

SUMMARY REPORT ON ALA WORKSHOP II

Rapporteur: Atty. Diane A. Desierto

“CROSS BORDER STATUTES & OTHER MEASURES TO CURB MONEY LAUNDERING”

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Makati, Philippines

Speakers from the ALA member countries delivered their respective papers at the ALA Workshop II and highlighted the following points, under the theme “Cross Border Statutes & Other Measures to Curb Money Laundering”:

A. Mr. Weekoon Nithimutrakul, from Thailand’s Anti Money Laundering Office, on behalf of Police Major General Peeraphan Prembooti, Secretary General of the Anti-Money Laundering Board of Thailand

Thailand is a party to, among others, the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention 1988), the UN Convention Against Transnational Organized Crime (Palermo Convention 2000), the International Convention for the Suppression of the Financing of Terrorism of 1999, The Financial Action Task Force (FATF).

In 1999, Thailand enacted its Anti-Money Laundering Act, which established the Anti-Money Laundering Office. The Act lists 8 predicate offenses, the expansion of which AMLO is currently proposing.

Earlier in 1992, Thailand has also enacted its Act on Mutual Assistance in Criminal Matters, which sets the framework for cooperation in criminal justice matters between states, such as intelligence-gathering, prosecution, among others. Thailand has also entered into Treaties of Mutual Assistance in Criminal Matters with 8 countries --- the United States, Canada, the United Kingdom, France, Norway, China, Korea, and Poland.

Thailand has also increased its efforts in international cooperation to combat money laundering through the Financial Intelligence Unit in the AMLO, which is authorized to share financial intelligence information with other countries. Under certain enumerated foreign predicate offenses, the AMLO can prosecute the laundering of proceeds of foreign crimes in Thailand. The sharing of financial information is made under a Memorandum of Understanding based on the Egmont Group model. AMLO has signed the MOU with 23 countries. Thailand also exchanges information on a reciprocity basis with other countries who have not signed the MOU.

Thailand is a member of the Asia Pacific Group on Money Laundering and the Egmont Group of Financial Intelligence Units.

B. Ms. Zuraini Haji Sharbawi, Senior Counsel, Government of Brunei

Brunei has yet to ratify the UN Convention Against Transnational Organized Crime, however, at policy level, consideration is made to accede to its provisions. Thus, numerous legislative instruments have been passed to satisfy international standards. These include, among others:

- the 2004 Anti-Trafficking and Smuggling of Persons Order, which penalizes acts such as recruitment, transportation, transfer, and harbouring of offenders;
- 2005 Mutual Assistance in Criminal Matters Order, which is the enabling legislation for the Mutual Legal Assistance Treaty of 2004;
- the 1918 Extradition Act and the new draft Extradition Order in its final stages which incorporates many recommendations as those found under the London Harare Scheme;
- the 2005 Societies Order which regulates non-profit organizations not otherwise regulated by other laws, which deems certain societies “unlawful” “if they are used or likely to be used for any unlawful purpose or purpose prejudicial to or incompatible with the peace, public, order, security, or public interest of Brunei Darussalam”;
- the 2002 Anti-Terrorism Order which, among others, criminalizes the funding of terrorist acts and provides for the freezing of financial assets of persons who commit or attempt to commit terrorist acts
- Other long-standing and effective legislation such as the Misuse of Drugs Act, Arm and Explosives Act, Biological Weapons Act, Public Order Act, Internal Security Act
- 2000 Money Laundering Order, which sets out internal procedures that must be complied with by relevant financial businesses as defined in the Order, to prevent their businesses from being abused by money-launderers. Preventive procedures include customer identification, record keeping, and internal reporting. Failure to comply with these requirements is penalized with imprisonment not exceeding 2 years, a fine or both.
- 2000 Drug Trafficking (Recovery of Proceeds) Act; and
- 2000 Criminal Conduct (Recovery of Proceeds) Order
- Disclosure of information by banks under certain conditions provided in the Criminal Procedure Code, the Prevention of Corruption Act, the 2000 Criminal Conduct (Recovery of Proceeds) Order, the Banking Act, the International Banking Order, among others.

Brunei has formed various institutions to curb money-laundering, such as the National Anti-Money Laundering Committee (NAMLC) and the Financial

Institution Division. Brunei's enforcement agencies also continue to attend regional training programmes to improve investigative techniques.

C. Dr. Agus Brotosusilo of the Faculty of Law of the University of Indonesia

On 11 February 2005, Indonesia was removed from the Non-Cooperative Countries and Territories list of the Financial Action Task Force. Indonesia had enacted Law Number 15, 2002, concerning the crime of Money-Laundering, which, however, is still not deemed fully compliant with international standards. Law Number 25, 2003 subsequently amended Law Number 15, 2002.

The Law, as amended defines "money laundering" as an "act of placing, transferring, disbursing, spending, donating, contributing, entrusting, taking out of the country, exchanging or other such acts related to, assets known or reasonably suspected to constitute proceeds of crime, for the purpose of hiding or disguising the origins of assets as if such assets shall be legitimate. The Law also lists various predicate offenses. The Law likewise provides that assets derived from an offence committed in Indonesian territory or outside Indonesian territory is also deemed a crime according to Indonesian law.

The Law as amended created the Indonesian Financial Transaction Reports and Analysis Center (PPATK). The PPATK has the mandate of preventing and eradicating money laundering in Indonesia. Accordingly, the PPATK can conduct audits, monitor records, prepare guidelines for reporting procedures of suspicious financial transactions, request information concerning the progress of investigation or prosecution of money laundering criminal acts, among its other powers. The PPATK is also authorized to implement provisions of international conventions or international recommendations in the prevention and eradication of the crime of money laundering. Notably, Indonesia has entered into various extradition and mutual legal assistance treaties with other states in the region. Indonesia has also enacted laws protecting reporting parties and/or witnesses giving testimony in money laundering cases.

The FATF has opined that Indonesia's compliance with the 40 Recommendations is dependent upon both its legal framework as well as its implementation. Indonesia's efforts toward this end is evident from various recent high-profile cases involving suspicious transaction reports.

Indonesia has not fully enforced its anti-money laundering laws, and is currently building its financial intelligence facilities and inter-agency cooperation to strengthen both institutional and political support to curb money laundering activities.

D. Ms. Rosita Abd. Ghani of the Bank Negara Malaysia

Malaysia has taken various legislative and institutional measures to address cross border money laundering. Legislation includes, among others:

- The Anti Money Laundering Act, defining the offense of money laundering, the investigation, freezing, seizure and forfeiture of the proceeds of serious crimes, suspicious transaction reporting and record keeping. The AMLA sets out 176 predicate offenses under 22 Acts of Parliament. Under the AMLA, an “unlawful activity” is defined to as a serious offense as specified in the Act, or a “foreign serious offense”, as certified by the foreign government, and which is also a serious offense in Malaysia.

The Central Bank of Malaysia was appointed as the competent authority to administer and enforce the AMLA. The Central Bank may communicate financial intelligence to a corresponding authority of a foreign State pursuant to any existing arrangement between Malaysia and the foreign state.

Moreover, in light of Malaysia’s present exchange rate controls, any person leaving or entering Malaysia with a certain amount in cash or negotiable bearer instruments exceeding the prescribed value should declare the amount. Failure to do so will make the offender liable for a fine not exceeding one million ringgit or imprisonment not exceeding one year. However, this requirement is dependent on the enforcement of the 1953 Exchange Control Act (Sections 24 and 25) and ECM 13, a subsidiary legislation issued under the said Act.

- 2002 Mutual Assistance in Criminal Matters Act
- 1992 Extradition Act

Malaysia has likewise set up the National Coordination Committee to Counter Money Laundering, an inter-agency committee set up to ensure adequate government agency cooperation and information sharing. The NCC consists of 13 different government agencies, and is chaired by the Central Bank of Malaysia. Malaysia is a member of the Egmont Group and the Asia Pacific Group on Money Laundering. Malaysia has also entered into various international agreements to combat money laundering --- a 2002 Trilateral Agreement with Indonesia and the Philippines, the ASEAN-US Joint Declaration on Cooperation to Combat International Terrorism, Mutual Legal Assistance in Criminal Matters, among others.

Malaysia also participates in training initiatives for law enforcement and private sector personnel on financial investigation, mutual legal assistance, prosecutor training, regional judicial officers training, among others.

E. Atty. Francisco Ed. Lim, President and Chief Executive Officer of the Philippine Stock Exchange

The aggregate volume of global money laundering has been estimated at between two to five percent of the world's gross domestic product. In response to this international phenomenon, the Group of Seven (G7) industrialized nations created the Financial Action Task Force (FATF) on money laundering. The FATF currently has 33 member states. In 1990, the FATF issued its 40 Recommendations to combat money laundering. Significant among these recommendations are:

- the Customer Due Diligence (CDD) and record keeping requirements under Recommendation No. 5. Under this proposal, financial institutions are strictly prohibited from keeping anonymous accounts or those with obviously fictitious names, and are correspondingly required to identify and verify the identity of their customers.
- the filing of Suspicious Transaction Reports (STRs) under Recommendation No. 13.

These recommendations are controversial because compliance therewith is extended to professional advisers, including lawyers. Lawyers are required to submit STR reports when they engage in a financial transaction on behalf of a client in relation to certain enumerated activities. Lawyers are likewise required to comply with customer due diligence and record keeping requirements. This obligation of lawyers is what is known as the "Gatekeeper Initiative".

Although the Anti Money Laundering Act of 2001, as amended, does not include gatekeeper provisions as would require lawyers to submit reports or to conduct customer due diligence.

Philippine laws on the "Attorney-Client privilege" render gatekeeper provisions infeasible. The Revised Penal Code makes it a crime for a lawyer to reveal clients' secrets acquired by him with a view to professional employment. The Rules of Court also disqualifies a lawyer from testifying on communications between him and the client without the latter's consent, provided that an attorney-client relationship exists and the privilege is invoked with respect to confidential information passed on during the course of professional employment. Client identity is deemed embraced in the privilege. The Code of Professional Responsibility likewise mandates the lawyer to preserve the secrets of his client even after the attorney-client relation is terminated. However, the attorney-client privilege is subject to the crime-fraud exception, where communications from a client to a lawyer that would perpetrate or facilitate a crime or fraud or other illegal purpose would not be subject to the privilege.

Ultimately, gatekeeper initiatives imperil the lawyer's independence from government interference and his fidelity to the client and his secrets, which are key values of the legal profession.

F. Mr. Lee Seiu Kin, Second Solicitor-General of Singapore

The main features of the anti-money laundering/combating the financing of terrorism regime in Singapore are:

- Corruption, Drug Trafficking and other serious Crimes (Confiscation of Benefits) Act – criminalizes the laundering of benefits derived from corruption, drug trafficking and other serious crimes. The CDSA essentially finds/identifies the illegal proceeds, freezes and forfeits them. The CDSA covers two main categories of predicate offenses – drug trafficking offenses as set out in the CDSA First Schedule and serious offenses as set out in a list of 184 offenses in the CDSA Second Schedule. Confiscation under the CDSA is conviction-based, although the CDSA also provides that a person “shall be taken to be convicted” if he “absconds” under certain conditions.

The CDSA creates specific offenses of money laundering, both in relation to predicate offenses from which a person obtains the proceeds, and also where a person deals or agrees to deal with tainted money. These include: assisting another to retain benefits, concealing or transferring benefits, acquiring benefits, and tipping off.

Furthermore, the CDSA provides for legal presumptions of benefiting from crime “if a defendant holds, or has at any time held, any property or any interest therein disproportionate to his known sources of income, and which he cannot explain to the satisfaction of the court”. This reverses the burden of proof and places the onus on the defendant to prove that the asset was legally acquired.

The CDSA also recognizes the rights of third parties which may be affected by a confiscation order.

The CDSA imposes specific obligations on financial institutions, consistent with international standards on customer due diligence and suspicious transaction reporting.

- Singapore’s Combating the Financing of Terrorism framework is constituted by the: UN (Anti-Terrorism Measures) Regulations 2001, Monetary Authority of Singapore (Anti-Terrorism Measures) Regulations 2002, and the Terrorism (Suppression of Financing) Act.

Notably, predicate offenses in the CDSA also include an “equivalent foreign offense committed overseas”, which would require Singapore investigators to gather evidence outside of jurisdiction, or enforcement of Singapore court orders outside of jurisdiction. This is facilitated by the Mutual Assistance in Criminal Matters Act.

Singapore is a founding member of the Asia Pacific Group on Money Laundering, and is an active member of the FATF since 1991. Singapore has also constituted the Financial Investigation Division of the Commercial Affairs

Department as its dedicated agency to investigate money laundering transactions.

During the Open Forum, the speakers addressed the following points for consideration:

1. Can present anti-money laundering measures be revised to include gatekeeper initiatives embracing non-traditional financial agents and institutions, such as money changers, which are not strictly regulated?

2. Can existing anti-money laundering measures work in tandem with anti-dummy legislation?

3. What is the basis for enforcement of jurisdiction to confiscate assets for offenses committed abroad?

4. How will present anti-money laundering measures be reconciled with bank secrecy laws?

5. How are "serious offenses committed abroad" defined? Will the jurisdiction enforcing the anti-money laundering statute require a prior conviction for such "serious offense committed abroad" before any confiscation of assets can be made?