandums of understanding, memorandums of agreement, local and foreign investments and other instruments that are to be ratified by the Union of Myanmar. The Attorney General is the Chief Prosecutor and appears in criminal cases and also litigates or defends claims of civil nature where the government is involved.

IV. THE LAW OFFICERS

The Law Officers who are appointed under the Attorney General Law, 2001, perform the functions and duties assigned to us by the Attorney General including tendering advice on criminal cases and before trial to be in conformity with the Law.

* International Law and ASEAN Legal Affairs Division, Deputy Director, Office of The Attorney General, Union of Myanmar.

V. JUDICIAL SYSTEM OF MYANMAR

The present judicial system was adopted by the Judiciary Law, on 27 June, 2000. All Criminal Courts in Myanmar have to adhere strictly to the established procedure and practice of admitting documentary and material evidence, examining witnesses, and examining complainants and the accused. Basic legal principles to be observed in conducting criminal cases are that the burden of proof lies on the prosecution. In criminal cases Law Officers play significant rules by giving legal opinion to the police before sending the case to the court, conducting before the court on behalf of State, and if he or she is not satisfied with the order of the court, filing appeal and revision to higher courts in order that the accused be convicted and the sentence be enhanced.

VI. LEGISLATION ON THE AREAS OF CORRUPTION

There is various legislations in Myanmar containing provisions for taking action against corruption.

1. The Prevention of Corruption Act

It is the main law and it provides more effective measures. This Law provides special rules of evidence that the burden of proof relies on the accused, if the acceptance of a bribe by the accused has been proved. The Law also provides that the Court may presume an accused guilty of corruption if he owns or owned too much money or properties beyond his income, where the accused cannot prove his lawful ownership of such money or properties. Any person convicted under *section 4(1) (c) /4(2)* of this law is punishable with imprisonment for a term which may extend to seven years. Besides, all benefits obtained by the accused by committing such offense shall be confiscated. The punishment under this law is more severe and effective than the punishment prescribed under the Penal Code. So, in Myanmar, serious corruption cases are prosecuted under with law. The law also authorizes investigating police officers to make necessary inspections of the bank accounts or registers of the accused and / or his or her dependents. However, the law requires obtaining prior sanction from the relevant appointing authority of the accused before taking action under this Law.

2. The Penal Code

It provides, under *sections 161 to 171*, corruption offences by or relating to public servants. Taking of gratification by public servants other than legal remuneration in respect of an official act; taking gratification in order, by corrupt or illegal means, to influence a public servant, taking gratification for exercise of personal influence with public servant, without consideration, from persons concerned in proceedings or business transacted by a public servant, disobeying direction of the law by a public servant, with intent to cause injury to any person, framing an incorrect document by public servant with intent to cause injury to any person; unlawfully engaging in trade by a public servant, are corruption offences punishable with imprisonment ranging from one year to three years, or with fine, or with both.

3. The Narcotic Drugs and Psychotropic Substances Law

It has particular provisions for taking action against investigating officers who commit corrupt acts. *Section 18* of the Law provides, *inter alia,* that a person authorized to search, arrest, seize, exhibit and investigate in respect of any offence under that law shall be, on conviction, punished with imprisonment for a term which may extend from 5 years to 10 years, if he is guilty of asking for and accepting any money and property as gratification either for him or herself or for another person, or accepting a narcotic drug or psychotropic substance unlawfully.

4. The Control of Money Laundering Law

The Law prescribes, under *section 25*, members of the investigation body not to demand or accept

money or property either for him or herself or for any other person as a gratification; substitution of an offender with any other person so that action cannot be taken against him or her imprisonment of an offender without taking action against him or her. The breach of such prohibitions may be punishable with imprisonment for a term which may extend from a minimum of 3 years to a maximum of 7 years and may also be liable to a fine.

5. The Myanmar Police Force Maintenance of Discipline Law

It has wide provisions concerning corruptions. Especially, its *sections 17* and *18* provide various kinds of corruptions. *Section 17* prohibits a person subject to that law not to commit, unnecessarily detaining of a person against the law, failing to bring his or her case before the proper authority for investigation, taking in or bringing in or allowing to be taken in, due to his or her negligence, articles which are prohibited from being taken in or brought into the prison or police custody, causing or allowing a prisoner or a person in custody to strike or otherwise ill-treat another person subject to that Law or any prisoner under custody, striking or ill-treating his or her subordinate, allowing to escape any person for whom he or she has a duty to keep or guard, and demanding or accepting cash or kind in a corrupt manner from any person. The offender who violates any of such prohibitions, on conviction by Police Court, may be punished with imprisonment up to 3 years or less punishment as prescribed in that Law. Section 18 of the Law further prohibits a person subject to that Law not to commit theft of any property belong to the Myanmar Police Force or any person subject to that Law, dishonestly misappropriate or convert to his or her own use of such property, committing criminal breach of trust in respect of such property, dishonestly receive or retain any such property, will-fully destroy or injure or cause loss through negligence of any such property, dishonestly misappropriate, obliterate, destroy , injure or cause loss through negligence, any exhibit, or do any other thing with intent to defraud or to cause wrongful gain or wrongful loss. The violation of any of such prohibitions shall be punishable with imprisonment up to 3 years or such less punishment as prescribed by that Law.

6. The Defense Services Act, the *Pyithu Hluttaw* Election Law, the Commercial Tax Law, the Forest Law and the Fire Services Law

They also provide provisions for taking action against corruption.

7. The Criminal Law Amending Act

It is the more effective procedural law in taking action against corruptions. If the Government has the reasons to believe that an accused in a corruption case obtained money or property by committing such an offence, it may direct to submit an application to the District Administrative Officer for the attachment of a warrant on such money or property. These speedy actions may deter or freeze or exhibit the money or property obtained by the accused in a timely manner.

VII. THE MEANING OF THE LAW TAKING ACTION AGAINST THE OWNERSHIP OR SALE OF PROPERTY OBTAINED BY ILLEGAL MEANS

It means the Government is authorized to confiscate movable or immovable property of a person who obtained such property by illegal means or from illegal business or brought with money evaded from income tax.

VIII. MYANMAR TAKING ACTION AGAINST CORRUPTION

Myanmar launched many operations to suppress corruption from 1974 to 1988. The Crocodile Operation, Machinery Operation, Shark Operation, Hinsa Operation, and Varasein (or Thunder Bolt) Operation are significant among others. The White Elephant Operation was also a special one and this Operation took action against even intelligence and customs officials.

IX. CRIMINALIZATION OF MONEY LAUNDERING

Money Laundering was criminalized under several provisions contained in the Control of Money Laundering Law 2002. To implement this Law effectively, Rules relating to the Control of Money Laundering Law was issued in 2003.The Central Control Board formed under this Law has the powers to pass an order confiscating money and property obtained by illegal means(*Section 8(1)*).Chapter IX of the Rules prescribes the details for confiscation.

X. RELATED INSTITUTIONAL MEASURES

- In Myanmar, corruption cases are cognizable case under the provisions of the Code of Criminal Procedure. Therefore those cases may be investigated by the Bureau of Special Investigation officers or Police Officers without obtaining warrant of a court. Bureau of Special Investigation (BSI) is conferred authority to investigate corruption cases under the provisions of the Bureau of Special Investigation and the Investigation Department Act, and the Myanmar Police Force is authorized to do so under the provisions of the Code of Criminal Procedure.
- Being a cognizable case, BSI Officers and Police Officers may book case against the accused at the respective police station, request for sanction to prosecute the accused from the relevant Ministry, arrest the offender, examine the accused and witnesses, seize the exhibits, construct the case, ask for expert opinions on the exhibits if necessary, ask for legal advice from the Office of the Attorney General or various Law Offices for sound construction of the case and reconstruct the case in accordance with the legal advice of the Office of the Attorney General or the respective Law Office, and file the case before a competent and relevant Court. Usually, the Bureau of Special Investigation investigates serious corruption cases and refers other corruption cases to Myanmar Police Force for investigation. If the case is not strong enough for sending up to the Court, and it is necessary to take some other action, such corruption case is referred to the Government department concerned for taking departmental action.
- Under *section 197* of the Code of Criminal Procedure, if an accused who is a Judge, Magistrate or any public servant who is not removable from his or her office save by or with the sanction of the President or relevant Ministry, is accused of any offence alleged to have been committed by him or her while acting or purporting to act in the discharge of his or her official duty, no Court shall take cognizance of such offence except with such previous sanction.
- When such cases are sent up before the Courts, BSI prosecutors or Law Officers conduct prosecution in those cases. Throughout the prosecution period, prosecutors consult with the relevant Investigation Officers of the case to construct the case strongly. If necessary, the Law Office concerned files appeals or revisions against the order and judgment of original or appeal Court to enhance punishment so as to obtain effective and deterrent punishments. The BSI may request the relevant Law Office to file revision in those cases. If the accused is acquitted by the Court, The Office of the Attorney General may file an appeal against acquittal order to the Supreme Court. The BSI or the Myanmar Police Force may apply to the relevant Law Office or Office of the Attorney General to file an appeal against acquittal.

XI. ADMINISTRATIVE MEASURES AGAINST CORRUPTION

All civil service personnel in Myanmar are responsible for abiding by the Fundamental Rules and Supplementary Rules. Those Rules prescribe that Government servants shall not, except with the prior sanction of the Government, accept directly or indirectly on his or her own behalf or on behalf of any other person, or permit any member of his or her family so as to accept any gift, gratuity or reward.

XII. CONFISCATION, FREEZING AND SEIZING OF PROCEEDS OF CRIME

• Myanmar laws allow for the confiscation of criminal property under the following pieces of legislation:

(i) Narcotic Drug and Psychotropic Substances Law 1993 in respect of cases concerning the following offences:

(a) Cultivation, Possession, Transportation, and Sale of narcotic drugs, psychotropic substances or chemical/plants used in the production of the same;
(b) Laundering the proceeds of (a);
(c) Accepting Bribes in connection with (a);
(d) Conspiracy to commit (a) or (b).

(ii) *Section 8(i)* of the Control of Money Laundering Law, 2002 allows the CCB to pass an order confiscating money and property obtained by illegal means.

(iii) The Code of Criminal Procedure, 1889, *Section 517* allows for the general confiscation of items of property including money, and other valuable property.

• Although Criminal Procedure Code *Section 517* is general in nature, it can widely apply and use in various corruption cases before the court as evidence and exhibits including money and property. Criminal Procedure *Code Section 517* provides as follows:

(1) When an inquiry or a trial in any criminal Court is concluded, the Court may make such order as it thinks fit for the disposal, by destruction, confiscation, or delivery to any person claiming to be entitled to possession thereof, or otherwise, of any property or document produced before it or in its custody, or regarding which any offence appears to have committed, or which has been used for the commission of any offence.

(2) When the High Court or a Court of Session makes such order and cannot through its own officers conveniently deliver the property to the person entitled thereto, such Court may direct that the order be carried into effect by the District Magistrate.

(3) When an order is made under this section such order shall not, except where the property is livestock or subject to speedy and natural decay, and save as provided by sub-section(4), be carried out for one month, or, when an appeal is presented, until such appeal has been disposed of.

(4) Nothing in this section shall be deemed to prohibit any Court from delivering any property under the provisions of sub-section (1) to any person claiming to be entitled to the possession thereof, on his executing a bond with or without sureties to the satisfaction of the Court, engaging to restore such property to the Court, if the order made under this section is modified or set aside on appeal.
Explanation.--In this section the term "property" includes in the case of property regarding which an

offence appears to have been committed, not only such property as has been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise. I also would like to present the MFIU.

XIII. THE FINANCIAL INTELLIGENCE UNIT AND ITS FUNCTIONS

- The Central Control Board on Money Laundering Order 3/2004 established the Myanmar Financial Intelligence Unit ("MFIU"). Myanmar has chosen the Law Enforcement model of an FIU. The MFIU is a unit under the Ministry of Home Affairs; it is headed by a Police Colonel, the head of the Myanmar Police Force's ("MPF") Department against Transnational Crime.
- The MFIU is the sole body in Myanmar authorized to receive transaction reports. The reports are delivered to the MFIU by the reporting bodies either by courier/messenger or through the post or by fax or electronic means.
- The MFIU has signed MOUs to govern the exchange of information and financial intelligence with the Thai FIU, AMLO and Indonesian FIU, PPATK.

XIV. DOMESTIC AND INTERNATIONAL COOPERATION FOR EFFECTIVE INVESTIGATION AND PROSECUTION OF CORRUPTION

Bureau of Special Investigation, Myanmar Police Force and Law Office cooperate for sound construction of the corruption cases at the pre-trial stage and during trial period. The Courts at various levels pass effective and deterrent punishments against the offenders of corruption cases. The Supreme Court instructs all Courts at all levels to pass effective and deterent punishments, on conviction, against the accused of corruption cases.

XV. INTERNATIONAL COOPERATION

- Myanmar is a Party to the ASEAN Treaty on Mutual Assistance in Criminal Matters. Under this treaty assistance is rendered among Parties. Besides, Myanmar has already enacted The Mutual Assistance in Criminal Matters Law 2004. It is the main Law in Myanmar for bilateral, multilateral and regional co-operation for effective search, seizure and confiscation of exhibits in criminal matters including corruption.

- This Law contains provisions for Search, Seizure and Confiscation of Exhibits as follows:

Section 25 With respect to request of any foreign State the Central Authority shall, if granted after scrutiny the request of a foreign State to search, seize, control, issue restraining order or confiscate the exhibit is granted instruct the relevant government department and organization to search, seize, control, issue restraining order and confiscate in conformity with the existing laws.

Section 26(a) The Central Authority shall administer the property seized as exhibits, property controlled and property confiscated under the request of a foreign State in conformity with the bilateral agreement.

Section 26(b) If there exists no bilateral agreement between the two States, the confiscated property shall vest in the State.

- Myanmar has already signed the United Nations Convention against Corruption and thoroughly studies

the Convention for the development of a main Law to effectively suppress the corruption.

XVI. CONCLUSION

This is the current situation in Myanmar. Myanmar has a good basic legal and regulatory framework for freezing, seizure and confiscation. However, in international co-operation in corruption cases, Myanmar has little experience. Myanmar is ready to co-operate in this area and make the provisions of laws operational.

Thank you.

MEASURES TO FREEZE, CONFISCATE AND RECOVER PROCEEDS OF CORRUPTION, INCLUDING PREVENTION OF MONEY-LAUNDERING

*Panumas Achalaboon**

I. MEASURES TO FREEZE, CONFISCATE AND RECOVER PROCEEDS OF CORRUPTION

The Organic Act on Counter Corruption, B.E. 2542 of Thailand is the principal law dealing with corruption cases involving government officials, who are divided into two categories: "State officials" and "persons holding a political position". (Appendix A)

These officials play a crucial role not only in central government, but also in State enterprise and local government organizations. Thailand makes efforts to control and eradicate corruption among these officials through inspecting their assets and liabilities when taking and vacating office and comparing the difference. If it is found that the official gained an unusual increase in property without reasonable grounds, he or she may be prosecuted and removed from office and be subject to asset measures. This document only focuses on asset measures in corruption cases.

The commission administering corruption cases in this Act is the National Counter Corruption Commission (N.C.C. Commission) which has following main duties and powers;

(i) to inquire into facts, summarize the case and prepare the opinion to be submitted to the Senate, Removal from Office;
(ii) to inquire into facts, summarize the case and prepare the opinion to be referred to the Attorney General for the purpose of prosecution in the Supreme Court of Justice's Criminal Division for Persons Holding Political Positions;
(iii) to inquire and decide whether a State official has become unusually wealthy or has committed an offence of corruption, malfeasance in office or malfeasance in judicial office; and
(iv) to inspect the accuracy and actual existence of assets and liabilities of State officials and inspect change of assets and liabilities of the persons holding political positions.

II. INSPECTION OF ASSETS AND LIABILITIES

A. Declaration of Accounts Showing Assets and Liabilities of Persons Holding Political Positions

Persons holding political positions have the duty to submit an account showing their assets and liabilities and those of their spouses and children who have not become *sui juris* as they actually exist on the date of the submission to the N.C.C. Commission on each occasion of taking or vacating office.

* Public Prosecutor, International Affairs Department, Office of the Attorney General of Thailand.

B. Declaration of Accounts Showing Assets and Liabilities of State Officials

Not every State official has to declare assets and liabilities. The law prescribes that only some State officials holding positions stated by law have the duty to submit to the N.C.C. Commission an account showing their assets and liabilities and those of their spouses and children who have not yet become *sui juris* upon taking office and upon vacating office.

These positions are President of the Supreme Court of Justice, President of the Constitutional Court, President of the Supreme Administrative Court, Attorney General, Election Commissioner, Ombudsman, judge of the Constitutional Court, member of the State Audit Commission, Vice President of the Supreme Court of Justice, Vice President of the Supreme Administrative Court, Chief of the Military Judicial Office, judge of the Supreme Court of Justice, judge of the Supreme Administrative Court, Deputy Attorney General and person holding a high-ranking Position such as the Commander of a National Force, the Commander-in-chief in respect of military officials and the Commander of the National Royal Thai Police

In addition to these positions of State Officials, the N.C.C. Commission has the power to prescribe the additional positions of State officials who will be under the obligation to submit an account showing assets and liabilities.

C. Scope of Declaration and Required Documents

These assets and liabilities declared by persons holding political positions and State officials must include assets and liabilities in foreign countries and those which are not in possession of that persons, their spouses and children who have not become *sui juris.*

In the case where a person holding political positions or a State official holds more than one position, that person must submit separate accounts showing assets and liabilities for every position in accordance with the time prescribed for the submission of the account in respect of such position.

The account showing assets and liabilities must be accompanied by copies of supporting documents evidencing the actual existence of such assets and liabilities as well as a copy of the personal income tax return for the previous fiscal year.

D. Time for Submission

(i) In the case of taking office, such person must submit within thirty days from the date of taking office.
(ii) In the case of vacating office, such person must submit within thirty days from the date of vacation.
(iii) In addition to the case of the vacating of office, the person who vacates his or her office, must also re-submit an account showing assets and liabilities within thirty days from the date of the expiration of one year after the vacation of office.
(iv) For a person holding a political position, who has already submitted the account, who dies while in office or before submitting the same after the vacation of office, an heir or an administrator of the estate of such person must submit an account showing assets and liabilities existing on the date of such person's death within ninety days from the date of the death.

E. Disclosure

The account and supporting documents submitted by the Prime Minister and Ministers must be disclosed to the public without delay but not later than thirty days from the date of the expiration of the time limit prescribed for the submission of such account. The account of the persons holding other positions cannot be disclosed to any person unless the disclosure will be useful for the trial and adjudication of cases or for the making of a determination and is requested by the Court or State Audit Commission.

F. Sanctions

If any person holding a political position and a state official intentionally:

(i) fails to submit an account showing assets and liabilities and supporting documents to the N.C.C. Commission within the time prescribed by this Act; or
(ii) submits such account and supporting documents with false statements; or
(iii) fails to disclose facts which should have been disclosed in such account and supporting documents, that person shall vacate office from the date of the expiration of the time limit prescribed for the submission of the account showing assets and liabilities or from the date of the discovery of such act.

In addition, that person can not hold a political position or a state official position for the period of five years from the date of the vacation of office.

In this case, the N.C.C. Commission will present the case to the Constitutional Court for final decision and, when the Constitutional Court gives a final decision that it is the case of an intentional submission of the account showing assets and liabilities and supporting documents with false statements or failure to disclose facts which should have been disclosed, such person shall vacate the position currently held, without prejudice to the acts previously done by such person while in office.

G. Inspection Report of a Person Holding a Political Position

In the case where the inspection report of a person holding a political position reveals an unusual change in the property owned by that person, the N.C.C. Commission will request the person holding the political position, or his or her heirs or the administrator of the estate, to explain the acquisition of such property. If that person cannot explain the source of unusual change, the N.C.C. Commission will pass the resolution that such person has had an unusual increase in his or her property.

In this case, the President of N.C.C. Commission will furnish all existing documents together with the inspection report to the Attorney General for instituting prosecution in the Supreme Court of Justice's Criminal Division for Persons Holding Political Positions so that the unusually increased assets will devolve on the State.

H. Allegation of Unusual Wealth

The allegation that any person holding a political position or any State official is unusually wealthy can be made by an ordinary person or the N.C.C. Commission

If an ordinary person files the allegation, it must at least contain the following particulars:

(i) the name and address of the person making the allegation;
(ii) the name or position of the alleged culprit;
(iii) the allegation and circumstance under which the alleged culprit has allegedly become wealthy.

After the allegation, the N.C.C. Commission will make a preliminary determination. If the alleged culprit has already submitted an account showing particulars assets and liabilities, the N.C.C. Commission will take such account into consideration.

In the case where the allegation meets the requirements or where there is a reasonable cause to suspect that the alleged culprit has become unusually wealthy, the N.C.C. Commission will proceed the fact inquiry.

For the purpose of a fact inquiry, the N.C.C. Commission can order the alleged culprit to show particulars of the assets and liabilities of the alleged culprit, which must not be less than thirty days and must not be more than sixty days.

1. Temporary Seizure

If the N.C.C. Commission discovers that any property of the alleged culprit is connected with the unusual wealth and is under the circumstance convincingly indicative of the possibility of its transfer,

move, transformation or concealment, the N.C.C. Commission has the power to issue an order of temporary seizure or attachment of that property, without prejudice to the right of the alleged culprit to submit an application for taking such property for use with or without bail or security.

When there occurs a temporary seizure or attachment of the property, the N.C.C. Commission will conduct the proof of the property without delay. In the case where the alleged culprit is unable to present evidence that the property under temporary seizure or attachment is not connected with the unusual wealth, the N.C.C. Commission will have the power to continue its seizure or attachment until it passes a resolution that the allegation has no *prima facie* case, which must be within one year from the date of the seizure or attachment or until the court passes a final judgment dismissing the case. However, if the proof is successful, the property will be returned to such person.

2. Case Proceeding

If the N.C.C. Commission has conducted a fact inquiry and passed a resolution that the alleged culprit has become unusually wealthy, it will proceed as follows:

(i) in the case where the alleged culprit is a person holding a political position, the N.C.C. Commission will file the case to the Attorney General for submission of a motion to the Supreme Court of Justice's Criminal Division for Persons Holding Political Positions requesting the Court to order that the property devolve upon the State;

(ii) in the case where the alleged culprit is the President of the Supreme Court of Justice, President of the Constitutional Court, President of the Supreme Administrative Court, Election Commissioner, Ombudsman, judge of the Constitutional Court, member of the State Audit Commission, Vice President of the Supreme Court of Justice, Vice President of the Supreme Administrative Court, Chief of the Military Judicial Office, Deputy Attorney General or is the person holding a high ranking position, the N.C.C. Commission will file the case to the Attorney General for submission of a motion to the Court having competence to try and adjudicate the case, requesting the Court to order that the property devolve upon the State;

(iii) in the case where the alleged culprit is the Attorney General, the N.C.C. Commission will submit a motion to the Court having competence to try and adjudicate the case, requesting the Court to order that the property devolve upon the State;

(iv) in the case where the alleged culprit is a State official who is not a person in (i), (ii) and (iii), the N.C.C. Commission will file the case to the Attorney General for submission of a motion to the Court having competence to try and adjudicate the case, requesting the Court to order that the property devolve upon the State. Moreover, the N.C.C. Commission will notify the allegation to the superior or the person having the power to appoint or remove the alleged culprit for the purpose of issuing a punitive order of expulsion or dismissal on the deemed ground of corruption.

3. Time for Submission of a Motion

The Attorney General or the N.C.C. Commission must submit a motion requesting the Court to order that the property devolve upon the State within ninety days from the date the case is received from the N.C.C. Commission.

4. The Burden of Proof

In the case in which a request is made that the property be ordered to devolve upon the State, the burden of proof to the Court that the said property does not result from the unusual wealth is upon the alleged culprit.

5. Execution

If the Court gives an order that the alleged culprit's property in respect of which the N.C.C. Commission has passed a resolution confirming its representing the unusual wealth or the unusual increase devolve upon the State, but the execution is unable to be conducted in whole or in part of such property, the execution may be conducted of other property of the alleged culprit within the prescription of ten years,

but it shall not be conducted in excess of the value of the property ordered by the Court to devolve upon the State.

I. International Cooperation Regarding Freezing, Confiscation, and Repatriation of Proceeds of Corruption

The Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) of Thailand is the law providing assistance and seeking for assistance regarding investigation, inquiry, prosecution, forfeiture of property and other proceedings relating to criminal matters to/from a foreign state. The Attorney General or the person designated by him is the Central Authority of Thailand. One main function of the Central Authority is to consider and determine whether to provide assistance to a requesting state; and, whether to seek assistance from a foreign government.

Assistance to a foreign state shall be subject to the following conditions:

(i) Assistance may be provided even if there exists no mutual assistance treaty between Thailand and the requesting state, providing that such state commits to assist Thailand under the similar manner when requested;
(ii) The Act which is the cause of a request must be an offence punishable under Thai laws except when Thailand and the requesting state have a mutual assistance treaty otherwise specifying;
(iii) A request may be refused if it affects national sovereignty or security, or other crucial public interests of Thailand, or relates to a political offence;
(iv) Assistance shall not be related to a military offence.

The state having a mutual assistance treaty with Thailand shall submit its request for assistance directly to the Central Authority. The state having no such treaty shall submit its request through a diplomatic channel.

The request for assistance from a foreign state to forfeit or seize property located in Thailand shall provide the description of the property and its location or the habitation of the person having it in possession, in detail sufficient to be acted upon.

In case of the request for forfeiting the property, it shall be also be accompanied by the original or the authenticated copy of the final judgment of the Court of the requesting state forfeiting such property.

In case of the request to seize the property, it shall be accompanied by the original or authenticated copy of the order of the Court of the requesting state to seize such property before the Court makes a judgment or a final judgment of its forfeiture.

Upon the receipt of the request, the Competent Authority (the Executive Director of the International Affairs Department, the Office of the Attorney General) shall apply to the Court having jurisdiction over the location of the property for the judgment of its forfeiture or the order of its seizure.

The Court may order the forfeiture of the property specified in a request if there is a final judgment of a foreign Court and it is forfeitable under Thai law.

Where the foreign Court has made a pre-judgment order seizing the property or made a forfeiture order against it but the order is not yet final, the Court, if it thinks fit, may make an order seizing it if it is seizable under Thai laws.

The Court shall have the power to order the forfeiture or seizure of property, even if the offence giving rise to forfeiture or seizure may not have taken place in Thailand.

The property forfeited by the judgment of the Court shall be devolved on the State, but the Court may give a judgment for rendering it useless or for its destruction.

In terms of asset recovery (UNCAC Chapter V), because Thailand has not ratified this Convention, there is no Thai legislation allowing the Thai Government to repatriate proceeds of corruption to the victim (requesting) country.

As mentioned above, under the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) of Thailand, the property forfeited by the judgment of the Thai Court according to the request for assistance from a foreign state shall be devolved on the requested state. However, if the treaty between Thailand and

other countries otherwise specifies, the property or proceeds of corruption forfeited shall remain to the requesting state.

J. Conclusion

Asset proceeding is one of the measures and law enforcement methods to deal with corruption cases. There are also criminal prosecutions by the Office of the Attorney General and removal from office by the Senate. The N.C.C. Commission plays a leading role in fact inquiry and inspection of assets and liabilities. It has the power to issue and order of temporary seizure and attachment of the property.

However, the check and balance system will be scrutinized by the Attorney General and the Court before unusually wealthy assets devolve upon the State.

III. MONEY LAUNDERING

Anti-Money Laundering Act B.E. 2542 (1999) of Thailand mainly focuses on two parts: offence and asset measures which closely rely on each other.

In terms of the offence, any person who will be said to commit an offence of money laundering is:

(i) transfer, accept a transfer of or convert the asset connected with the commission of an offence for the purpose of covering or concealing the origin of that asset or, whether before or after the commission thereof, for the purpose of assisting other persons to evade criminal liability or to be liable to lesser penalty in respect of a predicate offence; or

(ii) act in any manner whatsoever for the purpose of concealing or disguising the true nature, acquisition, source, location, distribution, or transfer of the asset connected with the commission of a predicate offence or the acquisition of rights therein.

It could be noticed that the elements of the charge as mentioned above must link to a predicate offence. This means that there must be any person committing a predicate offence and the person who commits the offence of money laundering is doing one of the elements of the charge relating to predicate offence for the purpose specified by the law. These two persons (predicate offence and offence of money laundering) probably could be the same. In this case, he will be prosecuted for both the predicate offence and offence of money laundering.

In Thailand, there are eleven predicate offences of which nine offences are in the Anti-Money Laundering Law (Appendix A) and other two 13 predicate offences are in the Human Trafficking Law and the Election Law which is deemed to be predicate offences under the Anti-Money Laundering Law.

Therefore, there are eleven predicate offences in Thailand. The burden of proof in both eleven predicate offences and offence of money laundering is beyond reasonable doubt. If a public prosecutor cannot meet that requirement, the court will dismiss the case and the offender will be freed. However, Anti-Money Laundering Act B.E. 2542 (1999) separates offence from the asset measures. The case of predicate offences and the case of money laundering are in the jurisdiction of Criminal Court and the case of asset measures is in the jurisdiction of Civil Court. If the Criminal Court dismisses the case, it will not affect the case of asset measures in the Civil Court. This means that the Civil Court can give an order that the asset be devolved on the State if it is satisfied that the asset is connected with the commission of the offence.

A. Measures to Prevent Money-Laundering

1. Report and Identification

(i) Financial Institutions

When a transaction is made with a financial institution, the financial institution has the duty to report

that transaction to the Anti-Money Laundering Office when it appears that such transaction is:

(i) a cash transaction exceeding two million Baht;
(ii) a transaction connected with the asset worth more than five million Baht;
(iii) a suspicious transaction, whether it is the transaction under (i) or (ii) or not

In the case where there subsequently appears a reasonable ground to believe that any transaction already made without being reported is a transaction required to be reported by a financial institution, that financial institution has to report it to the Anti-Money Laundering Office without delay.

(ii) Land Offices

Any land office has to report to the Anti-Money Laundering Office when it appears that an application is made for registration of a right and juristic act related to an immovable asset to which a financial institution is not a party and which is of any of the following descriptions:

(i) requiring cash payment in a larger amount than two million Baht;
(ii) involving a greater value of an immovable asset than five million Baht, being the assessment value on the basis of which fees for registration of the right and juristic act are levied, except in the case of a transfer by succession to a statutory heir; or
(iii) being made in connection with a suspicious transaction.

(iii) Professions

Some professions stated below have the duty to report to the Anti-Money Laundering Office any transaction when it is carried out in cash of a value exceeding the amount prescribed in the Ministerial Regulation (No Ministerial Regulation issued so far) or is a suspicious transaction:

- Professions that undertake provision of advice or being an adviser in transactions relating to the investment or movement of funds, under the law governing securities and stock exchange;
- Professions relating to trading of precious stones, diamonds, gems, gold, or ornaments decorated with precious stones, diamonds, gems, or gold;
- Professions relating to trading or hire-purchase of cars;
- Professions acting as a broker or an agent in buying or selling immovable property;
- Professions relating to trading of antiques under the law governing selling by auction and trading of antiques;
- Professions relating to personal loan under supervision for business that are not a financial institution under the Ministry of Finance Notification relating to Personal Loan Business under Supervision or under the law governing financial institution business;
- Professions relating to electronic money card that are not a financial institution under the Ministry of Finance Notification relating to electronic money card or under the law governing financial institution business;

Professions relating to credit card that are not a financial institution under the Ministry of Finance Notification relating to credit card or under the law governing financial institution business;

- Professions relating to electronic payment under the law governing the supervision of electronic payment service business.

2. Asset Proceedings

(i) Provisional Seizure

In conducting an examination of the report and information on transaction-making, if there is a reasonable ground to believe that any asset connected with the commission of an offence may be transferred, distributed, moved, concealed or hidden, the Transaction Committee have the power to order a provisional seizure or attachment of such asset for the duration of not more than ninety days.

The person having made the transaction in respect of which the asset has been seized or attached

or the stakeholders in the asset can present evidence that the money or asset in such transaction is not the asset connected with the commission of the offence in order that the seizure or attachment order may be revoked.

(ii) Case Proceeding

In the case where there is convincing evidence that any asset is the asset connected with the commission of an offence, the Secretary-General of the Anti-Money Laundering Office will refer the case to public prosecutor for consideration and filing a petition to the Court for an order that such asset be devolved on the State without delay.

After filing a petition, if there is a reasonable ground to believe that the asset connected with the commission of the offence will be transferred, distributed or taken away, the Secretary-General will refer the case to the public prosecutor for filing a petition to the Court for provisional seizure or attachment of such asset prior to an order. The Court has to consider this petition as a matter of urgency. If there is a convincing evidence that the petition is justifiable, the Court will give an order as requested without delay.

Upon the receipt of the petition filed by the public prosecutor, the Court will order the notice thereof to be posted at that Court and the same will be published for at least two days in a newspaper widely distributed in the locality in order that the person who may claim ownership or interest in the asset may file an application before the Court has an order.

The Court will also order the submission of a copy of the notice to the Secretary-General for posting at the Anti-Money Laundering Office and at the police station where the asset is located. If there is evidence that whoever may claim ownership or interest in the asset, the Secretary-General will notify in writing to that person for the exercise of rights therein. The notice will be sent by registered post to such person's most recent recorded address as shown in the evidence.

(iii) The Owner and the Beneficiary of Assets

Before the Court gives an order, the person claiming ownership in the assets in respect of which the public prosecutor has filed a petition for it to be devolved on the State can file an application satisfying that:

(i) the applicant is the real owner and the asset is not connected with the commission of the offence, or

(ii) the applicant is a transferee in good faith and for value or has secured its acquisition in good faith and appropriately in the course of good morals or public charity.

In addition, before the Court gives an order, the person claiming to be a beneficiary of the asset in respect of which the public prosecutor gas filed a petition for it to be devolved on the State can file an application for the protection of his rights. For this purpose, that person has to satisfy that he is a beneficiary in good faith and for the value or has obtained benefit in good faith and approximately in the course of good morals or public charity.

However, if the person claiming to be the owner or transferee or beneficiary of the asset is the person who is, in the past, associated with an offender of a predicate offence or and offence of money laundering, it shall be presumed that such asset is the asset connected with the commission of the offence or transferred in bad faith, as the case may be.

(iv) The Court Order

When the Court has conducted an inquiry into the petition filed by the public prosecutor, if the Court is satisfied that the asset to which the petition relates is connected with the commission of the offence and that the application of the person claiming to be the owner or transferee is not tenable, the Court will give an order that the asset be devolved on the State.

If the asset is cash, the Anti-Money Laundering Office has to forward one half to the Anti-Money Laundering Fund and another half to the Ministry of Finance. If it is the other type of asset, rules of the

cabinet will be followed.

If the Court deems that the asset in the petition is not related to the commission of an offence, the Court will order return of the said asset. In this case, where there is no claimant to the restrained asset within two years from the date the Court made the return order, the asset will be transferred into the Fund.

APPENDIX A

"State official" means a person holding a political position, Government official or local official assuming a position or having permanent salaries, official or person performing duties in a State enterprise or a State agency, local administrator and member of a local assembly who is not a person holding a political position, official under the law on local administration and shall include a member of a Board, Commission, Committee or of a sub-committee, employee of a Government agency, State enterprise or State agency and person or group of persons exercising or entrusted to exercise the State's administrative power in the performance of a particular act under the law, whether established under the government bureaucratic channel or by a State enterprise or other State undertaking.

"Person holding a political position" means Prime Minister, Minister, Member of the House of Representative, Senator, Political parliamentary official under the law on parliamentary officials, Governor of Bangkok Metropolitan, Deputy Governor of Bangkok Metropolitan and member of the Bangkok Metropolitan Assembly, Local administrator or member of a local assembly of a local government organization the income or budget of which is not lower than that prescribed in the Government Gazette by the National Counter Corruption Commission.

APPENDIX B

In Anti-Money Laundering Act B.E. 2542 (1999), "predicate offence" means any offence

- relating to narcotics under the law on narcotics control or the law on measures for the suppression of offenders in offences relating to narcotics;

- relating to sexuality under the Penal Code in respect of procuring, seducing or taking away for an indecent act a woman and a child for sexual gratification of others, offences of taking away a child and a minor, offences under the law on measures for the prevention and suppression of women and children trading or offences under the law on prevention and suppression of prostitution only in respect of procuring, seducing or taking away such persons for their prostitution, or offences relating to being an owner, supervisor or manager of a prostitution business or establishment or being a controller of prostitutes in a prostitution establishment;

- relating to public fraud under the Penal Code or offences under the law on loans of a public fraud nature;

- relating to misappropriation or fraud or exertion of an act of violence against assets or dishonest conduct under the law on commercial banking, the law on the operation of finance, securities and credit foncier businesses or the law on securities and stock exchange committed by a manager, director or any person responsible for, or interested in, the operation of such financial institutions;

- relating to malfeasance in office or malfeasance in judicial office under the Penal Code, offence under the law on offences of officials in State organizations or agencies or offence of malfeasance in office or corruption under other laws;

- relating to extortion or blackmail committed by claiming an influence of a secret society or criminal association under the Penal Code;

- relating to smuggling under the customs law;

- relating to terrorism under the Penal Code;

- relating to gambling under the law on gambling, limited to offences relating to being an organizer of a gambling activity without permission and there are more than one hundred players or gamblers at one time, or the total amount of money involved exceeds ten million Baht.

DISCUSSIONS AND RECOMMENDATIONS

SUMMARY OF DISCUSSIONS

The discussion sessions were chaired by Mr. Ricardo V. Paras III, Chief State Counsel, Department of Justice of the Republic of the Philippines.

Mr. Panumas Achalaboon, Public Prosecutor, International Affairs Department, Office of the Attorney General, Thailand, sat as Co-Chair, by consensus of the participants.

Mr. Haruhiko Ukawa, Deputy Director of UNAFEI, supported the Chairs as General Editor of the discussion sessions.

Topic (i): Measures to get information to identify and trace the proceeds of corruption, including effective use of FIU information.

In this first part of the discussion session, the participants addressed their experiences with Financial Intelligence Units (FIUs); the desirable qualities or character of FIUs; the use of information held by FIUs; and asset declaration.

All but one of the participating countries had already established FIUs and the participants discussed their experience with such institutions. They addressed the matter of **obtaining information** from financial institutions: co-operation and compliance from financial institutions are essential for an FIU's operation. Chair Paras enquired of the participants about the willingness of financial institutions to comply with know-your-customer rules, Suspicious Transaction Reports (STRs) and other reporting requirements. A participant from the Philippines responded that compliance in his country is generally satisfactory. The terrorist attacks of 9/11 led to increased acceptance on the part of financial institutions that political leadership demands more stringent records and anti-money laundering measures. As global financial transactions tightened after 9/11, the financial institutions accepted that an era of financial reporting had arrived and that the prudent provider of financial services would know his or her customers well. The participant from Malaysia also voiced confidence in the level of compliance in his country, but a visiting expert to the seminar expressed some reservation as to the willingness of financial institutions to divulge information to FIUs. It was noted that the effective discharge of FIU duties is directly tied to their independence. The participants echoed this principle throughout the discussions.

This discussion of the **importance of independence** for FIUs led the participants to focus on the elements required for an FIU to function at optimal efficiency. To prevent the use of private financial information for political gain the participants agreed that FIUs must be politically neutral. They further agreed that sufficient human and financial resources were indispensable.

The discussion also addressed the **use of information** held by FIUs, both between domestic law enforcement agencies and international counterparts. All agreed that the use of information held by FIUs should not be heavily restricted. Links between the FIU and its country's law enforcement agencies ensure that the FIU's work is an effective contribution to the fight against financial crime in all its forms. A visiting expert from the USA explained that authorized US law enforcement agencies had direct access to all Suspicious Activity Reports (SARs) and STRs filed with FinCEN, the US Department of Treasury's FIU. Law enforcement agencies do not have to wait for FinCEN to analyse or forward any of the information. This is particularly useful because FIUs are not necessarily aware of the relevance of particular pieces of information they acquire. Regarding international exchange of information, a participant from the Philippines explained that the Philippine AMLC has both proactive and reactive functions in exchanging intelligence via Egmont Secure Web.

Regarding **asset declaration** by government officials, the participants discussed the requirements of the respective countries and the relative merits and demerits of differing levels of stringency. The Philippine requirements are extensive, encompassing the assets and liabilities of spouses, children and extended family. Annual updates are also required. A participant questioned the practicality of requiring politicians to file asset declarations. Both the Philippines and the USA make such requirements of parliamentarians. A visiting expert from the USA explained that the US has both public and non-public agency reports and both

government officials and politicians must disclose their assets. Chair Paras mentioned time/response limits to more properly implement the requirement to disclose assets and liabilities. Participants then discussed what constitutes an appropriate time limit to place upon investigations of declarations.

Topic (ii): The development of laws and international co-operation to actualize freezing, confiscation, and recovery of the proceeds of corruption, including prevention, criminalization and prosecution of money-laundering.

The participants discussed the responsibilities incumbent on signatories to the UNCAC. Each participating country is a signatory to the UNCAC, and most have ratified it. The participants also addressed various aspects of the financial investigation process: identification, freezing, confiscation, and repatriation of the proceeds of crime. The participants also discussed measures against cash smuggling, including the requirements placed upon financial institutions regarding foreign currency exchange. Finally, they also addressed international co-operation in asset recovery.

Regarding **freezing**, the participating countries have differing requirements and procedures; some permit administrative freezing by law enforcement authorities, but most require judicial involvement through court orders. Some participating countries do not permit the use of freezing orders to secure non conviction-based forfeiture.

One expert cautioned against issuing freezing orders too early in an investigation, stating instead that finding intelligence and building a network are more useful long-term objectives than simply seizing funds once identified.

Other matters relating to freezing orders which the participants discussed include the procedures for *ex parte* orders, the most desirable period of validity of freezing orders and the need to protect third parties. One expert pointed out that the temporary UN Security Council Resolution 1373 makes freezing of terrorist assets an obligation.

More detailed discussion of **non conviction-based forfeiture** (NCB) then followed. UNCAC Art. 54.1 (c) requires States Parties to consider taking such measures as may be necessary to allow NCB in order to render mutual legal assistance (MLA), but not all of the participating countries provide for NCB.

Chair Paras explained that NCB is used in the Philippines and extolled its usefulness when the defendant cannot be prosecuted because of death, flight or absence. Further advantages of NCB forfeiture are that it may allow for a lower burden of proof than the "beyond a reasonable doubt" standard required of criminal conviction, and that jurisdiction can be more easily established in NCB cases. In criminal cases, the action is *in personam* and the physical presence of the defendant is essential, but an NCB case is *in rem*, a procedure against the asset, rather than the person, and jurisdiction can be established by serving a summons on the title holder. In the event that the title holder cannot be located, the summons can be served by publication.

Regarding **international co-operation in asset recovery**, the participants noted that repatriation of stolen assets is not automatic and that requests for assistance must be filed in accordance with the UNCAC or other relevant instruments. In this regard, the General Editor spoke of the importance of a strong network of practitioners who make active use of informal channels of communication. Such measures can be used immediately; they do not require any legislative changes or other reform. Informal consultation regarding draft requests can increase the request's executability and avoid later procedural difficulties in the requested state. Participation in international fora such as the Good Governance Seminars or other UNAFEI training programmes can facilitate the building of such a network of practitioners and the sharing of experience and expertise.

At the conclusion of the discussion sessions, the following Recommendations were adopted by consensus.

RECOMMENDATIONS

We hereby acknowledge the following points.

Preamble - Recognition of Current Situation:

1. Economic crimes, including corruption and money-laundering, are committed for the purpose of obtaining profit. Thus, identifying, freezing, seizing and confiscating the proceeds of crime are the most effective measures against those criminal activities. Further, the successful confiscation and recovery of the proceeds of corruption are vital to eradicate poverty and to secure sustainable economic development and the rule of law, especially in developing countries.
2. A variety of problems impede the abilities of prosecutors and investigators to confiscate and recover the proceeds of corruption, such as weaknesses in the prevention and control of money-laundering, legal loopholes, lack of expertise and resources to successfully trace, freeze and confiscate assets, both domestically and internationally, as well as insufficient trustful international co-operation.
3. As international transactions have become increasingly easy to conduct, so too has it become easier to move corruption and money-laundering proceeds across borders. Investigation and prosecution authorities face immense challenges in tracing and proving complex transnational flows of money and successfully freezing and confiscating the illegally acquired, transferred and diverted assets, particularly when the assets are located abroad. Under these circumstances, international co-operation among financial and criminal justice authorities in the relevant countries and mutual legal assistance in the freezing and confiscation of the proceeds of corruption have become focal issues in recent years. It has, therefore, become indispensable for each country to both adopt and fully implement effective legislation and practical measures for identifying, freezing, confiscating and repatriating the proceeds of corruption as may be provided in existing international agreements and conventions.

We hereby adopt by consensus the following Recommendations:

Recommendations:

1. Accession to the United Nations Convention against Corruption should be duly considered in order to utilize the Convention as an effective tool for identifying, freezing, confiscating and repatriating of the proceeds of corruption;
2. To implement obligations in the UNCAC, criminalization of acts of corruption in accordance with the UNCAC should be duly considered by respective countries. Such acts of corruption criminalized in accordance with the Convention should be included as predicate offences of money laundering;
3. Establishment of a Financial Intelligence Unit to gather and analyse information regarding financial transactions is considered essential to detect money-laundering and the laundering of the proceeds of corruption. Establishment of an FIU is called for by Article 14 of the UNCAC. FIUs should be adequately empowered and staffed so that they will be able to carry out their functions effectively and without undue influence. FIUs should provide the widest possible co-operation to their foreign counterparts without unduly restrictive conditions;
4. Financial institutions and FIUs should comply with relevant FATF 40+9 recommendations, which are the accepted international standards for an effective anti-money-laundering regime, especially those regarding the duty to verify every customer's identity and beneficial ownership and to report suspicious transactions;
5. In order to effectively detect the proceeds of corruption, criminal justice authorities and officials should pay adequate attention to suspicious transactions reported to their FIUs;
6. Criminal justice authorities and FIUs should develop the capacity of their officers by providing professional training on financial investigations including accounting procedures, new payment methods, and recent developments in identifying, freezing, confiscating and repatriating proceeds of corruption;

7. Law enforcement authorities should not ignore the myriad ways that the proceeds of corruption are moved and be alert to the fact that not all funds are moved through the formal financial sector. In order to combat cash smuggling and to promote targeting and interdiction of cash couriers, law enforcement and other relevant authorities should enhance international sharing of information and experience as regards the modes of operation employed by cash couriers and effective detection methods;
8. Establishment of an obligatory asset disclosure system for appropriate public officials, including high-ranking officials and politicians, should be considered. Access to such information should be granted to appropriate investigative authorities;
9. In order to prevent dissipation of the proceeds of corruption, adequate legislation and procedures should be enacted so that criminal justice authorities or FIUs are empowered to promptly take freezing measures;
10. Criminal justice authorities, upon receipt of a request from another country to freeze the proceeds of corruption located in their country, should act promptly to ensure that the funds are so restrained;
11. To ensure the effectiveness of freezing orders, authorities should be able to obtain such orders without alerting the subject of the investigation;
12. Adequate legislation and procedures for criminal conviction-based asset confiscation should be enacted, and properly implemented;
13. Where not already in effect, consideration should be given to enacting a law to allow for the confiscation of proceeds of corruption without a criminal conviction, especially in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases;
14. The possibility of shifting the burden of proof regarding the origin of alleged proceeds of corruption should be considered;
15. Concerning cases involving the embezzlement of public funds or the laundering of such embezzled funds, a legal mechanism which allows a requested country to return those confiscated funds to a requesting country should be in place, as mandated by Article 57 of the UNCAC;
16. Criminal justice authorities should effectively utilize mutual legal assistance as a measure to realize freezing, confiscation and recovery of proceeds of corruption;
17. Criminal justice authorities should provide the widest possible co-operation to their foreign counterparts so that proceeds of corruption can be effectively and promptly detected, frozen, confiscated and recovered. Such co-operation should be provided without unduly restrictive conditions;
18. Criminal justice authorities should strengthen and utilize informal channels with their counterparts in other jurisdictions prior to making a formal request for mutual legal assistance in order to facilitate active information exchange. Sharing of draft requests should be encouraged in order to avoid delays and to ensure that final versions will be executable in the requested country;
19. All investigative agencies are encouraged to build trustful co-operation at the domestic, regional and international levels, to ensure efficient investigations for a better prospect of conviction and/or asset recovery;
20. Participation in international fora, such as this Regional Seminar on Good Governance, to exchange experiences and possible solutions with other jurisdictions, should be encouraged. Participants should share with criminal justice and other authorities in their respective jurisdictions the knowledge gained from such international fora; and
21. Notice should be taken of assistance provided by the joint UNODC-World Bank Stolen Asset Recovery Initiative in developing and implementing measures to facilitate asset recovery.

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B. Visiting Experts

Mr. Emile van der Does de Willebois	Senior Financial Sector Specialist Financial Market Integrity Unit World Bank U.S.A.
Ms. Linda M. Samuel	Deputy Chief Asset Forfeiture and Money Laundering Section Criminal Division U.S. Department of Justice U.S.A.

C. Adviser

Mr. Robert E. Courtney III	Attaché U.S. Department of Justice Embassy of the United States in Manila

D. Organizers

UNAFEI

Mr. Masaki Sasaki	Director
Mr. Haruhiko Ukawa	Deputy Director
Mr. Naoyuki Harada	Professor

Ms. Yoshiko Kawashima	Senior Officer
Mr. Ikuo Kosaka	Officer
Ms. Grace Lord	Linguistic Adviser

UNODC RC

Mr. Michel Bonnieu	Senior Regional Legal Adviser Legal Advisory Programme UNODC Regional Centre for East Asia and the Pacific

Organizing Committee of the Philippines

Mr. Severino H. Gaña, Jr.	Assistant Chief State Prosecutor National Prosecution Service Department of Justice
Ms. Deana Penaflorida Perez	Senior State Prosecutor National Prosecution Service Department of Justice
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Ms. Gilmarie Fe S. Pacamarra	State Prosecutor Department of Justice
Ms. Anna Noreen T. Devanadera	Associate Prosecution Attorney Department of Justice
Mr. Cesar Angelo Chavez III	Associate Prosecution Attorney Department of Justice

SEMINAR SCHEDULE

9 December	**Opening Ceremony** **Opening Address** by Mr. Masaki Sasaki, Director, UNAFEI **Address** by the Honourable Ms. Agnes Devanadera, Secretary of Justice, Republic of the Philippines **Address** by Mr. Michel Bonnieu, Senior Regional Legal Adviser, UNODC RC **Special Address** by His Excellency Mr. Makoto Katsura, Ambassador of Japan to Thailand
	Introduction **Introductory Remarks** by Mr. Haruhiko Ukawa, Deputy Director, UNAFEI **Presentation** by Mr. Michel Bonnieu
10 December	**Papers and Contributions** Individual Presentation AMLC, the Philippines Individual Presentation OSG, the Philippines Individual Presentation PCGG, the Philippines Individual Presentation Cambodia Individual Presentation Indonesia Individual Presentation Lao PDR Individual Presentation Malaysia Individual Presentation Myanmar Individual Presentation Thailand
	VE Presentation, World Bank VE Presentation, US DOJ
11 December	**Discussion Session**
	Adoption of the Recommendations
	Closing Ceremony **Address** by Mr. Masaki Sasaki, Director, UNAFEI **Address** by Mr. Michel Bonnieu, UNODC RC **Closing Remarks** by Honourable Secretary Devanadera

APPENDIX

PHOTOGRAPHS

- ***Commemorative Photograph***
- ***Secretary Devanadera's Speech***
- ***Discussion Session***
- ***Introductory Remarks***

UNAFEI

Commemorative Photograph

Secretary Devanadera's Speech

Discussion Session

Introductory Remarks

ADDENDUM

A letter received, post publication, from Singaporean Authorities

The following letter from the Director of the Corrupt Practices Investigation Bureau of Singapore, received post-publication on 21 April, 2011, is hereby attached as an addendum to this report. Neither UNAFEI nor the government of Japan expresses any opinion on the conflicting views expressed by the Philippine and Singaporean authorities. This addendum does not imply any endorsement.

Swift and Sure

To combat corruption through swift and sure, firm but fair action
CORRUPT PRACTICES INVESTIGATION BUREAU
2 Lengkok Bahru Singapore 159047
Tel: 6270 0141 Fax: 6270 0320 Website: www.cpib.gov.sg

Your Reference :
Our Reference : CPIB/5.18.6
Date : 8 April, 2011

Mr Masaki Sasaki
Director, UNAFEI
1-26, Harumi-Cho, Fuchu
Tokyo 183-0057
JAPAN

Dear Mr Sasaki,

RECOVERY OF MARCOS ASSETS (PAPER BY DR JAIME S. BAUTISTA)

We refer to the above paper presented at the Third Regional Seminar on Good Governance for South East Asia Countries on "Measures to Freeze, Confiscate and Recover Proceeds of Corruption, including Prevention of Money-Laundering" co-hosted by UNAFEI, the Department of Justice of the Republic of Philippines and the UNODC Regional Centre for East Asia and the Pacific held in Manila in December 2009. The presentation was subsequently included in the related UNAFEI publication that was issued in October 2010. We had received a copy courtesy of the good office of UNAFEI in January 2011.

2 The presentation and paper contained several material inaccuracies which need to be addressed and rectified. Singapore ratified the UN Convention Against Corruption (UNCAC) on 6 November 2009.

3 With respect to the Marcos Funds case, that has been discussed at pages 72 to 79 of the Paper by Dr Bautista, Singapore would disagree with the arguments concerning this issue. In 2008, the Singapore Court of Appeal decided that the Philippines government could not rely on State Immunity to assert a claim over the relevant funds where there are other claimants, and that this should be more appropriately ascertained through a full hearing of all parties claiming the funds. The Singapore Court of Appeal also noted that the Philippines government has asked the Court to order that the funds be paid to it. This required the Singapore Court of Appeal to rule on the merits of the claim of the government of the Philippines. The Court of Appeal considered this as a submission to the Court's jurisdiction.

4. The Singapore Ministry of Foreign Affairs (MFA) explained to the Philippines authorities in 2008 that the Singapore Government was and is not in a position to dismiss any on-going matter before the Courts of Singapore. Any attempt to do so would constitute

Executive interference with judicial proceedings and be contrary to our Constitution. For the same reasons, the Government of Singapore is also not in a position to intervene in the next step of proceedings before the High Court in relation to the substantive merits of the case of each claimant.

5. Singapore had previously explained to the Philippines authorities that although the Court of Appeal had decided that State Immunity does not apply in this instance, this decision does not preclude the Philippines government from presenting its arguments fully on the substantive aspect of the case in subsequent proceedings. The Singapore High Court has not yet made a final decision as to which party is the rightful owner of the funds as the matter is still being litigated by the claimants.

6. We also disagree with the contention in Dr Bautista's paper that the Singapore proceedings appear to run counter to the current trends on multi-lateral co-operation. With respect to the UNCAC, the Convention does not oblige State Parties to interfere in judicial proceedings which are underway. In fact, article 57(2) of the UNCAC requires, very clearly, that the rights of bona fide third parties must be taken into account in any proceedings relating to the recovery of assets. The current proceedings before the Singapore Courts are therefore in line with the provisions of Article 53(a) of the UNCAC, and in no way run counter to the current trends in multilateral co-operation.

7. We trust that we have explained and clarified Singapore's position in respect of the proceedings in the Singapore Courts on the recovery of Marcos assets and that Dr Bautista will be made aware of our position. We would also request that a copy of this letter be enclosed as an addendum to the Paper by Dr. Bautista, in future hard copy or electronic editions of UN publications reproducing Dr Bautista's Paper.

Thank you.

Yours faithfully,

LL

Eric Tan
Director
Corrupt Practices Investigation Bureau
Singapore