

GROUP 3

EFFECTIVE MEASURES TO COLLECT INFORMATION, CONDUCT INVESTIGATION AND FINANCIALLY WEAKEN CRIMINAL ORGANIZATIONS' MONEY-LAUNDERING ACTIVITIES

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I. INTRODUCTION

The group decided to discuss through knowledge sharing and providing information on legal basis on the topic of “*Effective measures to collect information, conduct investigation and financially weaken criminal organizations’ money-landering activities*” based on experiences of the respective jurisdictions. On 23 May 2017, Group 3 organized and began discussions and elected by consensus Mr. Dicko as Chairperson, Ms. Puntarangkul and Mr. Anzai as Co-Chairpersons, Mr. Laule as Rapporteur, and Ms. Amaya Soto as Co-Rapporteur.

The objective of the Group was to identify effective and efficient measures to collect information and to conduct investigations on the topic of money laundering, and to examine how can we financially weaken criminal organizations that commit this kind of crime; to do so, it is important to identify, trace, freeze or seize any kind of assets, and to confiscate them if they are the result of this specific crime, and finally to provide some kind of compensation or restitution to the direct victims or even to society.

At the beginning of the session the group identified several topics: smuggling of firearms, corruption and money laundering; at the end, the group chose to discuss the topic of money laundering. The group came to the conclusion that it is important to discuss things like buying or selling of firearms and even corruption, or other kinds of crimes that are committed by organized crime groups, yet the final conclusion was that it does not matter if all the efforts are made only to fight these crimes as somehow these organizations will always find a way to reorganize if they have the ability to do so by transferring money illegally from one jurisdiction to another. They will find a way to recover and start all over again, probably even stronger than the first time; this is the reason why it is important to conduct special investigation, prosecution and adjudication when it comes to money laundering. If countries can find an effective way to cut their incomes, and disrupt their operations because a big part of this money comes from illegal actions such as selling drugs or firearms, or, even worse, smuggling of migrants, which is then used to commit other crimes. Organized crime occurs beyond borders and indirectly affects economies of countries, and therefore countries need to support each other using efficient techniques and measures to combat organized transnational crimes.

II. SUMMARY OF THE DISCUSSIONS

A. Basic Legal Framework to Address Money Laundering

Each jurisdiction has relevant legislation which defines the term “money laundering” and also provides the legal basis to address money laundering. Interpol defined money laundering as “*an act or attempted act to conceal or disguise the identity of illegally obtained proceeds so that they appear to have originated from a legitimate source*”.¹

Criminals involved in Transnational Organized Crime (TOC) frequently commit all kinds of crime, but in this report, we focus on money laundering, which is one of the crimes described by the United Nations Convention against Transnational Organized Crime (UNTOC),² also referred to as the Palermo Convention. Under Article 3, the Convention calls for member States to prevent, investigate and prosecute the offences established in accordance with Article 6 on laundering of proceeds of crimes. Nowadays relevant domestic legislation criminalizes the act of money laundering, and provides the legal basis for criminal procedure during the investigations, adjudication and punishment, as well as recovery and compensation of proceeds of crime.

B. Efficient Collection and Handling of Information

1. Source of Information

Every country in their domestic laws has already established ways of collecting and handling the information either if it is to open an investigation or if it is during the investigation regarding money laundering. The group has identified the following sources of information from which relevant authorities in each jurisdiction obtain information and data in their investigations on transnational crime.

(a) Community reports

In some jurisdictions, anyone in the community can report crimes related to money laundering; it can be an anonymous call, or someone going directly to the police department or the prosecutor's office and they may say what their concerns are and why they think that someone is committing money laundering. This kind of information is taken just as advice, not a complaint by itself, but at least it can help the authorities to have an idea where or who they should be looking for when it comes to conducting investigations on reported or suspected money laundering.

Sometimes it is very difficult for the police to open a case in some jurisdictions if the information provided by the community is speculative. For example, in Thailand, a Canadian married a Thai woman, and they bought a very huge amount of land, which affected the other community members because they could not gain access to their lands. This couple had just one source of income from a fitness centre, that apparently only had four clients, so the problem here was to find out where the money came from and how this couple managed to buy that land without having sufficient income. In this kind of case, the community might be concerned about the legality of this kind of business, according to experience, most of them are just coverups for illegal operations such as money laundering. In this particular case, the community's concern was not reported to police, but if any member of the public decides to report to the police on money-laundering activities in Thailand, the police can open a file, and according to their domestic law there is a possibility that the Anti-Money Laundering Committee, which is a state agency, will do further investigation.

Somalia has the Audit General Office, which receives information related to corruption and money laundering cases. Under their domestic law, this office can receive information from the community, officials or public offices, and even from other organizations in order to open a case and initiate investigations. There is a particularity: because everyone in the community knows each other, it is easy for the community to keep track of the activities of the other members of the community. It is very easy to know if the asset was bought by legal means or if it was obtained with dirty money from piracy activities or other illegal activities. Therefore, in this situation the information can be obtained from any member in the community by an investigator who is already conducting an investigation related to money laundering.

In other countries such as El Salvador and Brazil, any member of the public can provide information to the police or directly to the prosecutor's office. Depending on the quality and quantity of information in these countries, the prosecutor decides whether to continue with an investigation or to dismiss the case based on the lack of information—for example, when the person does not provide names, directions or specific dates or places.

The domestic law in Papua New Guinea (PNG) allows the police to open a case upon receiving reports from the public and then carries out further investigation, but sometimes as in other countries, people often

¹ <https://www.interpol.int/Crime-areas/Financial-crime/Money-laundering>

² The United Nations Convention against Transnational Organized Crime was adopted by the UN General Assembly resolution 55/25 of 15 November 2000 and it entered into force in 2003.

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fear repercussions, and that is one of the main reasons why it is so difficult to start an investigation with such sources of information. Recently PNG has attempted to pass the Whistle Blowers Bill in Parliament to give maximum protection to individuals so they can report on official corruption and matters related to money laundering, but the Parliament never passed the Bill.

In the case of Zambia, the High Court threw a matter saying that when it comes to money laundering, the investigation needs to rely on sufficient evidence and not only on a community report because of the speculative nature of such reports. To prevent this situation the prosecutor and the police need to gather as much information as they can in support of the case. This resolution or saying of the High Court of Zambia, was related to a previous resolution given by a lower court on a case directly related to money laundering.

When it comes to community reports, we can conclude that this source of information is important, and according to some domestic laws, it can help to start an investigation or generate leads or hints regarding persons of interest in the case. It is very important to remember that the community reports must be supported with hard evidence in order to have a well-structured case. Relying only on one source of information may be considered speculative. It is important to find other sources of information to confirm the theory of the case.

(b) Bank transactions records

All participants agreed that bank transactions of suspected persons can be obtained from commercial banks by police or the prosecutor in their respective jurisdictions. Whether or not a warrant is needed depends on the domestic law of each country. The banks have the obligation to provide all information that is requested. The court cannot deny access to the information on the grounds of bank secrecy. This situation has been overcome with the UNTOC under article 12 (6).

For some jurisdictions, Financial Intelligence Units (FIUs) play important roles in obtaining such transaction reports from the commercial banks, and these units can make these records available to the police, prosecutors or any authority that is conducting an investigation related to money laundering. Some countries have established in their domestic laws that all commercial banks are compelled to provide reports to the appropriate authority when the bank detects suspicious transactions. Therefore, they may not wait for the authority to ask them if an unusual transaction has been made. Domestic laws compel the banks to provide all the information that is requested, and for that propose the banks must have appropriate systems to keep all the records and documents safe and available when they are requested.

Some countries have established legal requirements to open a bank account. For example, in Japan, when a person wants to open a bank account there are some forms that need to be filled out with certain information, such as the reason for opening the bank account. A person is prohibited from using someone else's bank account.

In Laos, according to their domestic law, every time that an account has any kind of activity of transferring money the bank gathers and checks the information in detail of the transferor and the purpose of the transfer before further delivery to the beneficiary. If that information is not provided correctly and completely, the financial institution shall refuse the payment to the beneficiary and transfer the money back to the transferor and promptly report the case to the Anti Money Laundering Intelligence Office (AMLIO).

According to the group discussion, nowadays it is not difficult for any country to obtain any kind of bank records. This has been overcome with the UNTOC according to the article previously cited. It does not matter if you need a warrant from a judge to request the bank records, or if the prosecutor can request the record directly from the bank; the important thing here is that now the banks are obliged to keep all the records of bank transactions—loans, opened accounts, credit cards, all accounts transactions, etc., and they shall provide the information when requested by the legal authority of each country according to their domestic laws.

This final point on bank records, also applies when mutual legal assistance is the original request: all the States Parties of UNTOC shall provide other States parties with information previously requested by mutual legal assistance, and they apply their own domestic laws to collect the information related to bank records if that is the specific request in order to facilitate the necessary documents that are useful in other money-

laundering investigations that involve other countries.

(c) Taxation reports

Taxation reports are also important sources of information to monitor and to identify money-laundering activities by relevant agencies to execute any further investigations.

In some countries such as El Salvador, when a money-laundering investigation is opened, the tax reports become an important source of information because such information is available at the Taxation Department. In Japan, timely reports on taxation payments by individual companies can be obtained from the Ministry of Finance for the purpose of investigation.

Thailand shared its experience on drug trafficking issues and like in any other country drug traffickers do not pay any kind of tax for their illegal businesses. It is very difficult to trace the flow of money and to be able to separate legal from illegal assets and consequently forfeit any proceeds of crime. It is very difficult in Thailand to obtain tax reports of foreigners because there are too many informal activities and hard to collect tax information when it is an informal business.

Obtaining taxation reports is a basic step in any investigation relating to money laundering and tax fraud in Brazil. It helps to confirm whether the tax declaration made by the Person of Interest (POI) is consistent with the assets and if these assets are covered by the legal declaration made by the POI. If there is any disproportion, this kind of information can help in further investigations. Once the investigator or prosecutor has suspicious information that leads them to think that the POI also has an illegal source of income, there should be a comparison between all the income of the POI and all the assets that this person might have. If there is any disproportionality, then there is strong evidence of money laundering.

Brazil also has a standard means of collecting information. The agency that oversees public expenditures provides information to the prosecutor about overpricing in public contracts. In these kinds of cases, the prosecutor obtains from the Federal Revenue Service the list of the major payments done by the hired companies through these suspicious contracts. After getting this list, the prosecutor checks the social security records of the firms that received such payments. Sometimes it turns out that one or more of those firms do not have employees registered with the social security service. This kind of information is a clue that those firms do not have actual activity, and could have been used as a channel for kickback payments and money laundering.

PNG experiences the same situation as Brazil with fake or temporary companies who disappear after obtaining funds from the Government to do projects and do not pay tax. There are so many informal businesses that do not pay tax, making it very difficult to obtain tax reports to keep control of the regular and irregular activities, even if they are a legal or natural person. Taxation reports can be obtained from the Internal Revenue Commission. In Zambia, the Revenue Authority is the independent authority that collects taxes on behalf of the State in Zambia. It works with relevant agencies. Police can only obtain a search warrant and do searches at the Revenue Authority to collect taxation reports.

In El Salvador when they conduct investigations related to the MS-13 gang for any kind of crime, especially for extortion, the prosecutors and investigators look for information related to all those persons that somehow help the gang to launder their money. For example, if the investigation shows that the gang is buying cars, the investigation is conducted to find out if the person that is selling all these cars actually knows that the money used to buy those cars is illegal, or if in fact selling those cars without knowing the precedent of that money. There have been effective investigations conducted this way; in fact, in one case the investigation showed that the car importer in reality knew that the cars were being bought by gang members, and that the money was the result of different extortion schemes. The main clue for this investigation was the information collected from the tax department in that country.

This source of information is one of the main pieces of evidence in cases of money laundering. The reason is that with this information the prosecutor can demonstrate that the POI in fact cannot backup with legal documents the source of the money that sometimes can be translated into assets such as cars, houses or land.

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(d) Immigration reports

All participants agreed that immigration reports provided by the immigration authorities in the respective countries can provide valid information on the movement of POIs who travel from country to country to determine transfer of dirty money to conduct illegal activities in those countries.

In some countries like in Japan, if you are travelling to these country, some questions are asked by Japan's customs agents at the border, such as if you have a specific amount of money, the reasons why you are traveling to this country, period of time staying and the address of the place where the person will be staying. Police and investigating authorities can obtain further information from customs about a POI, especially if the person declares and enters with a large amount of money.

Japan had an experience in which a POI travelled to Hong Kong for short visits. Investigations showed he was purchasing gold in Hong Kong. He brought 10 Million Yen to Hong Kong to purchase gold. The purpose of the investigation was to establish that the gold was purchased using money fraudulently obtained. Investigation showed that the person did not make any reports on the gold he purchased to the respective authorities. The money used in this case was obtained from fraudulent activities, and after buying the gold, the person took it to Japan for the propose of selling it and obtaining more cash. The investigators obtained a number of immigration records that indicated the number of trips that the person made to Hong Kong. The suspect claimed that he brought the hard cash to Hong Kong undetected. He may have had criminal intentions so that was why he did not declare that he was carrying 10 million yen.

In one case, the accused person was travelling to Israel regularly, and was caught when he was entering US with millions of dollars. Immigration reported to customs. Customs took him in custody, conducted a body search, and they discovered and obtained millions of US Dollars attached to his body.

In other countries like Laos, if the person who takes money in or out of Lao PDR or any other valuable material goods, the value of which exceeds the limit fixed by the Bank of Lao PDR, the person needs to declare them to the customs officers, and the officer will do a follow up report to the AMLIO; in case the authorities detect or see any suspicious movement, that there is no declaration or there is an underreporting of valuable property, they will be seized and sequestrated immediately, and then will be reported to the AMLIO so they can do an investigation to determinate the source of the money or valuables.

The border controls are a very useful source of information if the money-laundering investigation involves transnational organized crime, with this kind of information the investigation can prove the movements of the person, or even only give a hint as to the amount of traveling the person does in a specific period of time, and if this amount of traveling can be possible according to the income that the person has, or if it is impossible for this person to travel that much because he does not have enough money to do this kind of traveling.

(e) Trade records

The Group agreed that information such as invoices, receipts, customs documents, online transactions like eBay, business registrations, and licences are also important to determine the trade (sales and buying) of properties or investments using dirty money.

Lao PDR has never prosecuted any money-laundering related cases as of yet. In the case of Mali, the public workers have more money than the business people, and most of the time the money comes from public funds; however, the authorities cannot do anything or just very little to investigate where the money is coming from. The reason is that it is very difficult to obtain records from companies, as they cannot expose records of purchases. In Mali, if a Government Minister is a shareholder in a certain firm, the company under the law must disclose that the Minister is the shareholder. This fact will be made known to the public to allow the transparent process of awarding tenders. If someone becomes president, he must by an oath declare that he is leaving the company during the period of the presidency, and cannot be a shareholder or provide any input in the operation of the company, which can be managed by someone else. The president is open for investigation and prosecution after he loses the election to see if his/her company had benefited by any means while he/she was in power.

El Salvador, Zambia and Japan have a specific agency accorded with functions to register and keep records of property, land titles, property development, purchases, ownership and transfer of property. It is

very easy to obtain relevant records from these agencies.

Trade records can be a very important source of information, and the person in charge of the investigation needs to have in mind that with organized crime, especially when it is transnational crime, some of these groups' main goals are to obtain money, properties and any other kinds of assets, and to reach these goals these groups commit any crime that can be a source of income. It is important for every country to keep records of all the assets that the community possesses, not only to have order in society, but also to keep track of the investments that people do, and to be able to provide the necessary information to the authority that is leading an investigation that involves properties or other kinds of assets that can be frozen and later confiscated upon a determination that they are the result of money laundering.

(f) Information provided by other countries (international cooperation)

All participants agreed that information on individuals and groups or organizations that are connected to money laundering activities, can be informally obtained at the beginning through the Financial Intelligence Unit (FIU), Interpol or through the police under relevant agreements as well as through diplomatic channels. However, working through diplomatic channels is a cumbersome exercise. Therefore, for any formal request, Mutual Legal Assistance (MLA) is a very important tool that is readily available for countries to send and receive information or evidential materials relating to money laundering and other transnational crimes. The Egmont group among other international organizations can be a valid source of information.

Countries can provide adequate support to each other if they have a previous agreement based on good will. For example, Brazil and the United States have come to this kind of agreement, and it has been a successful practice between these two countries. The best example was during an investigation that was being done by authorities in Brazil and they needed some information from the U.S; before the U.S. could give an answer to Brazil, they invited the respective authority that was conducting the investigation in Brazil, to come to the U.S. so they could identify the evidentiary materials that they needed and then make the correct or appropriate request. As a consequence, Brazil's authorities went to the U.S., identified exactly what they needed and finally made the appropriate request, having at the end the correct assistance from the U.S.

Mali, as some other countries, sometimes faces problems with mutual legal assistance. Sometimes the assistance requested is related to the extradition of a citizen of Mali, but countries such as Algeria, sometimes refuse saying that they cannot cooperate on the basis that they do not know exactly where the person is.

Papua New Guinea is able to receive or provide information both formally and informally to countries in the Pacific Region, including Australia, through MLA. As a result, recent investigations and criminal trials were successful.

Mutual Legal Assistance plays an important role during the investigation of transnational organized crime related to money laundering. The countries should provide all the information requested, having in mind that the help they provide will also have a good influence on their own countries, because in this way it is not only one country that is fighting organized crime. This also leads the other countries to look for persons that they did not know were related to organized crime or to crimes like money laundering.

(g) Past criminal records

The participants discussed how past criminal records can be a source of information to further investigate money laundering crimes.

In Mali, a list of groups and members of organized crime is provided by the Security State (Special Unit under the Authority of the President) to the President for review, specifically for the purpose to see if future crimes are committed by the offender.

In Japan, past criminal records are kept in the prosecutors' offices. The prosecutors use the previous documents to find useful information. If someone has a case and the name of the suspect, the police can go through the criminal records and find useful information related to money laundering. From the evidence, they can draw links and conduct an appropriate investigation. In Japan, they keep information on criminal offences for 50 years for offenders who are serving life in prison or who were sentenced to the death penalty. For offenders serving 10-30 years' imprisonment, their criminal records are kept for 30 years. It is easy for

the Japanese government to provide information. All the records are kept in the public prosecutors' offices.

In Zambia, the court keeps the records for 2–3 years only in the prosecutor's office. The prosecutor goes to court to obtain previous records that are beyond 3 years. Court records are accurate. You can easily access them and refer to them for future reference.

The participants shared further experiences from their jurisdictions on keeping POIs on blacklists or investigation watch lists to monitor their movement or activities. Most participants agreed that it is not a practice in their countries. In Japan, it is the normal duty of the police to keep records of known individuals in criminal organizations within Japan. In PNG, the Task Force Sweep, which has currently had its operations suspended by the government, had once issued instructions to airline companies to keep records on the movements of government Ministers, PNG elites, foreigners and individuals who became POIs in the investigations conducted by the agency, but in this case issues were raised on infringements of rights of individuals on freedom of movement under the Constitution. Many implicated were later investigated and prosecuted for embezzlement and money laundering.

(h) Information from social media

The participants agreed that social media is a source of information to conduct a preliminary investigation. POIs may operate in secret Facebook groups or openly discuss their criminal activities on Facebook. Nowadays organized crime is evolving as the technology evolves, setting a high bar for countries to come up with creative and legal methods of investigation, so this source of information can be used efficiently and not only as isolated information. Technology should not be a barrier to conducting an appropriate and effective investigation.

Some countries are now making conscious efforts to generate leads from their citizens. Such is the case in PNG. Nowadays the citizens of this country can expose suspicious movements on Facebook groups like "The Voice PNG" or "The News Page PNG" and several others on corrupt practices including money laundering before police do their own investigations. Sometimes such publications provide leads to police to conduct further investigations.

In other countries like in El Salvador, a case can be opened in the prosecutor's office on their own initiative if any sign of a probable crime is shown on any kind of social media site; such is the case that their domestic law allows them to initiate an investigation if a newspaper reports news related to someone or to some group that might be committing crimes such as corruption or money laundering.

(i) Witness testimony

All group members noted that testimony provided by a witness to police or investigators is a legitimate source of information, but it is required by the authorities and by the law, that in cases related to organized crime and more so if it is related to money laundering, there must be other sources of information that can support the witness testimony. This is to ensure that investigators do not only rely on one source of information. Thinking that maybe at trial, simple testimony would not be sufficient to prove that someone or some people have committed money laundering, the prosecutor needs documents to support that situation, even more so if we believe that the witness can refuse to give testimony in front of the judge or if something happens to the witness.

C. The Techniques Involved in Conducting Investigations

After discussion on the kind of information and the sources of information that the authorities need to conduct an efficient investigation, group members further proceeded into discussing the methods applied in collecting such information.

(a) Bank transactions

The participants discussed the techniques involved in collecting information from banks, and also shared challenges of obtaining information on bank transactions in their respective jurisdictions.

In some countries, mobile phones are used to withdraw or transfer funds, just like in Somalia, and the bank accounts can be traced. This mechanism can also be used to make purchases in some shops inside the country. The owner may use a SIM number that is not registered so it is complicated to get more

information. SWIFT runs infrastructure all over the world.³ SWIFT has to determine which bank is used, so to get bank details it is necessary to go to the bank with search warrants to obtain details of the transactions.

The commercial banks in most jurisdictions are obliged to report any suspicious transactions to the FIU. A warrant is needed for obtaining bank transaction information in jurisdictions where it is not mandatory to provide information. The mandatory reporting is based on the amount of money involved in the transaction. Some of these reports are called Suspicious Transfer Reports, and other reports refer not to the quantity of the transaction but to the activity itself and it is called not a quantified but a qualified report.

Countries are recommended to establish FIUs that serve as national centres for the receipt and analysis of: (a) suspicious transaction reports; and (b) other information relevant to money laundering, associated predicate offences and financing of terrorism, and for the dissemination of the results of that analysis.⁴ All FIUs are recommended to apply for membership with the Egmont Group and share information with each other.

In Japan, security cameras outside the Automatic Teller Machines play important roles in tracing who withdrew the money and at what ATM, the location and time. Using the special fraud method, prosecutors can only charge a person for fraud if the accused had known that opening an account using another person's name was fraudulent. However, it is quite difficult to charge a person with fraud if he or she was allowed by another person to use the account.

In El Salvador, banks share information and photos with all other banks in the country to create the same base or records of suspicious persons, making it easier for the investigators to interview and identify the users of some bank accounts. Sometimes other jurisdictions help provide intelligence and information to El Salvador, such as the U.S. State Department does when they trace a suspicious transaction between an account open in El Salvador, if it is related to another account in another country.

(b) Techniques applied in collecting information from social media

The group shared the same idea, that it was necessary to discuss the effective measures and techniques that can be applied to collect all the information during an investigation, and everyone agreed that nowadays some relevant information can be found in social media, but in these cases, it is quite complicated to obtain the information from these sources, and the legal procedure varies from country to country.

When it comes to money laundering investigation, it is important to consider the efficiency in collecting information from social media and to check the legal bases in each country so the information obtained can be used in an eventual trial. In other words, it is very important to conduct a clean investigation by ensuring the legality of obtaining information from social media, and sometimes the information we can collect from individuals' mobile phones or from private companies or applications or software like LINE in the case of Thailand.

It was very interesting when the discussion reached the question of the legality of using the fingerprints of POIs to access their mobile phones, including whether the use of fingerprints in this manner requires a warrant from a judge. The conclusion was that in these cases the investigator cannot force the person to unlock his or her phone, because this measure can be viewed as a form of self-incrimination. Therefore, obtaining fingerprints should require a warrant from a judge so legal means are used to force the person to unlock the phone, thus granting investigators access to all information that is inside and to social media applications.

As it was said before, in this technique of investigation the police officer can use the suspect's fingers to unlock the mobile phone, but to do so the police officer needs to have a warrant from a judge. Otherwise to open the mobile phone using the fingerprint without a warrant would be considered illegal. Everyone during the discussion agreed that nowadays smartphones carry many kinds of information, and somehow can be

³ Swift is the Society for Worldwide Interbank Financial Telecommunication. SWIFT's original mandate was to establish a global communications link for data processing and a common language for international financial transactions. <http://searchcio.techtarget.com/definition/SWIFT>

⁴ <https://egmontgroup.org/en/content/financial-intelligence-units-fius>

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compared to a PC, so if we make this comparison, the conclusion will be: *to obtain the information inside a PC the investigator or the prosecutor needs a judicial warrant; therefore, it should be the same when it comes to mobile phones.*

Finally, the group discussed the legality of hacking email accounts, Facebook profiles and other forms of social media that belong to a POI. The conclusion was that for hacking these sources of information, the principle of wiretapping can be applied, which means that in order to violate the right to privacy, it is necessary to obtain a judicial warrant in order to be able to continue the investigation with these kinds of techniques.

(c) Undercover operations and pretense

The group came up with a scenario to discuss legal issues surrounding undercover operations: *“Suppose that a suspicious person purchased a house using illegal money. At the beginning of the investigation the investigator sends a message to the person of interest, and the investigator says, “We were friends a long time ago”. (Although in reality there is no real relationship.) “You live in a good house. How did you buy it?” By saying we know each other from a long time ago, the investigator is looking to get the suspect closer to him. And as it was expected, because the suspect was feeling comfortable, he says to the investigator that he bought the house using the money that came from illegal activity. In this case, the question whether is this kind of investigation is legal or not.*

During the discussions, group members agreed that such technique is normal for an undercover operation to obtain information and therefore is legal. In such case, the investigator must not induce, and avoid use of force on the suspect in order to get information. Probably this kind of technique is necessary only for the initial investigation, and of course it would be necessary to bring together other supporting evidence to confirm the information that was provided at the beginning.

According to the group members, to do undercover investigations, there must be a previous order from the judge or the prosecutor, and this would depend on every country and their domestic laws; however, this kind of technique sometimes is only allowed in specific cases such as those that involved organized crime, and the investigation requires special techniques in order to do an efficient investigation.

In PNG, the new *Cyber Crime Act* criminalizes fake Facebook accounts, so for the police to create a fake account and do undercover operation to be able to get in touch with criminals, the police may require a warrant from the court.

(d) The use of cameras

The participants also discussed the use of cameras as a special technique of investigation, and the legality surrounding hidden cameras.

In some cases, surveillance techniques allow the use of hidden cameras in particular cases, but the legality of the use of this technique will depend on the space where the camera was placed and especially if it was required to have a warrant from a judge, such as in cases where the camera was set inside a private place.

It was also important to discuss the use of private video tapes, such as in cases where the POI or someone else has already placed a video camera inside an office, a house or any other place that can be considered as a private place; in order to be able to use these kinds of video records, even though they can be considered as private, the police officer or investigator can seize the video record and provide it as evidence during the investigation.

A real case happened in PNG, where a corruption fighting Global NGO became a witness after using undercover techniques to secretly record a video of an entire interview with some lawyers from a famous Port Moresby based law firm. Without knowing the conversation had been secretly recorded, some Government ministers, lawyers and PNG elites were named as persons who have secret accounts in Singapore and Australia, and PNG law firms helped facilitate the transfer of millions of Kina to pay PNG politicians. In this particular case, the video could not be used even though there was a search warrant, and the main reason was that it is illegal to film someone secretly in PNG without their consent according PNG laws.

The conclusion that can be made from this technique of investigation is that in order to place hidden cameras inside private places, there must be a previous warrant; if the camera is located in a public place, there is no need for a warrant and the only necessity is to seize the video. The same goes for private cameras that were previously placed by other persons. In this case, the investigator would only need a search warrant and to seize the video that was recorded for a third person.

(e) How to analyse information

The participants discussed the importance of analysing information as part of the investigation. Questions were raised as to whether analysis of data and information can be done at the same time while collecting information. Important key questions involved in the analysis of information were identified and discussed as follows:

- i. *Does the information obtained prove the elements of that breach or offence?*
- ii. *Does the information obtained identify another source of information?*
- iii. *Does the information identify another POI or link to an organization of interest?*
- iv. *Whether the information obtained complies with the rules of evidence, i.e., it must be legally obtained, obtained by rules of evidence, and the legality of the evidence. After arrest, the suspect is informed when charged.*

Members agreed that it is possible to differentiate the collection of evidence and do the analysis at are the same time. Collection of evidence and analysis go hand in hand where the prosecutor is also the investigator, though theoretically they are different. Members agreed that when analysing the whole body of evidence, it is important to analyse it in a broader context, which sometimes requires forensic analysis. The investigator or prosecutor must have a plan to ensure the collection of all information needed, and that the information is collected on time.

The final conclusion on this topic was as follows: if we are investigating a money laundering case, at the beginning of the investigation while the investigator is collecting all the information, at the same time this information needs to be analysed with the objective to check whether all the information collected is sufficient to charge a specific person, or if the investigation needs to be open to other persons that may be related to the first POI, and to determine whether these third persons participated in the money laundering.

D. How to Financially Weaken Criminal Organizations: Identifying, Tracing, Freezing or Seizing Assets and Confiscation of Proceeds of Crime

In our discussions, the participants shared experiences from their respective jurisdictions on how they have weakened criminal organizations. Everyone concluded that criminal organizations can be financially weakened by the identification, tracing, freezing or seizing of assets and confiscation of the proceeds of crime.

(a) Tracking

For investigations related to money laundering, it is important that from the beginning the illegal money can be tracked by all available means. Therefore the investigator and the prosecutor need to amplify the scope of the investigation and not only be looking for the money in bank transactions or other types of financial institutes, but also need to consider whether the money can be found physically in a specific place, like a car, house, hotel and so on; in this case, some special techniques can be applied for tracking the physical money. This type of tracking can be done just like in Brazil, where there is a possibility of using GPS to monitor the movement of suspected money that is laundered, or maybe by applying other techniques like undercover delivery, which is done in Japan when it comes to drugs, but it is important that, in order to use these techniques, the investigator or prosecutor should have a warrant issued by a judge.

PNG had an experience related with tracking drugs from country to country. In this case, the police busted a massive 50kg of methyl amphetamine, and it was valued at the cost of US \$8 Million, which originated from the Netherlands. When this package was on its way to PNG, a detective in the UK removed the drugs, and replaced it with soap powder and inserted a tracking device to allow the police to monitor its movement to its final destination. This method is called “controlled delivery”.⁵ In this case the shipment was

kept under surveillance based on the existing international law enforcement network. Finally, the Australian Federal Police, the New Zealand Police, the PNG Transnational Crime Unit and PNG customs were involved as the illicit cargo moved to New Zealand and Australia before being delivered to a house in Port Moresby. Police obtained a search warrant, entered the property unnoticed, and when the suspects went into the property at dawn to pick up the illicit cargo, the law enforcement officers arrested and detained the suspects. They were prosecuted and are serving terms in prison.

Just as the real case experienced by PNG, the same mechanism should be applied with the movement of cash when there is an open investigation related to money laundering. Of course, it would be very difficult to implement this kind of technique. However, with appropriate legislation and the appropriate devices, along with some other special techniques of investigation, this can lead to a very successful and efficient investigation related to money laundering.

(b) Freezing of assets

The reason why the group chose the topic of money laundering is because transnational organized crime is finding ways to grow every single day, and not only in terms of how many people belong to organized criminal groups, but also in terms of the ways these groups commit crimes and how they are able to obtain money to continue their criminal purposes or just to increase their incomes. Every country needs to find ways to financially weaken these criminal organizations and to find efficient ways to prevent the use of the assets that these groups possess and to prevent them from transferring these assets a third person, making it difficult for the authorities to confiscate the assets after trial.

In order to do so, there are some countries that already have come up with efficient ways to find, freeze and seize assets at the beginning of an investigation, and a good example is Brazil. This country has MOUs signed with the Judiciary & Central Bank in a new system which seeks to unify all databases of all banks. A judge can have access to this database and then freeze any account after a court order that he issues himself. The specific procedure is that the judge, upon request, can search the database, and the system will allow the judge to freeze the account and transfer the money to the Court. Under the relevant laws, the judge can transfer money from the account of the accused into the account of the judiciary. The money kept in the account of the judiciary is then returned to the State or used to compensate the victims of fraud and anti-money laundering activities if the court issues such orders at the conclusion of the trial. To open a bank account, every citizen needs to register with the Federal Revenue Service, which is a requirement according to their domestic law, and this registration is made through an ID.

Just as in Brazil, in other countries like in Zambia and El Salvador a court order is needed in order to freeze a specific bank account. Police in Japan can freeze accounts immediately before investigations are conducted. In other countries like in Japan, police officers can freeze any account or all the accounts immediately by just sending the order to the respective banks, and this can be done before the investigation is conducted.

(c) Non-conviction-based confiscation

The participants also discussed non-conviction-based confiscation as a means of confiscating properties and assets from accused persons, and they shared experiences and challenges in their respective countries.

In some countries like in Mali, the prosecutor can negotiate with the accused person to come to a deal in order to avoid confiscation, and the accused can voluntarily return the tainted property. The prosecutor in this case gives assurance that if the accused person repays the whole amount in terms of monetary value, there will be no prosecution. If the negotiation is successful, the accused returns the property through the non-conviction-based method of confiscation.

In the case of El Salvador, non-conviction-based confiscation can be done while the criminal proceeding is progressing, and these procedures do not depend on the other in order to have a successful ending. According

⁵ Under Article 2 (f) of UNTOC “Controlled delivery” shall mean the technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of persons involved in the commission of the offence.

to their domestic law, the money recovered goes specifically to the police, the Ministry of Justice or the Prosecutor's Office.

This type of procedure is regulated in article 12, paragraph 7 of UNTOC, and some countries are already implementing this provision, which is mandatory for all the States Parties to this Convention.

(d) Differentiating between genuine assets and proceeds of crime

The group had further discussions around a case scenario to differentiate between confiscation of properties obtained from clean money and those obtained from dirty money. The case scenario was: "Say 10 suspects got US\$10,000.00 each through money laundering. Each also has US\$90,000.00 worth of assets obtained legally. Say only one perpetrator is charged". The question asked was if the assets were commingled with dirty money and clean money, how can the prosecution confiscate what was obtained illegally, and how can the prosecution differentiate illegal money from legal money if both are in the same account.

In these kinds of cases, Mali's courts can either hear the matter in a civil proceeding and the single perpetrator is charged only for the amount received illegally, while in a criminal proceeding the single person charged is accountable to repay everything he and his accomplices purchased using dirty money. In other countries such as Thailand, a case like this can be heard in a civil proceeding and does not require the criminal to show up.

In Brazil and El Salvador, the authorities need to identify and confiscate what is illegally obtained. If damage is done to the society, a separate civil proceeding is conducted if the victims request compensation, and in order to repay the society, a civil proceeding is required.

The group agreed that the ease of identifying and differentiating properties and assets that are legally obtained by POIs and those which are proceeds of crime differ from one country to another. Countries need to understand each other's different economic, legal and social systems that influence the criminal justice system in order to address the money laundering and other crimes, so every country can provide assistance when it comes to transnational organized crime.

(e) Seizing or confiscation in a speedy manner

The participants discussed further as to how authorities in their respective countries can confiscate properties and assets purchased with money that is laundered. Each participant shared the experiences from his or her country. The participants learned that in several jurisdictions, when the authorities are unable to find the assets purchased from dirty money, they can also confiscate the equivalent value. If the accused received a house through a legal process, then that house can be converted to state property if the criminally obtained assets in are not found.

In order to do so, first the authorities need to identify all the properties in a speedy manner. Secondly, they need to identify the properties that were not legally obtained from the illegal money. The authorities have to identify all the money and assets through investigation and do analyses of those assets. After the analysis, the authorities can make a final decision on the properties which are owned by the person investigated or a third party, on those that are legally purchased or received, and those which were illegally obtained. Such allows the authorities to seize properties or assets that can be a substitute if the assets obtained through illegal means are hidden.

In El Salvador, the prosecutors have an arrangement with some public offices and other agencies where information about purchases of assets by individuals can be obtained on all matters within four hours by email. All relevant public agencies supply information by email to the Public Prosecutor, and a special unit in the Public Prosecutor's Office analyses and determines the background information of all properties, houses, cars and firearms including information on addresses, locations and phone numbers of individuals. Evidence is obtained within a two-month period. These kinds of agreements make it easier for the prosecutor to ask for the court to order confiscation of the equivalent value if those assets purchased using illegal money are concealed. If the prosecution knows that an account has a specific amount of money, the prosecutor can issue a provisional order to the bank to freeze the account; then the prosecutor needs to go to the court and request a formal order or warrant.

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In Somalia and Mali, most people do not have bank accounts. They keep money in their homes and large purchases are done in cash. It is the matter of the State to encourage the citizens to keep money in bank accounts. Criminals have a large network of extended family members and friends, and they give money to the POI for any kind of business. The money works for the POI as an investment, and they conduct all kinds of illegal business. Later-on the illegal business comes under investigation.

In Laos, families depend on each other and the money does not go through the banking system. The investigators have to compare the properties and assets the person had in the last few years, and all that he has recently accumulated. In the process of investigation, the law allows for confiscation of all properties and money in his possession related to the case, in order to ensure that the assets seized or sequestered shall not be sold, pawned, transferred, concealed, embezzled, dissipated and so on. This ensures that the assets related to the case shall be applied towards confiscation, fines, court fees or for appropriations as state property.

In Zambia and in PNG, you cannot confiscate the property of the accused. The court must issue further confiscation orders if the court finds the suspect guilty of money laundering and the purchase of properties with such money. In Zambia, the prosecutor advertises the assets after confiscation if the POI somehow escapes and cannot be found. Any person that has an interest in the property may come and claim the property after it is advertised. In a certain case, a POI stole money and bought different items including five vehicles, which were seized. The prosecutor advertised the items after proceedings were initiated. During the advertising period, one came and declared that he acquired that property before the seizure. The issue was, that the third party must be an innocent person, so the question arises whether the cars owned by the third parties can be confiscated and sold by the authorities?

In Japan while the trial is underway or before the trial, the prosecutors have to conserve the tainted properties and an authorization is needed from the judge. After the trial, the properties can then be confiscated.

PNG lately has taken tremendous steps to improve its financial system by passing new laws to counter money laundering and terrorism financing activities. The new laws introduce comprehensive measures to detect and deter money laundering and terrorist financing. Banks, financial markets, real estate companies and law firms are obliged to conduct due diligence on all customers and clients, report cash and electronic threshold transactions, assets of a designated person and entity and suspicious matters to the Financial Analysis and Supervision Unit (FASU), which is PNG's financial intelligence unit. Under FASU's direction, financial institutions can freeze bank accounts if suspicious transactions are immediately reported to FASU.⁶

The group agreed that the arrangement to confiscate assets is the ideal mechanism to weaken organized crime, but such arrangements must always have a legal basis so there is no confiscation outside the law and the procedures differ from one jurisdiction to another. The group agreed that if all government agencies of the respective countries have a good database, and there are agreements to share information between the courts and agencies, like Brazil, freezing of bad bank accounts and confiscation of tainted properties would be swift.

(f) Compensation or restitution to victims

The group went on to discuss how to compensate victims. In Japan, money confiscated in the criminal proceedings is distributed. Distribution can be done administratively. Money acquired through crimes will be only distributed to victims. The person responsible for such proceedings is the prosecutor's assistant officer. The prosecution can ask the court for the equivalent value in money or other properties of the tainted property if the same is concealed. The money goes to the National Treasury, and the victims of transnational organized crime are then compensated.

Brazil has the capacity to freeze and confiscate any properties purchased by dirty money, and the victims are then compensated. After the court freezes the account of the sentenced person, the money is transferred and kept in the account of the judiciary. The money is returned to the State or used to compensate the victims of fraud and anti-money laundering activities if the court issues such orders at the conclusion of the

⁶ Explanatory Note of the Anti-Money Laundering and Counter Terrorist Financing Bill 2015, pg. 5-6.

trial.

III. CONCLUSION

In conclusion, the group reached an agreement that the sources of obtaining information in the investigations for money laundering activities are static, which is the same across all countries, but there are differences from one jurisdiction to another in the methods and techniques applied in collecting information. Efficient investigative measures and prosecution based on current laws and practices differ from one country to another.

The ease of identifying and differentiating properties and assets that are legally obtained by POIs and those which are proceeds of crime differ from one country to another. Countries need to understand each other's different economic, legal, and social systems that influence the criminal justice system in order to address money laundering and other crimes, so they can help each other to fight transnational organized crime, which affects all countries.

To confiscate proceeds of crime in a swift manner, a country needs a legal basis so there is no confiscation outside the law, and a strong mechanism must also be set in place. The application of Article 12 of the UNTOC is necessary in order to reach this goal.

All government agencies of the respective countries need to have a good criminal database as well as a database of registration of properties and related information, and there should be agreements between agencies to share information in a timely manner to trace the movement of proceeds of crimes, records of purchases, and money transactions. Such information must be easily accessible and readily available to law enforcement agencies.

Money laundering is a transnational organized crime that occurs across borders, and international cooperation between countries is needed not only in the areas of providing assistance when requested but there must be sharing of knowledge and technical support between countries to enhance the systems on the ground in each country for quick facilitation of requests.