COMBATING TRANSNATIONAL CRIME:
INTERNATIONAL COOPERATION IN CRIMINAL MATTERS

A model curriculum for Commonwealth law schools

Commonwealth Legal Education Association

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ABOUT THE CLEA CURRICULUM DEVELOPMENT PROGRAMME

In his inaugural address in 1994, the then President of the CLEA, Professor N.R. Madhava Menon of the National Law School of India University emphasised:

> *"… the need to make legal education socially relevant and professionally useful; for law schools to prepare themselves for the demands of the profession in the context of the information revolution and other global challenges and to support continuing legal education and distance learning programmes".*

He also drew attention to the need for a fresh look at the law curriculum and teaching methods. As a result, the Commonwealth Legal Education Association is committed to supporting the introduction of new law courses and development of existing law courses to reflect the importance of Commonwealth jurisprudence and to assist Commonwealth law schools equip their students to meet the demands of the 21st century lawyer.

The first in the curriculum development series is the Model Human Rights Curriculum for the Commonwealth. This was first published in 1999 and was extensively expanded and revised in 2005. This is available on the CLEA website: www.cleaonline.org. The other courses being developed at present are (i) Islamic Law and (ii) Tackling Corruption and the Misuse of Public Office. Further details are also available on the CLEA website www.cleaonline.org.

These curricula are under constant development and improvement and the Association looks to law teachers from around the Commonwealth to provide information, ideas and material for inclusion in the curricula.

The course on Combating Transnational Crime is of particular contemporary importance. Whether it be tracking down the assets of “kleptomaniacs” who have looted the assets of their country; seeking the repatriation of fugitives so that they can stand trial for their alleged crimes; or preventing the movement of funds designed for use in terrorist activity, this course will enable law teachers to discuss the legal issues involved and, it is hoped, enable Commonwealth member countries to better tackle the spectre of transnational crime and terrorism.

I very much hope that this initiative will encourage and assist Commonwealth law teachers to address these issues in their teaching, research and writing and, in doing so, provide law students with knowledge and skills that are essential for contemporary legal practice.

John Hatchard
Secretary General, CLEA
Marlborough House *20 November 2006*

COMBATING TRANSNATIONAL CRIME: A MODEL COURSE AND CURRICULUM

The need to combat crime with a transnational element is now a major challenge for countries worldwide. Such criminality can occur at several levels. Firstly, crimes which by their very nature often involve a transnational element, for example, drugs trafficking, trafficking of persons, environmental crime, cybercrime, trafficking in firearms, and terrorism. Secondly, crimes which are essentially "domestic" in nature but which have a transnational element, for example, where relevant evidence is located outside of the jurisdiction. Thirdly, the laundering of the proceeds of crime will often have a transnational element.

The past few years have seen significant international efforts to combat crime with a transnational element. These include the work of the United Nations particularly through with the UN Convention Against Transnational Organised Crime and the UN Convention Against Corruption and the work of both the Financial Action Task Force and the Organisation for Economic Cooperation and Development. In addition, there are an impressive range of relevant regional initiatives including those from the Council of Europe, African Union, European Union and Organisation of American States. The Commonwealth also remains at the forefront in tackling transnational crime, particularly through the development of the London Scheme for Extradition within the Commonwealth and the Commonwealth Scheme on Mutual Legal Assistance.

At the heart of these initiatives is the requirement for states to develop effective cooperation mechanisms in order to assist each other in the investigation and prosecution of offences with a transnational element. Three scenarios illustrate the point:

(1) Key evidence in a criminal case is located in a foreign jurisdiction;
(2) The suspect is outside of the jurisdiction and is unwilling to return;
(3) Proceeds from the crime are moved out of the country and laundered through the international financial system.

In essence, there is a twin approach here. One is to "get the crooks": i.e. use the criminal law to punish the offenders. This may involve the need to make use of mutual legal assistance regimes to acquire evidence upon which to convict (as in Scenario 1) or the development of effective extradition arrangements between states in order to obtain the return of the fugitive (as in Scenario 2). The second, and arguably potentially more effective, approach is to go for "the loot". In other words, seek to take the profit out of crime by forfeiting the proceeds of crime, no matter where in the world they are located (as in Scenario 3).

It seems that few law teachers in the Commonwealth (and beyond) include a discussion of such issues in their teaching, research and writing. There are several reasons for this situation. The main one is probably the ongoing perception that crime is a largely national issue: for in teaching criminal law, criminal justice and the law of evidence, it is often assumed that the

criminal(s), the evidence and the witnesses are all in the jurisdiction where the crime took place. The reality is neatly encapsulated by Gubbay, J.A. in *S v Mharapara* [1986] LRC (Const) 235 at 237:

> "Past is the era when almost invariably the preparation and completion of a crime and the presence of the criminal would coincide in one place, with that place being the one most harmed by its commission."

Another reason is the lack of ready access to information and materials on transnational crime. Here text book writers on criminal law, criminal justice and criminal evidence do their readers an injustice by almost entirely neglecting transnational crime issues.

The result is that law students and legal practitioners are often ill-equipped to understand and deal with issues that are of the greatest contemporary and practical significance. For example, there remains concern that whilst international cooperation issues constitute a significant and a growing part of the work-load in government law offices, the often high turnover of personnel means that training law officers "on the job" is not enough.

Thus the aim must be to develop courses and programmes that are sustainable over a long period of time and which allow for the development of knowledge of transnational crime issues generally within the Commonwealth legal community.

Developing a course on combating transnational crime

The Programme of Action of the Commonwealth Legal Education Association recognises the need to make legal education socially relevant and professionally useful and that one way of achieving this is to support the development of new law curricula. This goal is reflected in the current project which seeks to address a general concern on the part of the Association that the traditional law school curriculum is not designed to train lawyers for practice in a transnational legal world.

The course materials were originally prepared by Dianne Stafford and Kim Prost of the Commonwealth Secretariat, Criminal Law Unit, but have been updated and expanded by John Hatchard for this edition. The course deals with three subject areas:

- Mutual Legal Assistance;
- Extradition; and
- Proceeds of Crime.

The materials are designed for use in any Commonwealth jurisdiction. The hope and expectation is that this will encourage and assist law teachers from around the Commonwealth to develop their own country-specific courses based on the materials or to include relevant material in their existing law courses. The materials can be used at both the academic and professional legal education levels. In addition, it is hoped that it will also encourage research and writing in a fascinating area of the law.

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SOME BASIC TERMS

"Bilateral treaty" (bilat): a treaty between two states

"Multi-lateral treaty": (multilat) a treaty between several states

“MLAT”: mutual legal assistance treaty

"Requested state": the state to which a request for mutual assistance is made

"Requesting state": the state that is seeking assistance

"Central Authority": the person or body established in a country to receive and send requests for mutual assistance

"Predicate offence": the offence(s) for which mutual assistance or the freezing or forfeiture of assets can be sought

"Dual criminality": the conduct in question constitutes a criminal offence in both the requested and requesting states

"Commonwealth Schemes" = the Harare and London Schemes

"Harare Scheme" = Commonwealth Scheme on Mutual Legal Assistance

"London Scheme" = London Scheme for Extradition within the Commonwealth

"*Letter rogatory*": a letter from a court within one jurisdiction seeking assistance from a court in another jurisdiction.

"*in rem”* proceedings: the forfeiture of the proceeds of crime

"*in personam”* proceedings: forfeiture proceedings directed against a person convicted of a predicate offence

Section 1

MUTUAL LEGAL ASSISTANCE

What is mutual legal assistance?

Under international law, enforcement jurisdiction is strictly territorial in nature. Therefore a state (the requesting state) requiring evidence or other investigative assistance needs to seek assistance from and obtain the authorisation of the requested state.

Strictly speaking, "mutual legal assistance" is that part of international co-operation that permits the use of *compulsory* measures in the requested state to produce evidence that is required in the requesting state. In contrast, the term “mutual assistance” refers to the provision of informal assistance between states. This is often done through police to police co-operation or between agency to agency.

The extent to which countries are willing to assist with an informal request does, of course, vary greatly. In some cases it will depend upon the domestic laws of a particular state, on the state of the relationship between the requesting and requested states and, perhaps ultimately, the attitude and helpfulness of those asked to respond to the request.

Article 46 of the United Nations Convention Against Corruption helpfully sets out the scope of mutual assistance:

Article 46 Mutual legal assistance
1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.
2. 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 in relation to the offences for which a legal person may be held liable in accordance with article 26 of this Convention in the requesting State Party.
3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:
(a) Taking evidence or statements from persons;
(b) Effecting service of judicial documents;
(c) Executing searches and seizures, and freezing;
(d) Examining objects and sites;
(e) Providing information, evidentiary items and expert evaluations;
(f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
(g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
(h) Facilitating the voluntary appearance of persons in the requesting State Party;

(i) Any other type of assistance that is not contrary to the domestic law of the requested State Party;
(j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention;
(k) The recovery of assets, in accordance with the provisions of chapter V of this Convention.
4. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention.
5. The transmission of information pursuant to paragraph 4 of this article shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to the disclosure and, if so requested, consult with the transmitting State Party. If, in an exceptional case, advance notice is not possible, the receiving State Party shall inform the transmitting State Party of the disclosure without delay.
6. The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.
7. Paragraphs 9 to 29 of this article shall apply to requests made pursuant to this article if the States Parties in question are not bound by a treaty of mutual legal assistance. If those States Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the States Parties agree to apply paragraphs 9 to 29 of this article in lieu thereof. States Parties are strongly encouraged to apply those paragraphs if they facilitate cooperation.
8. States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.
9. (a) A requested State Party, in responding to a request for assistance pursuant to this article in the absence of dual criminality, shall take into account the purposes of this Convention, as set forth in article 1;
(b) States Parties may decline to render assistance pursuant to this article on the ground of absence of dual criminality. However, a requested State Party shall, where consistent with the basic concepts of its legal system, render assistance that does not involve coercive action. Such assistance may be refused when requests involve matters of a de minimis nature or matters for which the cooperation or assistance sought is available under other provisions of this Convention;
(c) Each State Party may consider adopting such measures as may be necessary to enable it to provide a wider scope of assistance pursuant to this article in the absence of dual criminality.
10. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in

obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by this Convention may be transferred if the following conditions are met:
(a) The person freely gives his or her informed consent;
(b) The competent authorities of both States Parties agree, subject to such conditions as those States Parties may deem appropriate.
11. For the purposes of paragraph 10 of this article:
(a) The State Party to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State Party from which the person was transferred;
(b) The State Party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State Party from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States Parties;
(c) The State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person;
(d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State Party to which he or she was transferred.
12. Unless the State Party from which a person is to be transferred in accordance with paragraphs 10 and 11 of this article so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from the territory of the State from which he or she was transferred.
13. Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to this Convention. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States Parties. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States Parties agree, through the International Criminal Police Organization, if possible.
14. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. The Secretary-General of the United Nations shall be notified of

the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Convention. In urgent circumstances and where agreed by the States Parties, requests may be made orally but shall be confirmed in writing forthwith.

15. A request for mutual legal assistance shall contain:

(a) The identity of the authority making the request;

(b) The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;

(c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;

(d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;

(e) Where possible, the identity, location and nationality of any person concerned; and

(f) The purpose for which the evidence, information or action is sought.

16. The requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

17. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request.

18. Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party.

19. The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay.

20. The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party.

21. Mutual legal assistance may be refused:

(a) If the request is not made in conformity with the provisions of this article;

(b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests;
(c) If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;
(d) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.
22. States Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.
23. Reasons shall be given for any refusal of mutual legal assistance.
24. The requested State Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request. The requesting State Party may make reasonable requests for information on the status and progress of measures taken by the requested State Party to satisfy its request. The requested State Party shall respond to reasonable requests by the requesting State Party on the status, and progress in its handling, of the request. The requesting State Party shall promptly inform the requested State Party when the assistance sought is no longer required.
25. Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.
26. Before refusing a request pursuant to paragraph 21 of this article or postponing its execution pursuant to paragraph 25 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions.
27. Without prejudice to the application of paragraph 12 of this article, a witness, expert or other person who, at the request of the requesting State Party, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State Party shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested State Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States Parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or, having left it, has returned of his or her own free will.
28. The ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.

29. The requested State Party:
(a) Shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;
(b) May, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public. 30. States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this article.

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Mutual assistance (informal requests)

Background

Long before the development of the more formalised process of mutual legal assistance, other mechanisms for cooperation have existed.

In fact, a wide range of information or evidence can be readily obtained directly from another State without any need for a formal mutual legal assistance request. If the enquiry is a routine one and does not require the requested country to seek to use coercive powers, then it may be possible for the request to be made and complied with without a formal letter of request. For example, potential witnesses in the requested state may be contacted to see if they are willing to assist the requesting state voluntarily. This could include obtaining a voluntary witness statement, particularly in circumstances where the evidence of the witness is likely to be non-contentious.

The obtaining of public records, such as names of the directors of a public company or birth, marriage or death certificates, may often be obtained informally. Indeed access to the Internet has made obtaining such information much more effective.

The seeking of informal assistance may also pave the way for a later, formal request. For example, it may be possible to narrow down an enquiry in a formal mutual legal assistance by working with the requested state in identifying exactly what information is required.

Law Enforcement Co-operation

i) General

The most long-standing and frequently used mechanism for cooperation is through law enforcement cooperation. There are well-established police to police channels through which much essential information has been and continues to be shared. There are a broad range of channels, both formal and informal, for this type of cooperation.

Informally there are many direct relationships that exist between police officers and police forces. Often the police forces within a region will have long

established practices for sharing information, joint investigations and providing general assistance to each other.

It is important to remember that unless compulsory measures are required, it is much quicker and easier to use these alternative methods.

(ii) Use of memoranda of understanding
In some instances, these relationships between police or law enforcement agencies are formalised by agreements or memoranda of understanding (MOUs). Such agreements are becoming increasingly common and cover issues such as:

- Exchange of information
- Right of observation and pursuit into another country
- Participation in investigations
- Co-ordinating the implementation of special investigative techniques, such as controlled deliveries, surveillance and undercover operations, for the purpose of gathering evidence

Interpol (see below) has now developed a model Police Cooperation Agreement and a copy can be found at:
www.interpol.int/Public/icpo/LegalMaterials/cooperation/default.asp.

Such agreements are not limited to police agencies alone. Other law enforcement organisations such as customs services, competition and anti-trust agencies and environmental departments have such arrangements for the sharing of information and assistance in relation to investigations.

(iii) Posting of police personnel
Some states make arrangements to post police liaison personnel in foreign states. Again this can occur within a region or on a broader basis, depending on the interests and resources of the various states involved. This also helps build up familiarity and trust between agencies.

(iv) The role of Interpol
The International Criminal Police Organization (generally known as Interpol) facilitates world-wide police cooperation. It currently has 181 member countries, including all 53 Commonwealth member states.

The work of Interpol includes information exchange, co-ordination of operational activities, facilitation of cooperation and making available expertise, know how and information on best practices. As noted earlier, it has also developed a model Police Cooperation Agreement to encourage and facilitate cooperation between police forces.

Another key function of Interpol is the posting of “red notices”. These notices contain information about persons wanted by national jurisdictions. Some countries can arrest individuals directly on the strength of the red notice. Other countries will use the information in the notice to obtain a domestic warrant. Either way, this system serves as an important mechanism for international cooperation in the arrest of wanted persons on a global basis.

Interpol also has responsibility for transmitting requests for mutual legal assistance and extradition under a wide range of international and regional instruments. These include the European Convention on Mutual Assistance in Criminal Matters, the Council of Europe Criminal Law Convention on Corruption, the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, and the United Nations Convention against Transnational Organized Crime. For a full listing see: www.interpol.int/Public/ICPO/LegalMaterials/conventions/Default.asp

See further www.interpol.int

(v) The role of Europol

Europol is the European Union's law enforcement organisation whose mission is to assist the law enforcement authorities of Member States in their fight against serious forms of organised crime. It commenced operations in July 1999.

It is primarily a criminal intelligence and information sharing body that is designed to support the law enforcement activities of member states, particularly in specified crime areas such as terrorism, people trafficking, money laundering, financial crime and cybercrime. The organization's activities extend to the member states of the European Union and other European countries.

See further www.europol.europa.eu

The sharing of financial information: the role of Financial Intelligence Units (FIU)

The function of a FIU is to receive suspicious transactions reports from financial and related institutions. These are made where 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 (see Recommendation 13 of the Financial Action Task Force 40 Recommendations, noted below).

The units are responsible analysing these reports as well as other financial information that institutions or individuals may be required to provide and to feed that to relevant law enforcement authorities as may be appropriate. They thus perform a two-fold function of general support to law enforcement and detection of money laundering. While most agencies of this nature restrict their functions to receipt, analysis and dissemination of relevant information, some also have an investigative capacity.

In some jurisdictions the FIU is also responsible for advising financial institutions and regulatory agencies on anti-money laundering measures and receiving and providing feedback on the transaction reporting and its effectiveness.

Over 100 countries have established FIUs. Because of the global nature of money laundering it is important that the information and intelligence

accumulated by the FIUs is shared internationally. To that end, since 1995 a number of FIU's began working together in order to expand and systemise the exchange of information, improve expertise and capabilities and provide support to each other's organizations. This informal association has been named the Egmont Group (based on the location of its first meeting at the Egmont Palace in Belgium). See further www.egmontgroup.org

Mutual legal assistance (formal requests)

When is a formal request necessary?

A state submits a formal request for mutual legal assistance to the requested state in order to obtain the assistance either:

- in gathering evidence for a criminal investigation or prosecution; or
- in tracing, freezing and confiscating the proceeds of crime.

If the request is in order, the requested state can use its domestic compulsory measures to deal with the request.

In making the request, there are a number of conditions that generally must be noted:

- It is essential that regard is given to the fact that a requested state will have to comply with its own domestic law, both as regards whether assistance can be given at all and, if so, how that assistance is, in fact, given
- There is a general pre-requisite of dual-criminality, i.e. the alleged conduct must be a crime in both the requesting and requested state
- The assistance must relate to the investigation of a specified crime(s) against a named perpetrator(s)
- The specialty rule means that if the charge changes after a request has been made, a fresh mutual legal assistance request will be required (unless the new charge was anticipated in the original request)
- A prerequisite for mutual legal assistance is the guarantee for a fair trial and respect for fundamental rights within the legal system of the requesting state

Types of assistance available

The types of assistance available will depend on the applicable treaty or the law of the requested state. However, generally this includes:

- Taking evidence or statements from persons;
- Effecting service of judicial or other documents;
- Effecting searches and seizures;
- Examining objects and sites;
- Providing information and evidentiary items and expert evaluations ;
- Providing originals and certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
- Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes

- Facilitating the voluntary appearance of persons in the requesting State Party (including persons in custody);
- Any other type of assistance that is not contrary to the domestic law of the requested State Party;
- Identifying, freezing and tracing proceeds of crime;
- The recovery of assets.

(See for example: Article 46(3) UN Convention Against Corruption (above))

The following provides an example drawn from the United Kingdom of the kinds of information that can be offered by way of a formal request for mutual legal assistance submitted through a Central Authority (i.e. the body specified in the requested state to receive and administer requests for both mutual legal assistance and extradition) and by informal means.

COMPETENCIES OF THE CENTRAL AUTHORITY INCLUDE:	**COMPETENCIES OF THE UK NATIONAL CENTRAL BUREAU OF INTERPOL INCLUDE:**
* Serving a summons or other judicial document requiring a person to appear before a judicial authority in the requesting country as a witness or defendant in criminal proceedings. * Obtaining sworn evidence or other authenticated or certified evidence, including banking documentation, for use in criminal proceedings or investigations. * Authenticating or certifying evidence for use in the requesting country where that evidence has already been obtained by the UK police for their own purposes. * Exercise of search and seizure powers where evidence is required for use in criminal proceedings or investigations. * Temporarily transferring prisoners, with their consent, to the requesting country to appear as witnesses in criminal proceedings or to assist in criminal investigations.	* Interviewing witnesses and suspects in criminal investigations where the person to be interviewed is willing to co-operate without appearing before a judicial authority in the UK and where any statement made would be unsworn. * Tracing assets in investigations preliminary to prosecution, particularly where the offence involves money laundering. * Sharing with the requesting country information concerning investigations into offences which have been committed in the UK. * Obtaining medical or dental statements or records where the patient has given written consent. * Providing details of previous convictions: • for the purposes of police investigations, vetting applicants for employment in law enforcement or for work with access to children or suitability for owning firearms and holding gambling licences - when provided with a copy of the person's fingerprints. • for police intelligence purposes only - without fingerprints. * Providing telephone subscriber details (UK telephone companies can provide only the family name and the initial of the subscriber and the address where the telephone is located). * Providing medical samples (body orifice swabs and samples of blood, saliva, semen, hair, urine and other tissue fluids can be obtained with the consent of the person from whom the sample is required). * Providing details of keepers of motor vehicles registered in the UK and of driving licences issued in the UK.

International and regional instruments relating to mutual legal assistance

Considerable progress been made in the development of a framework of instruments for providing assistance between states in a direct and efficient manner. There are essentially four approaches:

A. Bilateral mutual legal assistance treaties

Individual states are free to develop mutual legal assistance treaties on a bilateral basis (bilats). This is often done to enable the provision of assistance between states of a different legal tradition. The oft-cited example of the first breakthrough instrument is the treaty between the United States and Switzerland that came into force in 1977. Since then a network of bilateral instruments between states of similar or diverse legal tradition has developed.

Here two countries formally agree an MLAT which enables them to extradite criminals or those suspected of crime and/or to provide assistance in the investigation or prosecution or crime or the confiscation of the proceeds of crime. The bilateral treaty permits them to set out precisely the circumstances in which assistance will be granted.

Comprehensive international co-operation treaties impose clear and concise obligations on the contracting parties and contain acceptable safeguards for:

- the requesting state to whom assistance cannot be arbitrarily refused;
- the requested state which maintains effective sovereignty and the right to protect, for example in the sphere of extradition, fugitives and nationals from unacceptable detention or treatment.

Treaties can, and usually do, contain provisions relating to the resolution of disputes between the contracting parties and major disputes can be resolved by recourse to appropriate fora agreed by the contracting parties.

The parties are obliged, at international law, to be able to give effect to their obligations under the treaty.

The major benefit of bilateral treaties is that they can be specifically tailored to meet the needs and wishes of the parties: although this can sometimes mean that they unduly limit the assistance available or include additional limitations on the power to extradite.

The major disadvantage of extensive bilateral arrangements is their cost - both in financial and personnel terms. For example, if 15 countries each wished to have bilateral extradition relations with the other 14 members there would need to be a total of 105 bilateral treaties. Clearly the negotiation of this number of treaties would be an expensive and time-consuming task. This makes the development of multilateral treaties attractive.

B. Multilateral mutual legal assistance treaties (multilats)

There are varying kinds of multilateral treaties relating to mutual legal assistance (or extradition). Although multilateral extradition and mutual

assistance treaties have the same general benefits as bilateral treaties, the obligations they contain are generally the subject of more exceptions than would be the case in a bilateral treaty. The reason for this is that the treaty needs to reflect the negotiating position of a large (or relatively large) number of parties, each of whom must have included in the document the position it is prepared to adopt in respect of the country to whom it is prepared to grant the least benefit.

A convention which is to work between countries with divergent legal systems, traditions and practices in the field of extradition is likely to result in an instrument which, having taken into account the views and requirements of all potential states parties, represents the best available compromise on all issues rather than reflecting the most effective regime. For example, if the domestic law of one or more of the states concerned provides that no national shall be surrendered, the treaty must reserve to the requested party the absolute right to refuse the extradition of nationals. If the laws of the countries in the negotiating group are sufficiently dissimilar a treaty could have a substantial number of grounds of refusal of assistance. This would obviously not make for an effective or certain instrument.

International treaties
Perhaps the most influential instrument in the development of mutual legal assistance was the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the 1988 Drugs Convention). This enables State Parties to seek and provide a broad range of assistance in evidence gathering in cases involving drugs trafficking.

The inclusion of a “stand alone” provision on mutual assistance within the 1988 Drugs Convention, in addition to its practical effect, also constituted recognition of the integral role mutual assistance plays in combating crime, in this instance drug trafficking.

More recent multilateral instruments of note are the United Nations Convention against Transnational Organised Crime and the UN Convention Against Corruption (UNCAC) both of which contain detailed articles on mutual legal assistance.

Counter-terrorism treaties:
The major counter-terrorism conventions impose obligations on State Parties to provide mutual assistance in criminal matters and to either prosecute or extradite alleged offenders.

See, for example:
- International Convention for the Suppression of Terrorist Bombing, 1997
- International Convention for the Suppression of the Financing of Terrorism, 1999
- International Convention for the Suppression of Acts of Nuclear Terrorism, 2005

Regional instruments

Within Europe, the first mutual assistance scheme was the European Convention on Mutual Assistance in Criminal Matters, developed by the Council of Europe and which entered into force on June 12, 1962. It was an important achievement of its time in its recognition of the necessity for specific instruments for cooperation in evidence gathering. However, like all new instruments, it had limitations. Perhaps the most notable was that the Convention was designed to operate amongst the civil law states of Europe, and it therefore did not address perhaps the most significant challenge to effective mutual assistance, bridging the differences between legal systems (see below)

For the African region, the *African Union Convention on Preventing and Combating Corruption* was adopted by the 2nd Ordinary Session of the Assembly of the Union in Maputo on 11 July 2003. Its objectives include:

- To promote and strengthen the development in Africa by each State Party, of mechanisms required to prevent, detect, punish and eradicate corruption and related offences in the public and private sectors.
- To promote, facilitate and regulate cooperation among the State Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption and related offences in Africa. (Article 2(1) and (2))

On 3 October 2002 the Southern African Development Community *Protocol on Mutual Legal Assistance in Criminal Matters* was signed by the 14 Heads of State/Government.

Here the State Parties agree to:

- provide each other with the widest possible measure of mutual legal assistance in criminal matters
- provide assistance without regard to whether the conduct in question would constitute a criminal offence in the requested state
- designate a Central Authority to make and receive requests.

Somewhat similar provisions are found in the *Economic Community of West African States Convention on Mutual Assistance in Criminal Matters.*

For the Americas, the Inter-American Convention on Mutual Assistance in Criminal Matters also addresses the area in some detail.

Note also the United Nations Model Treaty on Mutual Assistance that provides an excellent guide for nations wishing to develop mutual legal assistance treaties (http://www.un.org/documents/ga/res/45/a45r117.htm).

C. The Commonwealth Approach

Introduction

The 53 Commonwealth member countries share the view that they must have in place effective co-operation procedures which ensure that global and national interests in making the world a safer place are capable of

achievement by facilitating the trial of criminals in the place where the offence was, or was alleged to have been, committed.
An equally important element of the Commonwealth perspective on international co-operation is that member countries ought to be able to deal with mutual assistance (or extradition) requests from other member countries of the Commonwealth in the absence of treaties and to do this on the basis of laws which are as much in harmony with each other as possible.

Within the Commonwealth's shared legal values, member countries can deal with extradition or mutual assistance requests in a way that places between member countries minimal procedural obstacles.

The history of co-operation in the criminal field between member countries of the Commonwealth derives from their shared legal traditions inherited from Britain. Virtually all Commonwealth countries draw their extradition law and practice from the UK and indeed some of that law and practice dates back almost 150 years: which in itself emphasises the importance of holding a regular review of international cooperation arrangements.

While extradition relations between Britain and foreign states were dealt with by treaty, Britain dealt with the surrender of criminals between the various parts of the Empire under different laws. Obviously, it was neither necessary nor possible for the sovereign to have a treaty with herself or himself and the practice of "backing" or "indorsing" of warrants issued in one part of the Empire for execution in that part where the fugitive was located was introduced. Indorsement of the warrant by the magistrate in the place where the fugitive was located had the practical effect of making the original warrant one which was on par with a local warrant and executable in the place in which it was indorsed.

The attainment of independence by the various colonies of Britain did, of course, affect extradition relations between the newly emerging and sovereign members of the Commonwealth. There were no treaties between them and it was strongly felt that the attainment of sovereign status and independence rendered inappropriate the continuation of the backing of warrants regimes.

In response, in 1966 Commonwealth Law Ministers developed what is now known as the *London Scheme for Extradition within the Commonwealth* (formerly the London Scheme on the Rendition of Fugitive Offenders)(see Section 2 of the curriculum for details). The Scheme is not a treaty. Rather it is a statement of agreed principles with each member country of the Commonwealth agreeing to enact legislation which will allow surrender to another Commonwealth country in accordance with the Scheme.

In 1986 Commonwealth Law Ministers at their Meeting in Harare, adopted the *Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth* (the Harare Scheme). As before, the Scheme itself does not constitute a treaty. However as it has been adopted by consensus within the Commonwealth and it is expected that Commonwealth member states will enact or amend domestic law as necessary in order to render assistance in accordance with the Scheme.

The purpose and scope of the Scheme is set out in paragraph 1:-

> (1) The purpose of this Scheme is to increase the level and scope of assistance rendered between Commonwealth Governments in criminal matters. It augments, and in no way derogates from existing forms of co-operation, both formal and informal; nor does it preclude the development of enhanced arrangements in other fora.
> (2) This Scheme provides for the giving of assistance by the competent authorities of one country (the requested country) in respect of criminal matters arising in another country (the requesting country).
> (3) Assistance in criminal matters under this Scheme includes assistance in
>
> (a) identifying and locating persons;
> (b) serving documents,
> (c) examining witnesses;
> (d) search and seizure;
> (e) obtaining evidence;
> (f) facilitating the personal appearance of witnesses;
> (g) effecting a temporary transfer of persons in custody to appear as a witness;
> (h) obtaining production of judicial or official records; and
> (i) tracing, seizing and confiscating the proceeds or instrumentalities of crime.

The reference to “existing forms of co-operation” is to established channels, such as those of Interpol. The Scheme also recognises, and facilitates, the developing bilateral and regional arrangements between Governments and also between specialist enforcement agencies.

Law Ministers were well aware, when adopting the Harare Scheme, of the progress made in other contexts but were nonetheless convinced of the great value of a Commonwealth Scheme in this field. The Scheme in no way prevents the full use, and active development, of other forms of co-operation where circumstances make that desirable. It does, however, provide a clear basis for legislative and other action in Commonwealth countries.

Member states implement the Harare Scheme by enacting national laws which are consistent with the provisions of the Scheme and which permit the relevant authorities of the requested country to respond to requests from other Commonwealth countries.

The normal method of evidencing the countries to which assistance will be rendered in accordance with the Scheme is to include a Schedule to the national mutual assistance in criminal matters laws, a list of Commonwealth countries. In the absence of such a list, a court could be asked to determine whether legislation which purported to allow assistance to Commonwealth countries actually allowed assistance to a specific country. In such a case the onus would be on the party seeking to provide the assistance (usually the government law officers) to prove that the requesting country was a Commonwealth country. Unless the court was prepared to take judicial notice of material which evidenced Commonwealth membership, such a matter may be able to be proved by an affidavit from the Minister for Foreign Affairs.

While there is a commitment on the part of Commonwealth states to implement the Harare Scheme by domestic legislation, in practice not all have done so. So before making a request to another Commonwealth state under the Harare Scheme, it is vital to check that the state has enacted the necessary domestic legislation.

The withdrawal of Zimbabwe from the Commonwealth in December 2003 has no effect on the validity of the Harare Scheme. However, where mutual assistance legislation is limited to Commonwealth countries, such withdrawal will have the effect of preventing assistance being provided to Zimbabwe, unless there is an alternative avenue for providing such assistance.

D. Use of ad hoc administrative arrangements

In the absence of an obligation to cooperate based on a treaty, states can and do rely on reciprocity (e.g. the Harare Scheme) or comity. In the case of the latter, this is not binding but is essentially an administrative arrangement undertaken merely an act of courtesy in a particular case.

For a useful example, see the facts of *In re Pokidyshev and Rodionov* (1999 CanLII 3787) set out at page 24 below.

E. Alternative methods of seeking assistance

It is important to remember that there may be more than one method in which mutual assistance can be obtained. As article 18(2) of the AU Convention notes:

> If two or more State Parties have established relations on the basis of uniform legislation or a particular regime, they may have the option to regulate such mutual relations without prejudice to the provisions of this Convention.

The political dimension

Whether a country is willing to provide mutual legal assistance depends on several factors. A key one is the state of relations between the requesting and requested states for, ultimately, the decision by the requested state whether or not to provide assist is a political one.

Note the views of the Doherty J.A. in the Court of Appeal of Ontario in the Canadian case of *In re Pokidyshev and Rodionov* (above):

> "[16] The [Canadian Mutual Legal Assistance in Criminal Matters Act] addresses various kinds of help that Canada and foreign states can provide to each other in their efforts to combat international crime. This appeal is concerned with Part I of the Act which provides various means by which a foreign state can obtain information from sources in Canada to assist that foreign state in its investigation of criminal activity.
>
> [17] The overall scheme of Part I of the Act may be described in these terms. The foreign state seeking Canada's assistance must have a treaty with Canada as defined in the Act (s.2). Alternatively, the Minister of Foreign Affairs for Canada must have entered into an administrative arrangement with the foreign state providing for assistance in the particular investigation being

conducted by the foreign state (s.6). If a treaty or administrative arrangement is in place, the foreign state may request the assistance of the Canadian authorities. *Requests for assistance made by foreign states under the Act must be approved by the Minister of Justice* (section 11(1), section17(1)). If the Minister approves the request, a competent Canadian authority (in this case the Attorney General for Ontario) shall, where the request requires a court order for its implementation, make the necessary application to a superior court (section 11(2), section 17(2)). If the court grants the order and further orders the material sent to the foreign state, the material can only be sent if the Minister of Justice is satisfied that the foreign state will comply with the terms of the order (section 16, section 21).

[18] Under the Act, the Minister of Justice serves as the guardian of Canadian sovereignty interests. She effectively controls both ends of the process. No request goes forward without her approval and no sending order is implemented without her approval. The central role of the Minister of Justice in the process reflects the essentially political nature of decisions involving international relations. These decisions properly rest with the executive arm of the federal government which is responsible for the conduct of Canada's foreign relations." (emphasis added).

International co-operation at the prosecutorial and judicial levels

Prior to the development of mutual legal assistance mechanisms there were other means by which such assistance was sought which remain in existence today.

1. Court to Court

Traditionally, the process used was that of a *letter rogatory*. This is a letter from a court within one jurisdiction seeking assistance from a court in another jurisdiction. Letters rogatory have been described as follows:

> "Letters rogatory are the medium, in effect, whereby one country, speaking through one of its courts, requests another country, acting through its own courts and by methods of court procedure peculiar thereto and entirely within the latter's control, to assist the administration of justice in the former country; such request being made, and being usually granted, by reason of the comity existing between nations in ordinary peaceful times." *The Signe* (1941) F. Supp 819 at p. 820

While the letters may be transmitted via state diplomatic channels, these are literally "court to court" requests for assistance. Initially used mostly in relation to civil matters, with the growth of the transnational component of crime, such letters are now also common in the criminal law context.

Most common law states, either by virtue of statute or common law, have long recognised such letters and have received and provided assistance through this mechanism in relation to both civil and criminal matters.

Amongst civil law states, the practice of mutual assistance is still centered on "letters rogatory" although the scope and nature of transmission of requests has altered. The reason for this is simply that in most civil law states, judicial authorities such as the judge's instruction in francophone African states,

control the investigative process and there are not distinct pre- and post-charge phases to that process, as exist in the common law.

So whatever stage a criminal matter is at, in a civil law country, generally the letter of request will emanate from a judicial authority and thus will constitute a "letter rogatory".

The facts of *In re Pokidyshev and Rodionov* (above) provides a helpful illustration of the point. Here Russia was seeking the assistance of Canada to obtain certain documents relevant to a corruption investigation:-

> On January 19, 1996, the Russian ambassador to Canada wrote to the Minister of Foreign Affairs requesting Canada's assistance in respect of an ongoing investigation by the Russian authorities in conjunction with the [Canadian police]. The investigation was said to relate to the offences of bribery, the payment and acceptance of secret commissions and the theft of stable nuclear isotopes from the Russian Federation. The details of that investigation were set out in Letters Rogatory which were incorporated by reference in the ambassador's letter and attached to that letter. The Letters Rogatory made it clear that the Russian authorities were investigating the possible misappropriation of the isotopes, the payment of bribes to a Russian official and the abuse of power by that official. The Letters Rogatory requested information concerning certain bank accounts and also asked that certain persons be questioned by the Canadian authorities.
>
> The ambassador's request concluded in these words:
>
> > My Government should be grateful if Canadian authorities would provide this legal assistance through any means available under Canadian Law and proposes that this note, together with your reply, constitute an administrative arrangement providing for legal assistance which will enter into effect on the date of receipt of your reply and will remain in effect for six months from that date.
>
> The ambassador's reference to "administrative arrangement" takes one to section 6(1) of the [Mutual Legal Assistance in Criminal Matters] Act which provides that the Minister of Foreign Affairs may, where there is no treaty between Canada and another state, "…enter into an administrative arrangement with that other state providing for legal assistance with respect to an investigation specified therein. …"
>
> By letter dated February 7, 1996, the Minister of Foreign Affairs for Canada acknowledged the ambassador's request and wrote:
>
> > Under section 6 of the Mutual Legal Assistance in Criminal Matters Act of Canada, the Minister of Foreign Affairs may enter into an administrative arrangement with another state to provide legal assistance in a specific case. Your letter and this response will constitute such an administrative arrangement under the Act in order to provide legal assistance to the Russian Federation in the case of Mr. Alexandre Mikhailovich Pokidyshev, Mr. Alexandre Yakovlevich Rodionov, the Centre for Stable Isotopes and XEME Inc. as set out in the Russian letter rogatory of June 4, 1994, and supplementary letters rogatory of November 14, 1995 and November 20, 1995. This

> arrangement has been approved by the Minister of Justice of Canada and will remain in effect for six months from the date of this letter.
>
> On April 5, 1996, the Russian authorities made a formal request for assistance under section 17 of the Act. That request set out the offences being investigated by the Russian authorities (bribery, theft, misuse of official position), detailed the facts which had been revealed by the Russian and R.C.M.P. investigations to that point and sought orders requiring production to the Russian authorities of copies of documents seized from the appellant's place of business and from various financial institutions.
>
> In July 1996, the Russian ambassador requested a renewal of the administrative arrangement. As with the initial request, the ambassador asked the Canadian authorities to provide "legal assistance through any means available under Canadian law." The Minister of Foreign Affairs renewed the administrative arrangement as of August 7, 1996.
>
> On September 17, 1996, the Canadian authorities, pursuant to section 17 of the Act, formally approved the Russian request dated April 5, 1996. That approval specifically referred to providing copies of documents seized by Canadian law enforcement agencies.
>
> On October 16, 1996, the Attorney General of Ontario, a "competent authority" under the Act, applied for a gathering order under section 17(2) of the Act. The application was supported by the affidavit of Corporal Hillyard. In that affidavit he summarized the diplomatic steps leading to the application, the Russian investigation and the Canadian investigation. Based on his investigation and the documents provided by the Russian authorities, he concluded that the seized documents would provide evidence to the Russian authorities in respect of offences over which the Russian court had jurisdiction. He listed these offences as theft (misappropriation of entrusted property), abuse of authority or power of office, giving and receiving a bribe, and intermediation in bribery. Corporal Hillyard also indicated that he had been made aware of an amnesty decree declared by the Russian Federation and had sought advice from the Russian authorities as to the relevance of that decree to this case. He stated that the authorities had advised him in writing that the decree would have no effect on the offences or persons being investigated in this matter. The letter was attached to his affidavit.
>
> The application led to making of the gathering order ….

Within the common law it is the police, and in some jurisdictions the prosecution authorities, who are responsible for the investigation leading up to the laying of criminal charges. Once charges are instituted, prosecution authorities will present the case before the court. As a result when evidence is sought for an investigation or prosecution, by and large the authority seeking the assistance will not be a judicial authority.

For this reason, except in cases where charges have been laid and the evidence sought is testimony of a witness for a preliminary hearing or trial, a court to court letter of request will not be an effective mechanism by which a common law jurisdiction can obtain relevant evidence.

As noted earlier, for gathering evidence between common law jurisdictions and between common law and civil law jurisdictions, the mechanism generally used is a mutual legal assistance request i.e. a non-judicial letter of request submitted pursuant to treaty, bilateral or multilateral. This is on the basis of reciprocal legislation enacted either generally or in compliance with the Harare Scheme or submitted on the basis of comity and reciprocity.

2. Commission Evidence

Related to this, is the process by which the court of one state can seek to obtain “commission evidence" in another state. Generally started once again by a letter rogatory, a state will seek permission for evidence to be taken on commission.

The form of commission evidence will vary from state to state. In some jurisdictions the law provides specifically for a commissioner to be appointed to receive the evidence in the foreign state and the request will be made for the prosecution and defence to attend in order to examine and cross-examine the witness.

Other jurisdictions take a more flexible approach, allowing for the judge issuing the request for commission evidence to set out the applicable procedure and providing for either foreign or domestic authorities taking the evidence.

3. Enforcement of Judgments

One other notable method of assistance in criminal matters is that of the enforcement of criminal judgments between one state and another. This concept of mutual recognition of judgments has been recognized within Europe for many years. The practice led to the adoption of the European Convention on the International Validity of Criminal Judgements (1970) and more recently the 1991 Convention between the Member States of European Communities on the Enforcement of Criminal Sentences.

While the idea of mutual enforcement of judgments has worked effectively in the civil field, it has had limited success in the criminal sphere. Even amongst European states, very few have ratified and implemented the above noted Conventions and the practice is almost non-existent amongst common law states. The closest to a growing practice in the criminal area in this respect is really the really the recognition and enforcement of orders of restraint and forfeiture in the area of proceeds of crime.

4. Transfer of Offenders

Another form of cooperation in criminal matters is the process for the transfer of convicted offenders between states. Either on the basis of treaty or domestic legislation a person convicted and sentenced to imprisonment in a foreign country can be transferred to his or her country of nationality or, under some regimes, to a country with which he or she has close ties. Generally such arrangements are premised on the consent of all parties -- the convicted person, the custody state and the transfer state. There are also usually conditions as to the amount of time left on the sentence and certain requirements for information. As with mutual assistance and extradition, there

is a relevant Commonwealth Scheme known as the *Commonwealth Scheme for the Transfer of Convicted Offenders.* This is set out in Appendix 2 below.

MUTUAL LEGAL ASSISTANCE: THE BASIC PRINCIPLES

Background

A request for mutual legal assistance is normally based upon an assurance of reciprocity. The assurance may be reflected through a bilateral or multilateral treaty or provided in or with the request itself.

Whatever mechanism is used, the nature of mutual legal assistance is that the requesting state is prepared to render similar assistance to the requested state. Most instruments reflect the principle that the widest measure of mutual assistance will be provided between states, e.g.:

> 1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.
>
> 2. 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 in relation to the offences for which a legal person may be held liable ….
>
> (United Nations Convention Against Corruption, art 46)

The importance of adopting a flexible approach

If assistance is to be effectively rendered across and between different legal systems, both the requesting and requested state must employ a flexible approach. In particular, the requested state should render the assistance in the manner sought by the requesting state to the extent not prohibited by law.

The requesting state should have the capacity to receive and use evidence gathered in a foreign state even though it has been gathered in a different manner, subject to any fundamental legal constraints, although this does not include acting beyond one's powers.

> The Attorney-General of Gibraltar sent a letter of request to the Federal Office for Police Matters in Switzerland seeking information relating to a fraud investigation by the Royal Gibraltar Police. He did this without applying to any Court or other judicial authority in Gibraltar, and no one had been arrested, charged or brought before a Court in connection with the allegations set out in the letter. An investigating judge in Switzerland duly summoned the second plaintiff and obtained answers to the questions contained in the letter. A second letter of request was issued shortly afterwards. In response to an inquiry by the Swiss authorities, the defendant gave his assurance that he had followed the correct procedure in issuing the letter and that the Swiss authorities would receive the same help in Gibraltar.
>
> The plaintiffs alleged under a number of heads that the defendant lacked the authority to issue the Letter of Request.

Held, granting the application and following a detailed examination of the Evidence (Proceedings in Other Jurisdictions) Act 1975, and the European Convention on Mutual Assistance in Criminal Matters 1959:

1. Pursuant to its inherent jurisdiction the Supreme Court of Gibraltar has the authority to issue a Letter of Request to a foreign court or tribunal;
2. There was no statute in force in Gibraltar which gave the AG the power to issue a Letter of Request;
3. Swiss law required reciprocity before a Swiss court can comply with a formal Letter of Request. The assurances given by the AG in this matter were misleading because under the Evidence Ordinance, the Supreme Court could only assist the Swiss authorities if criminal proceedings had been instituted in Switzerland (and none had been commenced in Gibraltar in the present case). Further, the Letter lacked particularity and the Supreme Court should in parallel circumstances refuse to process the request.
4. The defendant was in no position to give binding assurances (here relating to reciprocity). Only the Governor could give an assurance that binds the Crown.
5. The defendant may issue a request to a foreign court but not a "Letter of Request" within the meaning given to that phrase by international law. In this case he misled the foreign court on several matters and therefore obtained improperly the evidence supplied.

Arche Trehaud AG & Vollenweider v. HM Attorney-General for Gibraltar, (unreported, Supreme Court of Gibraltar, 1995)

Limits on the granting of mutual legal assistance

The limits on mutual legal assistance practice are the fundamental requirements of the legal system in the requested state. This means that:-

- No country can execute a request for assistance that would require a breach of domestic law
- No country exercises investigative powers on behalf of another country that it could not lawfully exercise in relation to a domestic offence.

This latter point should not be interpreted, however, to prevent a state from employing different investigative powers in relation to foreign requests that might be used for domestic cases, provided the exercise of the power is authorised by law. Because of the differences between legal systems and even between countries of the same general legal tradition, it may be very useful to employ a form of compulsory power in relation to a foreign request that is not used domestically. What is not acceptable is to use a power for a foreign request that could not be lawfully employed domestically if the state chose to implement it.

Dealing with the problems posed by different legal systems

For the purpose of criminal law there are four major legal systems in the world each of which has its own characteristics and hence its own rules of practice and procedure. These systems are:

- Common law system
- Civil law system (e.g. France and Francophone countries)
- Shariah (Islamic law) system
- Chinese law system

Most Commonwealth countries are common law jurisdictions. Several countries, such as Sri Lanka and South Africa, have their legal systems based on Roman-Dutch law. Even here their criminal justice and evidence systems are very similar to those of the common law.

Often the differences between the systems of law are seen as a barrier to effective international co-operation and indeed it is widely believed that certain criminal organisations take advantage of the differences between legal systems by structuring activities so as to render transnational investigations more difficult.

In the field of mutual assistance in criminal matters, some examples of the differences between legal systems occur in the following areas:

- judicial responsibility for, or oversight of, the conduct of criminal investigations which goes hand in hand with the civil law concept that requests for assistance may only be made by judicial officers (investigating magistrate/*juge d'instruction*);

- the concept of evidence taken under oath is not known;

- not all legal systems share the presumption of innocence;

- the laws relating to foreign police officers speaking to voluntary witnesses may vary;

- the competence and compellability of witnesses and issues relating to the laws of privilege may vary;

- there may be different concepts of offences, particularly relating to fiscal offences, fraud, and conspiracy.

A fundamental principle of mutual assistance common to all bilateral and multilateral treaties and other schemes and arrangements is the requirement that a request for assistance should be executed in accordance with the requirement of the law of the requesting state except where to comply with that law would violate a fundamental legal principle of the requested state or that the law of the requested state precludes compliance in the form requested.

This fundamental principle lies at the heart of effective co-operation because there is little point in a country providing a response to a mutual assistance request that fails to meet the requirements of the requesting state and usually makes the product unusable in proceedings for which it was acquired.

A frequently occurring example is found in the provision of testimony of witnesses and concerns the ability of the prosecution and the defence to examine the witness whose testimony is sought in another country.

However with appropriate preparation and co-operation, the differences in legal systems need not present real obstacles and can usually be overcome without compromising the values of the requested state.

A basic familiarity with the principles and operational procedures of at least the civil law system will assist in overcoming any apparent difficulties.

The need for consultation

The most fundamental practice of successful mutual assistance authorities is that consultation between the relevant authorities in the requesting and requested countries will usually result in a compromise procedure which meets the standards required of the requesting state and complies with the law of the requested state.

A simple example can be found in dealing with the taking of testimony for use in a foreign state. If the law of the requesting state requires that both the defence and the prosecution have the opportunity to examine and cross-examine the witness before the testimony can be admitted and the law of the requested state prohibits foreign counsel from appearing in its courts to examine witnesses the most used solution is for questions to be put to the witness through the court's presiding officer.

MAKING THE REQUEST

Who makes the request?

One of the major issues in mutual assistance concerns the authority that requests assistance. Between common law and civil law jurisdictions, different authorities are responsible for the conduct of criminal investigations. In the common law, police and in some instances prosecutors conduct the investigation. Once criminal charges are laid, the prosecutor takes control of the matter and presents the case before the court. In most civil law jurisdictions, a judicial authority conducts the investigation and prepares the file for consideration by the trial court.

As a result, in a common law jurisdiction, the police or a prosecutor will initiate a request for assistance in relation to a criminal investigation. In civil law systems, the request will emanate from a judicial authority. This fundamental difference has created considerable problems in mutual assistance practice. Many civil law states will not accept a request for assistance unless it emanates from a judicial authority. In the common law, as judicial authorities are only involved in the issuance of relevant orders related to an investigation, such as a search warrant, and they are otherwise independent of such investigations, it is not possible for them to submit a request for assistance. As this fundamental difference could prevent the rendering of assistance, various solutions have been developed to overcome the problem.

- Some instruments simply provide that a request will be accepted for execution provided that it emanates from an authority responsible for criminal investigation or prosecution within the requesting state.
- Other instruments focus on the transmission between central authorities with the actual requesting authority being irrelevant.
- With civil law states that are more entrenched in the tradition of judicial involvement in the investigative process, such as France, one unique mechanism employed has been to deem the Attorney General in a common law state to be a judicial authority for the purposes of a request. Thus if the request emanates from or is endorsed by the Attorney General, which is possible for most common law states, it will be considered to be a judicial request for the purpose of execution within a civil law state.

Role of a Central Authority

In terms of effective mutual assistance, the important role of a "central authority" cannot be underestimated. This is reflected in the requirement that a state party establish and maintain an effective central authority that is found in numerous international conventions: see, for example, Article 13 of the UN Convention against Transnational Organised Crime.

The Harare Scheme illustrates the typical role of a central authority:

> 4. Each country shall designate a Central Authority to transmit and to receive requests for assistance under this Scheme.
> 5.(1) A request for assistance under this Scheme may be initiated by any law enforcement agency or public prosecution or judicial authority competent under the law of the requesting country.

(2) The Central Authority of the requesting country shall, if it is satisfied that the request can properly be made under this Scheme, transmit the request to the Central Authority of the requested country and shall ensure that the request contains all the information required by the provisions of this Scheme.
(3) The Central Authority of the requesting country shall provide as far as practicable additional information sought by the Central Authority of the requested country.

Central authorities are usually located in the Justice Ministry or the chambers of the Attorney General. The relevant statute (or other instrument) designates the authority as the point for transmission and receipt of requests for assistance. It is important to note that a central authority can range from a large office such as the United States Office of International Affairs within the Department of Justice to a small unit or one or two designated officials within the chambers of the Attorney General. The size and structure of the authority will depend to a great extent on the volume of requests as well as on the available resources.

The central authority is responsible promptly either (i) to see to the execution of requests or (ii) to transmit the requests to the appropriate executing authorities and to seek their prompt execution. In all of these respects, the difference between the success and failure of a mutual assistance programme often is directly linked to the effectiveness of the central authority.

In addition to the contact and transmission role, effective central authorities have a much more expanded role to play for they constitute a resource point for both foreign and domestic authorities. Thus the police and prosecutors both foreign and domestic can contact the central authority to obtain *advice and information* in relation to requests and possible future requests.

1. Key requirements for maintaining an efficient central authority

(i) Provision of readily accessible up to date information on how to contact a central authority. Here many Commonwealth states include this information on their government websites.

(ii) Speedy response: some requests need to be acted upon immediately e.g. freezing of assets in a bank account before they are moved out of the jurisdiction or the apprehension of a suspect who is transiting through the requested state. Thus, ideally, a central authority should accessible on a 24/7 basis to deal with urgent requests.

(iii) Confidentiality: There are likely to be extremely sensitive aspects to some requests for assistance (for example where they relate to high-profile public officials). Thus the need to maintain confidentiality is a key aspect of the operation of an effective mutual assistance system

(iv) Informing other states of the procedure for making a mutual assistance request (see below).

2. Some common problems:

(i) Lack of staff in the Central Authority to handle requests. In small Commonwealth jurisdictions, in particular, there may be no dedicated member of staff to handle mutual legal assistance requests. Such requests are handled as part of the general duties of law officers, many of whom may be burdened with other pressing matters and cannot always provide an effective and expeditious response.

(ii) The cost implications for the requested state in complying with the mutual legal assistance request may be considerable. In lengthy or complex cases, the requesting and requested states may agree to share the costs of the investigation and/or to share any of the proceeds of crime recovered in the case.

(iii) Limited expertise on handling mutual legal assistance requests within the central authority or local law enforcement agencies.

Procedure for making the request

This will depend upon the applicable treaty or other basis for mutual assistance. A typical example is as follows:

SADC Protocol on Mutual Legal Assistance in Criminal Matter, Article 4
Execution of the Requests

1. The Central Authority of the Requested State shall promptly execute the request or when appropriate, shall transmit it to the competent authorities having jurisdiction to do so. The competent authorities of the Requested State shall do everything in their power to execute the request.
2. The Central Authority of the Requested State shall make all necessary arrangements for representation in the Requested State of the Requesting State in any proceedings arising out of a request for assistance.
3. Requests shall be executed in accordance with the laws of the Requested State and the terms of this Protocol.
4. If the Central Authority of the Requested State determines that the execution of the request would interfere with an ongoing criminal investigation, prosecution or proceeding in that State, it may postpone execution, or make execution subject to conditions determined to be necessary after consultations with the Requesting State. If the Requesting State accepts the assistance subject to the conditions, it shall comply with the conditions.
5. The Requested State shall use its best efforts to keep confidential a request and its contents if such confidentiality is requested by the Requesting State. If the request cannot be executed without breaching such confidentiality, the Central Authority of the Requested State shall so inform the Requesting State which shall then determine whether the request should nevertheless be executed.
6. The Requested State shall respond to reasonable inquiries by the Requesting State concerning progress in executing the request.
7. The Requested State shall promptly inform the Requesting State of the outcome of the execution of the request. If the request cannot be successfully executed in whole or in part, the Requested State shall inform the Requesting State of the reasons therefor.

Form and content of requests

Article 5 of the *SADC Protocol on Mutual Legal Assistance in Criminal Matters* again provides a typical example whilst the requirements of the Swiss authorities illustrate the practicalities of making a mutual assistance request:

Article 5: Contents of Requests

1. In all cases, requests for assistance shall indicate:
   a) the competent authority in the Requesting State conducting the investigation, prosecution or proceedings to which the request relates;
   b) the nature of the investigation, prosecution or proceedings, and include a summary of the facts and a copy of the applicable laws;
   c) the purpose of the request and the nature of the assistance sought;
   d) the degree of confidentiality required and the reasons therefor; and
   e) any time limit within which the request should be executed.

2. In the following cases, requests for assistance shall include:
a) in the case of requests for the taking of evidence, search and seizure, or the location, restraint or forfeiture of proceeds of crime, a statement indicating the basis for belief that evidence or proceeds may be found in the Requested State;
b) in the case of requests to take evidence from a person, an indication as to whether sworn or affirmed statements are required and a description of the subject matter of the evidence or statement sought;
c) in the case of temporary transfer of exhibits, the current location of the exhibits in the Requested State and an indication of the person or class of persons who will have custody of the exhibits in the Requesting State, the place to which the exhibit is to be removed, any tests to be conducted and the date by which the exhibit will be returned; and
d) in the case of ensuring the availability of detained persons an indication of the person or class of persons who will have custody during the transfer, the place to which the detained person is to be transferred and the date of that person's return.

3. Where possible, requests for assistance shall include:
a) the identity, nationality and location of a person who is the subject of the investigation, prosecution or proceedings;
b) details of any particular procedure or requirement that the Requesting State wishes to be followed and the reasons therefor.

4. If the Requested State considers that the information is not sufficient to enable the request to be executed, it may require additional information.

5. A request shall be made in writing. In urgent circumstances, a request may be made orally but shall be confirmed in writing promptly thereafter.

CHECKLIST FOR FOREIGN REQUESTS FOR MUTUAL ASSISTANCE IN CRIMINAL MATTERS (SWITZERLAND)

Requests for Mutual Assistance in Criminal Matters addressed to Switzerland must correspond to the following requirements and contain the following indications:

1. Legal bases
- European Convention on Mutual Assistance in Criminal Matters of 29th April 1959 / other agreements containing prescriptions on mutual assistance; or
- bilateral treaty; or
- declaration / agreement on reciprocity.

2. Requesting Authority
- Indicate the competent investigating or prosecuting authority; and
- State the office / authority from which the request emanates. It is recommended to indicate the person dealing with the case (name as well as telephone and telefax numbers).

3. Object of the request
- Investigation or criminal proceeding before a judicial authority; or
- Preliminary enquiries of an authority which is authorized by law to investigate or to prosecute offences, provided that an appeal to a judge can be made in the foreign proceeding.

4. Person who is the target of the investigation or proceeding
- Furnish as far as possible exact and complete identifying data of the accused or incriminated person (family name, first name, nationality, date and place of birth, profession, address, etc.).

5. Summary of the facts/legal qualification of the offence
- Give a summary of the relevant facts indicating the place, the time and the manner of the perpetration of the offence. In a voluminous and complicated case, a résumé of the most important facts has to be added; and
- Indicate the legal qualification of the facts (murder, theft, fraud, corruption etc.).

6. Reason for the request
- Point out the connection between the foreign proceeding and the required measures;
- Indicate exactly the evidences sought and the acts requested (blocking of the account X by the bank Y, seizure / surrender of the documents XY, interview of the witness Z, etc.);
- In case of examination of witnesses a questionnaire has to be elaborated;
- In case of search for persons or premises, for seizure or surrender of objects a confirmation has to be added that these measures are permitted in the requesting State (does only apply to States with whom exists no agreement on Mutual Assistance in Criminal Matters).

7. Application of the foreign law at the execution (exception)
- Show the need for the application of the foreign prescription at the execution; and
- Reproduce the legal prescription [law] to be applied.

8. Presence of parties to the foreign proceedings at the execution (exception)
- Give the reasons for the presence of these persons at the execution; and
- Indicate exactly the identity and the status (office) of these persons.

9. Form of the request

- Written;
- A legalisation of the official records is not necessary.

10. Language/Translation

- Draft the request in German, French or Italian; otherwise
- Enclose a translation into one of these three official languages.

11. Channels of Transmission

- By diplomatic channels to the Federal Office of Justice of the Federal Department of Justice and Police in Berne, if there is no agreement regarding other channels (through the Ministry of Justice or direct contact with the requested authority);
- In urgent cases through Interpol; the request has to be confirmed in writing and its original must be transmitted later on through ordinary channels to the Federal Office of Justice.

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Meeting the Needs of the Requesting State

Consistent with the general principles applicable to mutual assistance, the aim of the requested state must be to accommodate the request submitted, including providing assistance in the form and manner sought. If the evidence provided in response to the request cannot be used in the investigation or proceeding in the requesting state, there may as well have been no assistance provided.

Some basic principles:

- Obtain full details of the mutual assistance regime operating in the country from which assistance is required. These are sometimes available on the internet
- Specify the precise assistance sought
- Check to see what additional information is necessary: e.g. a request for search and seizure may require providing details of the basis for the belief (reasonable grounds to suspect) that evidence will be found from the search.
- Where possible, focus on the end result not on the method of securing it. For example, it may be possible for the requested state to obtain the evidence by means of a production or other court order, rather than by means of a search warrant.

Some principles of good practice:

(i) Use non-system specific language

Every legal system has its own terminology. For example, an “affidavit” may have meaning in a Commonwealth state but not elsewhere. As a request for assistance is addressed to and intended for a foreign authority, system specific terminology should be avoided. Instead the request should describe what is sought, rather than referring to a term. For example, rather than “affidavit”, the request should refer to the need to obtain a statement which is sworn or affirmed to by the person providing it.

(ii) Demonstrate the relevance of the request

While the test that must be met before a compulsory order will issue can vary from state to state, in almost every legal system the relevance of the evidence sought to the investigation or prosecution will have to be established. Every request for assistance therefore should address that issue: i.e. there should be a clear description of why or how the evidence in question is relevant to the investigation or prosecution.

(iii) Be specific

In most legal systems "fishing expeditions" are not permitted. All requests for assistance should be specific as to the assistance sought. For example, if the requesting authorities are seeking bank information they will need to provide an indication, if not of a specific bank account, at least sufficient information for the relevant bank to be identified in the requested state. The type of information needed from those accounts and the time period should also be indicated.

(iv) Focus on both the evidence and the form in which it is provided

In preparing a request, it is important to focus not only on the evidence sought but the form or manner in which the evidence must be provided for it to be admissible at trial. Those requirements as to form and procedure must be set out in detail in the request and be included from the beginning.

For example, if a country requests bank documents, it may be necessary to obtain an accompanying certificate for the documents to be admitted at trial. If that is the case, the certificate should be provided with the request to avoid unnecessary duplication of work in the requested state.

(v) Consider time constraints

Requests for assistance take time to execute. While urgent situations and emergencies may arise, those conducting an investigation or prosecution should strive to submit requests on a timely basis, with reasonable deadlines that take into consideration the resource constraints in a requested state.

Transmission/Presentation of Request

The manner in which a request is transmitted will again depend on the basis upon which it is being presented. By and large, all mutual assistance treaties will identify the channel of communication to be used for the request.

In the case of most Commonwealth states, the requests will be routed directly between relevant Justice Ministries or Attorneys General's offices. In the absence of an identified channel, the request should be sent through the diplomatic channel i.e. transmitted between the ministries of foreign affairs under cover of a diplomatic note.

On a practical level, effective mutual assistance is dependent to a great extent on the flexibility and willingness of the requested state, as reflected in its treaties, laws and practice, to meet the needs of the requesting state. This must extend to the substantive types of assistance available and the capacity to adduce the assistance in varying ways as may be demanded by differing legal systems.

This principle is often reflected in mutual assistance treaties by providing that requests will be executed in accordance with the law of the requested state and to the extent not prohibited by or contrary to that law, in the manner sought by the requesting state. This encourages an execution process that will as far as possible allow for evidence to be gathered in a manner that will be acceptable and useful in the requesting state.

HANDLING INCOMING REQUESTS

Securing Evidence – Use of Compulsory Powers

Executive authorisation

Mutual assistance is generally a two-tiered process. When a request for assistance is received, and before any further steps are taken, the responsible executive authority within the state (normally the Justice Minister or Attorney General) will consider if the request can be executed. See again the *Pokidyshev and Rodionov* case discussed earlier.

The factors to be assessed in this decision will depend upon the applicable instrument and legislation. If, for example, there is only the general ground of refusal that protects the fundamental interests of the state, then the executive will consider the request in relation to those considerations. If other grounds of refusal apply, those will generally also be assessed in advance of execution. Generally, the executive considerations arise before attention turns to meeting the applicable legal requirements to obtain the court order.

On a practical level, in reviewing the request for approval, the responsible authority will also examine whether the request, as submitted, meets the requirements of any applicable treaty and whether it is sufficient for execution on a substantive level. This will involve a consideration of whether all the required information has been provided and whether there is enough information to obtain the relevant order. In mutual assistance practice, this examination occupies much of the time of the authorities as compliance with technical standards is one of the central challenges of mutual assistance practice.

Types of assistance

1. Evidence from witnesses

One of the critical components of mutual assistance is witness evidence, in the form of a statement or testimony, obtained by way of a subpoena or other compulsory order. Particular difficulties arise when a state has no legislation permitting the taking of statements or testimony by compulsion.

a) Witness statements

Taking a statement from a person is generally a fairly simple and straight forward aspect of mutual assistance, except for the issue of whether a person can be compelled to provide such a statement if “charges” have not been instituted.

Where the request emanates from a civil law state, this distinction will generally be irrelevant as the request will most often come from a judicial authority, who has initiated an investigation and the evidence taken will be included in the record that he or she prepares for submission to a trial court. In these circumstances, a compelled statement should be possible. However, in some instances the statement sought is that of the person who is the subject of the investigation and the ability to compel the person to appear and further

to provide a statement will be limited or impossible in many jurisdictions because of the constitutional protection against self incrimination.

Less clear is the instance where the statement is sought by a common law state, pre-charge, for investigative purposes. Here the positions are divided. In some jurisdictions, consistent with domestic practice, a witness cannot be compelled to provide a statement except before judicial authorities in the context of a proceeding. This is the case in many Caribbean jurisdictions.

In other common law countries this is permitted either because, as in the UK, it is also permitted domestically or, as in the case of Canada, the decision is taken to allow foreign authorities to gather such evidence as would be available under the foreign law, even though Canadian law does not permit such measures domestically.

b) Witness testimony
Where a witness is compelled to provide evidence for a trial proceeding, many complicated issues arise.

First there is the fundamental question as to whether the representatives of the requesting state will be permitted to participate in the proceedings in the requested state. This will depend to a great extent on what is provided for in any applicable treaty and what can be accomplished under the law of the requested state.

There are various possibilities. Most states will permit authorities from the requesting state to be present when the request is executed. However, the extent of participation will vary. Some states will insist that the evidence be taken in the same manner as if this was a domestic case.

If this is a request by a common law state to a civil law state, this can prove to be a substantial hurdle to effective assistance. Under the civil law system, the judicial authority will interview the witness and provide of summary of what he or she says. The summary of course, will be inadmissible in most, if not all, common law trial proceedings. Because of this problem, most civil law states will now permit a verbatim transcript of the evidence of a witness to be made.

For some common law countries, evidence gathered by the foreign authorities in this manner may be admissible based on legislative provisions for the admission of foreign evidence. For example, the Australian *Foreign Evidence Act* permits the admission of witness evidence obtained through a mutual assistance request, although the court maintains a broad discretion to exclude the evidence if, for example its admission would be unfair to one of the parties.

For other jurisdictions, that do not have such legislation or that face constitutional restrictions in this regard, it is imperative that counsel, both for the accused and for the prosecution, are able to participate in the proceedings, examining and cross-examining the witness preferably directly or through authorities of the requested state.

However, in practice, one of the most significant challenges, is trying to obtain permission for the defence and prosecution counsel to pose questions either directly or indirectly. Even as between common law states, the issue is far from simple. Many common law states also treat the gathering of witness evidence as if it were a domestic proceeding, with the result that they may require domestic counsel to question the witness on behalf of the prosecution and the defence. While this is certainly better then excluding examination and cross-examination, it does create practical problems. In addition to the expense, in complex cases, counsel from the requesting state, who is already very familiar with the case, will be in a much better position to conduct the examination then a locally engaged counsel.

These are just some examples of the practical problems that need to be worked out in each case where the evidence of a witness is to be taken.

c) Applicable law

On a related point, there is always the question as to what rules of evidence and practice apply in the case of the taking of evidence. From a point of principle, it is argued that as the evidence is being taken within a state, those laws should apply. At the same time the argument can be made that if the evidence is to be introduced in a trial in a foreign state, it would be more appropriate that the laws and practice of the requesting state should apply, to the greatest extent possible. In most instruments and legislation, a middle approach is adopted, applying the law of the requested state but providing that the request should be executed in the manner and form requested, to the extent not prohibited by the law of the requested state.

However some states, like Canada have gone further by providing that the evidence of a witness will be taken in accordance with the law of the requesting state except that Canadian laws relating to privilege and non-disclosure of information will apply.

The issues of privileges, immunities and the basis for objections that arise in the context of witness examinations are often addressed specifically in mutual legal assistance treaties and legislation. In essence, what evidence can be adduced and on what basis can the person object to answering a question. The approaches vary. In some treaties, the witness is given the benefit under the laws of both the requesting and requested state. In other schemes, the witness will be allowed to refuse to answer on the basis of a law of the requested state or where the answer would require the witness to breach privilege or a law in the foreign state.

d) Confrontation

For some countries of a common law tradition the major challenge is to ensure that the rights of cross-examination and confrontation are preserved in relation to the evidence gathered. As noted above, the extent to which a witness can be cross-examined, particularly by counsel for the defence will depend to a large extent on the applicable law.

For some countries, notably the United States, the right of confrontation requires that the accused have an opportunity to physically face his or her

accusers. This can be very difficult, if not impossible, to achieve in the context of foreign requests, as even if representatives of the state and the accused are permitted to attend and participate in the proceedings, the accused may not be. Some treaties will deal with this point explicitly allowing for the transfer in custody of an accused person to attend the execution of the request.

Recently, these requirements have been met by the use of telephone or video link to allow the accused to be at least “virtually present” at the proceedings.

2. Search and Seizure

a) Basic principles

One of the most common measures a state may seek is search and seizure. That is, the requesting state will identify a place to be searched and the requested state will use compulsory powers to authorise a search of the relevant premises and the seizure of any material related to the case in question.

On a practical level, this can be a very difficult exercise because different countries have different standards to be met for the issuance of an order for a search. The problem is particularly acute as between different legal systems.

In the common law systems there is generally a requirement to demonstrate a reasonable basis to believe or suspect that an offence has been committed and relevant evidence will be found. In the United States the standard is that of probable cause. In Canada it is reasonable and probable grounds to believe. In Australia and the UK, it is reasonable grounds to suspect. However, in civil law states, the concept of a threshold standard for a warrant does not exist. Generally, the investigating judge or magistrate will order a search when he or she has reason to believe that relevant evidence may be found as a result.

Because of this divergence in approaches, cross-system requests can be very difficult. Common law states will often overwhelm civil law states with a mass of detail to establish a basis for belief and civil law countries will not provide sufficient information as to the basis upon which they believe relevant evidence may be found.

The process for obtaining a search warrant in aid of a foreign investigation, within a common law state does not vary dramatically from the procedures employed for a domestic warrant. Depending upon law and practice, either the request from the foreign state will be filed directly, along with any supporting material or a police or enforcement officer will swear an affidavit in support of a request for a warrant, based on the request from the foreign state. A warrant, once issued, will be executed generally in the same manner as a domestic warrant. Depending on the applicable law, foreign authorities may be allowed to be present during execution of the warrant although they will not be allowed to participate beyond mere presence.

b) Use of production orders

Many states also employ the less invasive measure of a production order to provide the requesting state with documents and things needed for an investigation or prosecution. The standard for obtaining a production order is generally lower then that applicable to a search and seizure, although it can vary from jurisdiction to jurisdiction.

Such an order will be directed to the holders of the documents or things and will order that they be produced to the court or, in some systems, a designated person, within a specified period. The production order is an extremely useful device where the evidence sought is held by a neutral party, such as a bank or business, where there are no concerns that evidence will be moved or destroyed. In some systems it may be necessary to demonstrate why a production order will not work (i.e. because the evidence may be destroyed etc.) before the court will consider the issuance of a search warrant.

c) Use of Privileged or Confidential Material

Whether gathered by search or by production order or compelled through a witness, there is always the potential in mutual assistance that a privilege will be claimed with respect to the material or the question posed. The most common means employed to address such issues, is to allow for the objection to be made and an examination conducted and decision reached in the requested state.

Procedurally the matter would be dealt with in a similar manner to a domestic case raising the same issues. In the case of documents, they would be sealed and a judge would consider arguments in respect of privilege. In the case of a witness the arguments will be advanced on the basis of the applicable law, which may include privileges in the requesting state.

One area of particular concern is privileges or confidentiality requirements relating to financial records. That information can often be critical to an investigation. As will be discussed further in relation to money laundering and proceeds of crime, there are now a number of ways to provide a basis for overriding such protections provided the appropriate criteria have been met.

PROVISION OF WITNESSES

a) General

Mutual assistance can also be used to obtain the voluntary attendance of witnesses in the requesting state, and in particular allow for the transfer of witnesses in custody.

It is a fundamental principle that a witness cannot be compelled to attend a proceeding outside of the state. However, in many instances, witnesses will be willing to travel to another state to provide evidence. But it would be inappropriate for the authorities of the foreign state to approach the witness directly. In addition to the sovereignty concerns, this may put undue pressure on the witness such that his or her attendance would not be truly voluntary. Thus, through a mutual assistance request a foreign state can ask the authorities in the state where the witness is located to facilitate his or her appearance in the requesting state to testify or otherwise provide assistance.

b) Non-custodial

In the case of a witness who is not in custody, he or she will be approached by domestic authorities, usually the police. They will advise him or her of the proceedings and determine if the person is prepared to voluntarily attend the proceedings in the foreign state. Costs associated with the travel will be borne by the requesting state and the witness will be advised of this.

c) Custodial

This mechanism is particularly useful in the case of a witness who is in custody in the requested state. In this instance the role of the requested state will be not only to facilitate voluntary attendance but also to secure the necessary court orders to allow for the witness to be transported in custody to the foreign state.

d) Safe conduct

Whether in relation to a person in custody or not, one of the key considerations will be whether he or she will receive "safe conduct" in the foreign state. This is an important principle, which prevents abuse of the process by the requesting state.

"Safe conduct" is to mutual assistance what "specialty" is to extradition. While the exact content of the assurance may vary, fundamentally the person is guaranteed that he or she will not be prosecuted, punished or otherwise have his or her liberty restricted in the requesting state in relation to matters that arose before he or she was temporarily transferred. As with specialty, it does not prevent prosecution or detention for alleged offences committed during the transfer. Some version of the protection also extends to not requiring the person to testify in any other proceeding, except that to which the request relates.

CONFIDENTIALITY AND USE LIMITATIONS

Obligations of Requested State

Mutual assistance involves the transmission of information and evidence for use in criminal cases. In order to prevent abuse of the process or misuse of information, there are obligations with respect to confidentiality and limitations on use, which are placed on both states.

Generally these obligations will arise from the instruments governing the transmission of the request or in the case of a non-treaty request, from specific undertakings between the two states. The requested state that receives the request is obliged to keep its existence and content confidential. Under some instruments, this will be subject to an exception with respect to the execution of the request such that the requested state may disclose the request and its content, to the extent necessary for its execution. This will permit, for example, the filing of the request or an affidavit outlining its content before a court, to obtain the necessary orders. In other instruments, even this disclosure will require the authorisation of the requesting state, on a case-by-case basis.

In addition to non-disclosure requirements, the requested state is generally obliged not to use the information transmitted by the requesting state for purposes other then execution of the request. Thus, the requested state cannot take the information from the request and use it in an investigation or proceeding or otherwise in the requested state or transmit it to a third state.

In relation to both obligations, if the requested state needs to disclose or use the information in some other context, it can do so by obtaining the consent of the requesting state.

Obligations of Requesting State

The requesting state faces similar obligations with respect to the information or evidence obtained in response to the request. In the case of confidentiality, the obligation is generally limited to a requirement that the information not be disclosed, except as necessary in the course of the investigation or proceeding for which assistance was requested. Thus for states that have disclosure obligations with respect to a criminal case, such disclosure will not violate the applicable confidentiality obligations.

The limitation of use obligation on the requesting state is particularly important, akin to the specialty protection in extradition. In obtaining the evidence sought and providing it to the requesting state, the requested state relies upon the information provided in the request, in particular the purpose for which the evidence is sought. Thus it is important that the requested state can be confident that the evidence provided will be used only for the purpose originally specified. This protection is particularly important for states that will not provide evidence to assist all types of criminal matters, for example, those states that will not provide evidence for the enforcement of purely fiscal offences.

Grounds for Refusal

a) General

There are a wide range of philosophies, as between states, with respect to grounds for refusal of mutual assistance requests.

Some instruments, such as the 1959 European Convention on Mutual Legal Assistance in Criminal Matters (www.statewatch.org/news/2006/jan/1959-CoE-Convention.pdf) adopt a very conservative approach, importing almost all the grounds of refusal applicable to extradition. Thus a request for mutual assistance may be refused on grounds such as military or political offence, prejudice, double jeopardy and most significantly, the absence of dual criminality.

Other instruments incorporate a single ground of refusal, which is sufficiently broad so as to protect the interests of the requested state, but at the same time encourage the execution of requests, as opposed to the refusal of them. The broad ground of refusal is illustrated by the approach of the UN Model Treaty on Mutual Assistance (www.un.org/documents/ga/res/45/a45r117.htm). Article 4(1)(a) provides that assistance may be refused if "the requested State is of the opinion that the request, if granted, would prejudice its sovereignty, security, public order (*ordre public*) or other essential public interest."

Between these two extreme positions, states may decide to reflect both the general ground plus some, but not all, of the bases available in extradition practice.

b) Dual criminality

There is significant ongoing debate about requiring dual criminality for the rendering of assistance. States that do not impose such a requirement, even on a discretionary basis, note that, unlike extradition, mutual assistance does not impact directly on the liberty of an individual.

Further, provided the requested state has the discretion to refuse the request because the nature of the offence under investigation is unacceptable, there is no need to impose an additional requirement that the conduct under investigation would be criminal in the requested state. As well, given the variation in laws with respect to important matters such as the predicate offences for proceeds of crime and laws respecting computer crime and fraud offences, dual criminality requirements can unnecessarily hinder successful assistance in important cases.

Those States supporting a discretionary ground note that while there may be no direct implications for liberty, mutual assistance involves the application of compulsory measures within the territory of a state and that should not occur unless the subject matter would also be criminal in that state. The argument is made on the basis of general public policy as well as the underlying concept of reciprocity. Further, it is often noted that, as the requested state generally has discretion with respect to the dual criminality ground of refusal, it does not preclude the rendering of assistance in appropriate cases.

One compromise on this issue, which is reflected in some multilateral instruments, for example, the Inter-American Convention on Mutual Legal Assistance in Criminal Matters (www.oas.org/juridico/english/Treaties/a-55.html), is to limit the discretionary ground of refusal to the most invasive of investigative techniques such as search and seizure.

Note the approach of Article 46(9) of the UN Convention Against Corruption:

(a) A requested State Party, in responding to a request for assistance pursuant to this article in the absence of dual criminality, shall take into account the purposes of this Convention, as set forth in article 1;

(b) States Parties may decline to render assistance pursuant to this article on the ground of absence of dual criminality. However, a requested State Party shall, where consistent with the basic concepts of its legal system, render assistance that does not involve coercive action. Such assistance may be refused when requests involve matters of a de minimis nature or matters for which the cooperation or assistance sought is available under other provisions of this Convention;

(c) Each State Party may consider adopting such measures as may be necessary to enable it to provide a wider scope of assistance pursuant to this article in the absence of dual criminality.

EMERGING ISSUES IN MUTUAL ASSISTANCE

A. Evidence given by way of technology

With advances in technology one of the emerging concepts in mutual assistance is the use of video and satellite links to gather witness statements and testimony. Using this technology, a witness in state A can be questioned by authorities in state B on a real time basis. The evidence can be given live directly to a court proceeding. As the technology improves and becomes more accessible to all states, it will provide an important alternative to costly and complicated processes for commission evidence and will hopefully alleviate some of the problems arising from the differences in legal systems.

There are several issues that have to be addressed in using technology for this purpose including the administering of any applicable oath, perjury, contempt and the applicable law.

a) Oaths and undertakings

The administration of an oath or other solemn undertaking can pose problems particularly where the rules are different between the two states. Depending on the requirements of the law of the requesting state, there are alternative means by which this issue can be addressed. For example, arrangements can be made for the requested state to administer the process in that state, while linked to the requesting state or, if possible, under the law of the requesting state to administer the oath or undertaking via the technology link.

b) Perjury

A related question is the issue of perjury, more particularly which state will have jurisdiction over a perjury offence. As the statements in question are made physically in the requested state and the person is present there, the requested state will generally have territorial jurisdiction and be the most convenient forum for the case. However as the proceeding in question is not a domestic case, it may well be that the requesting state will have the greater interest in conducting the prosecution. Yet, absent specific legislation, it is unlikely that a claim of jurisdiction will succeed, given that the witness is not physically present in that state.

c) Contempt of Court

Similar issues arise in relation to contempt of court, which can be even more complex, as the actions of the witness may well constitute a contempt of courts in both states. For example, if a witness has been compelled to appear in the requested state and he or she refuses to continue with the questioning or disrupts the proceedings, that action may be in contempt of the domestic court order and the foreign proceedings. However once again there will be serious questions about the jurisdiction of the requesting state, as well as the practicality of enforcement, in this situation. The most flexible solution in relation to both issues is for both states to have jurisdiction, allowing either state to conduct such a prosecution, as may be appropriate in individual cases.

As in the case of evidence gathering without such technology, one of the questions that arises is the interplay of the laws of the requesting and

requested state. In the case where evidence is being given directly into the proceedings in the requesting state, it is even more critical that, as much as possible under the law of the requested state, the rules of the requesting state will apply.

B. Admissibility of foreign evidence

Inevitably, the development of transnational crime issues will affect the rules relating to the admissibility of evidence obtained from outside the jurisdiction. This is a matter that a significant number of Commonwealth states have yet to address. In 2001, the Commonwealth Secretariat hosted the meeting of an expert group that tasked making recommendations for a model law on foreign evidence. It recommendations provide a useful basis for any Commonwealth state wishing to develop appropriate legislation.

Report of the Commonwealth Expert Working Group on Evidence

FOREIGN TESTIMONIAL EVIDENCE

The Group recommended the following content for a model law on foreign testimonial evidence:

Application to evidence obtained in response to a mutual assistance request

(a) This law shall apply to testimony and any exhibit annexed to such testimony obtained as a result of a request by [name of jurisdiction/name of responsible MA authority e.g. Attorney General] under a mutual assistance in criminal matters scheme or treaty

ii Pre-conditions to admissibility

"To be admissible the testimony must:
(a) have been taken:
(i) on oath or affirmation; or
(ii) under such caution or admonition as would be accepted by courts in the foreign country concerned, for the purposes of giving testimony in proceedings before those courts; and
(b) either
purport to be signed or certified by a judge, magistrate or officer in or of the foreign jurisdiction to which the request was made; or
the (responsible authority for mutual assistance or an authorized officer of that authority) by signed writing has certified that the testimony and any annex was obtained as a result of a request made to a foreign country by or on behalf of the (responsible authority) in which case it is presumed (unless evidence sufficient to raise a doubt about the presumption is adduced) that the testimony and annex was obtained as a result of the request.

iii. Form of testimony
(a) Testimony may be reduced to writing or be recorded on an audio or video tape.

(b) Testimony need not:
(i) be in the form of an affidavit; or
(ii) constitute a transcript of a proceeding in a foreign court.

The Group was of the view that the evidence obtained in the foreign jurisdiction could be in alternative forms such as in writing or recorded through the use of technology. The Group recommended the inclusion of a flexible provision to this effect.

iv. Admissibility

(a) Subject to subsection (b), foreign testimony may be adduced in a criminal proceeding.
(b) The foreign testimony is not to be adduced as evidence if:
(i) it appears to the court's satisfaction at the hearing of the proceeding that the person who gave the testimony concerned is in [the requested country] and is able to attend the hearing; or
(ii) the evidence would not have been admissible had it been adduced from the person at the hearing

v. Discretion to prevent foreign testimony being adduced

(a) The court may direct that foreign testimony not be adduced as evidence if it appears to the court's satisfaction that, having regard to the interests of the parties to the proceeding, justice would be better served if the foreign testimony were not adduced as evidence.
(b) Without limiting the matters that the court may take into account in deciding whether to give such a direction, it must take into account:
(i) the extent to which the foreign testimony provides evidence that would not otherwise be available; and
(ii) the probative value of the foreign testimony with respect to any issue that is likely to be determined in the proceeding; and
(iii) the extent to which statements contained in the foreign testimony could, at the time they were made, be challenged by questioning the persons who made them; and
(iv) whether exclusion of the foreign testimony would cause undue expense or delay; and
(v) whether exclusion of the foreign testimony would unfairly prejudice any party to the proceeding.

vi. Prior disclosure required

In order for the prosecution to adduce foreign evidence under this law in a criminal proceeding, the evidence must have been disclosed to the defence within a reasonable time prior to the proceedings.

The Group discussed at length the possible problems that could arise with legislation that allows for the admission of testimonial evidence, even though there had been no opportunity to cross-examine on that evidence. This will be a particular concern for jurisdictions that have a written constitution, including a bill of rights. It was noted that such legislation could be challenged on the basis of a constitutional right to cross-examine or on the basis that the process would affect the fairness of the trial. Even for countries without a written constitution, such arguments would arise.

However, the Group did note that because of the inherent difficulties surrounding the introduction of evidence from another state, this type of legislation could still be very useful. The Group was of the opinion that it would be of practical value particularly where the evidence to be admitted is of a technical nature or comprised a small part of the case. Examples were given where the evidence related to a technical analysis conducted in another country, chain of possession or explanation of documentation being adduced. The Group was firmly of the view that the provisions could not be used to admit key evidence where there had been no opportunity for the defence to cross-examine.

The Group was of the opinion that while some countries may not be able to adopt such legislation because of constitutional constraints, it might be very useful for those jurisdictions that were able to implement such a scheme, provided appropriate safeguards were included.

With these issues in mind, the Group recommended that, as in the Australian legislation, the model law should give the judge a broad discretion to decide on admission or exclusion of the evidence, after considering all of the circumstances surrounding the taking of the evidence, including any opportunity to cross-examine.

Video/Satellite Evidence (Persons outside the Country)

A. Video Evidence - Witness outside of the Jurisdiction

The Group considered the content of a model law on video/satellite evidence relating to witnesses who are outside the jurisdiction. The Group determined that the model law should be divided into two distinct sections. The first section would address the necessary legislation for the country providing the evidence of a witness to a foreign state i.e. the jurisdiction in which the witness is physically present. The second section would address the legislation required in the jurisdiction receiving the evidence i.e. the place where the relevant trial or proceeding is being held. For purposes of clarity, the terms “sending” and receiving” are used in reference to the two separate sections of the law.

In addition, to ensure that the legislation is flexible and capable of application to both existing and future technology, the Group recommendation uses neutral language such as the “provision of evidence by way of technology” and “technology that allows for the virtual presence of the witness”.

Section 1 — Sending evidence by way of technology from (name of jurisdiction) to a foreign jurisdiction (Model law for the Sending Jurisdiction)

i) Evidence to be provided in response to a request for mutual assistance or under other provisions relating to foreign requests for assistance.

The provisions should apply where evidence is sought by a foreign jurisdiction pursuant to a mutual assistance request or, if applicable, a letter of request from a foreign court.

After considering some existing legislative examples, the Group was of the view that the process should be initiated in the sending jurisdiction by some form of request from the foreign jurisdiction. The two most common types of requests are those presented under mutual assistance treaties or schemes or traditional letters of request or *letters rogatory.* The Group was of the view that the law should apply to all such requests.

ii) Orders to issue under mutual assistance or other legislation

Countries should amend existing mutual assistance legislation or legislation relating to the execution of requests by foreign courts to provide for orders to issue from the relevant authority for the sending of evidence by way of technology to the foreign jurisdiction.

Existing legislation relating to mutual assistance or *letters rogatory* will generally set out the procedures to be used in the case of the taking of testimony from witnesses. Thus, to effectively implement a scheme for sending evidence by way of technology, that legislation should be amended to make specific reference to the power of the relevant authority to order that the testimony be given via technology.

iii. Power to compel witness to attend at location where technology available

If a person is to give evidence by way of technology under [relevant mutual assistance or other foreign request legislation] in a court or other place within the jurisdiction where the technology is available, the court shall issue a subpoena to the witness to compel his or her attendance at the court or at that place.

The Group noted that it was necessary to provide a power for the court to compel the witness to attend at a location where the necessary technology would be available for the live link. While some court facilities may now or in the future have such capacity, in many instances that will not be the case. Therefore, it is important to include in the legislation this power to compel the witness to attend at a location where the technology is available.

iv Laws of perjury and contempt still apply

Where a person gives evidence for a foreign proceeding by way of technology under (refer to mutual assistance or other foreign request legislation), the laws of the sending jurisdiction relating to contempt and perjury shall apply to that testimony.

The Group discussed which laws of perjury and contempt would apply to testimony that is given, effectively in two jurisdictions. The Group was of the view that because the witness is physically located in the sending jurisdiction, most often, it is those laws which will be the most convenient to apply. Therefore, to the extent that any issue could be raised as to the application of the law of the sending jurisdiction, given the actual proceeding is in another state, the Group recommended that this point be made clear in the law. At the same time, as will be seen later in the report, the Group was of the view that it would be appropriate to have dual jurisdiction in relation to these matters and recommended that the perjury and contempt laws of the receiving jurisdiction should apply also.

v. Applicable Law of Evidence and Procedure

Where a person gives evidence for a foreign proceeding by way of technology that allows for the virtual presence of the person before the court outside (name of jurisdiction) or that permits the parties and the court to hear and examine the witness, the evidence shall be given as though the person were physically before the court outside (name of jurisdiction) for the purposes of the laws relating to evidence and procedure but only to the extent that giving the evidence would not disclose information otherwise protected by the (name of jurisdiction) law of non- disclosure of information or privilege.

One of the most complex and difficult issues in relation to this subject, is the question of what procedures and which evidentiary laws will apply to the taking of the evidence. In practical terms, since the evidence is being adduced at a proceeding in the receiving jurisdiction, it would make most sense to apply the procedural and evidentiary laws of that jurisdiction. The laws of the sending jurisdiction would not be relevant to a proceeding in a foreign jurisdiction. For example, if the witness is in a common law country and the proceeding is in a civil law country, it would not be helpful to allow for objections on the basis of the hearsay rule when no such rule exists in the civil law jurisdiction.

However, in most jurisdictions, there are some evidentiary and procedural rules that are based on fundamental societal precepts and values. For example, privileges in relation to communications within the context of certain relationships — spouses, legal counsel and client, priest/penitent — have developed because of the need to protect such relationships and the underlying trust associated to them. Given that throughout “virtual” proceedings, the witness is still physically present in the sending jurisdiction, it is still necessary to respect those rules in the sending jurisdiction, which reflect fundamental principles and values in that society.

The Group was of the view that the appropriate solution would be to apply the procedural and evidentiary laws of the receiving jurisdiction to the greatest extent possible, with the limitation that the laws of the sending jurisdiction, with respect to privileges and the protection of information, should continue to be respected.

In the discussion, the Group recognized that this approach would have to be reconciled with any existing laws on mutual assistance, which generally contain provisions on the laws that will apply when the evidence is taken in a traditional manner for transmission to another state. In some jurisdictions, the witness will be entitled to object to answering questions on the basis of the laws of both jurisdiction or some other combination of the two. Therefore, consideration will have to be given to whether the laws on this point should be reconciled or if there should be a distinction maintained.

Section II Receiving evidence by way of technology from a foreign jurisdiction (Model law for the Receiving Jurisdiction)

1. **Evidence through technology that allows for virtual presence**
Option 1

A person other then the accused, who is outside (name of jurisdiction) may give evidence from that place by way of technology that permits the witness to testify in the virtual presence of the parties and the court in (name of jurisdiction), but evidence may not be so given without leave of the court.

Option 2

(a) A court shall receive evidence given by a witness outside (name of jurisdiction) by means of technology that permits the witness to testify in the virtual presence of the parties and the court in (name of jurisdiction) unless one of the parties satisfies the court that the reception of such testimony would be contrary to the interests of justice.

(b) A party who wishes to call a witness in (name of jurisdiction) under subsection (1) shall give notice to the court before which the evidence is to be given and the other parties of their intention to do so not less than ten days before the witness is scheduled to testify.

Despite lengthy debate, the Group could not reach a consensus as to whether evidence given by live technology link should require the permission of the court or not. The majority view, reflected in Option 1 was that leave of the court should be required in all such cases. In the view of the majority, live link evidence constitutes a variation from the ordinary means by which evidence is given and therefore it should require the approval of the court. Those holding this view noted that the court in each instance should consider the matter with particular regard to issues such as the reasons why the witness could not be present, efforts made to secure his or her attendance, issues of cost with respect to attendance as well as the conditions under which the evidence would be given in the foreign state. In the opinion of the majority, the court

should then decide in each case whether or not to receive the evidence in this manner.

The minority view was that the legislation should be framed to allow for the reception of the evidence without leave of the court, but a discretion should be retained for the court to refuse to receive the evidence if satisfied that it would be contrary to the interests of justice to do so. Those adhering to this view were of the opinion that unlike "alternative" means of giving evidence, there is little distinction to be drawn between live evidence and live link evidence. In both instances the witness can be heard and observed by all parties and the examination and cross-examination will be in real time. Thus there is no reason why adducing evidence in this way should require the leave of the court. They were also of the view that in order to overcome the potential for bias towards existing approaches and away from technology, it was necessary to allow for the evidence to be received in the absence of a party satisfying the court, on a standard of interests of justice, that it should not be done.

For this reason two options have been included for consideration in relation to the reception of this evidence.

ii. Audio evidence

A person other than the accused, who is outside (name of jurisdiction) may give evidence from that place by way of technology that permits the parties and the court in (name of jurisdiction) to hear but not see, and examine, the witness if the court is of the opinion that it would be appropriate considering all the circumstances including the nature of the witness' anticipated evidence and any potential prejudice caused by the fact that the witness would not be seen by the parties or the court.

The Group was of the opinion that the model law should cover not only live video link but audio link as well. In their view, while audio evidence would not be appropriate for all situations, it could be very useful where the nature of the evidence to be given is of a technical or minor nature and video technology is either not available or otherwise impracticable. However, unlike the case of "virtual" technology, here the Group agreed that, because the witness cannot be seen, the court must have a discretion to consider all of the circumstances and determine whether or not to receive the evidence.

iii. Application of laws of contempt of court and perjury

(a) Subject to subsection (b), where evidence is received by a court in (name of jurisdiction) from a witness who is outside the jurisdiction, pursuant to sections 1 or 2, the evidence is deemed to be given in (name of jurisdiction) for the purposes of the laws relating to evidence, procedure, contempt of court or perjury.

(b) A witness shall not be found in contempt under the laws of the receiving state for refusing to answer a question, where that refusal is based on a law in the sending jurisdiction that applies to the proceedings. Where

there is an issue as to the law of the sending jurisdiction or its applicability to the proceeding, the matter may be determined by a ruling of a judge of the sending jurisdiction present during the taking of the evidence or if no judge is present, by a certificate of a judge of the sending jurisdiction, provided subsequently."[4]

As mentioned earlier, the Group was of the view that it would be appropriate to provide for dual jurisdiction over matters such as perjury or contempt of court. This provision would allow for the jurisdiction receiving the evidence via the technology to have jurisdiction in the case of perjury or contempt. While realistically it will be difficult to exercise the jurisdiction because the person in question is not present in the territory, it was still the view that there may be some instances where the receiving jurisdiction would want to pursue the matter.

At the same time, with reference to contempt, the Group was of the opinion that it was necessary to include a protection for the witness in those cases where the law of the receiving jurisdiction would require an answer to a question but the applicable evidentiary law of the sending jurisdiction would preclude it. For example, a witness is giving evidence from Switzerland to a proceeding in the UK. He or she objects to answering a question put by counsel in the UK, on the basis that the Swiss banking confidentiality law prohibits the disclosure of the information. Nothing in the UK law would permit or prevent the witness from answering the question. It would however be inappropriate for the witness, caught between the law of two jurisdictions, to have to face sanction in the UK for refusing to answer the question. Therefore the Group was of the opinion that in such cases, it should be clear that the witness could not be found in contempt in the receiving jurisdiction for relying on an applicable law of the sending jurisdiction in which he or she is located.

The Group considered the very difficult practical problems that arise because the laws of both jurisdictions, in some respects, apply to the proceedings. In particular, they discussed how decisions would be made in relation to objections raised in the course of the proceedings.

Where the objection is based on the law of the receiving jurisdiction, the Group determined that the judge at the proceeding in the receiving jurisdiction would be in a position to rule on such matters at the time. However, when the objection was based on the evidentiary law of the sending jurisdiction, e.g. a privilege was invoked, there were practical problems.

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C. Access by defence to mutual assistance

Another issue of growing relevance in mutual assistance is the ability for the defence to access the mutual assistance process. There are divergent views amongst states on this question. In the United States, the defence cannot seek assistance under the mutual assistance process. If they wish to obtain evidence in a foreign state they must rely on a letters rogatory process. The United States mutual assistance treaties generally contain a clause that reflects this position. In other states, such as Canada, the defence does not constitute a competent authority under the mutual assistance legislation or applicable treaties. However, in practice, the prosecution, either as a result of a court order or otherwise, may seek evidence on behalf of the defence. This approach is enshrined in legislation in Australia with the mutual assistance legislation providing that the defence may apply to the court for an order directing the Attorney General to make a request to a foreign state.

D. Power/Right of accused to stop or challenge proceedings

There is also much diversity of approach to the question of whether a suspect or accused has the ability to intercede in a mutual assistance process. The extent to which the accused can challenge the making of the request, the approval of the request, the relevant order or the transmission of the evidence will depend very much on the applicable law and process. In some states (e.g. the United States) the process is often of such an administrative nature that it provides little opportunity for the accused to know of the request or to bring a challenge.

In other jurisdictions, the accused has a limited opportunity to challenge the making of the court orders but not the executive actions. For example, in Canada the accused has standing to challenge if he or she can demonstrate an interest in the evidence sought.

APPENDIX 1

(HARARE) SCHEME RELATING TO MUTUAL ASSISTANCE IN CRIMINAL MATTERS WITHIN THE COMMONWEALTH

PURPOSE AND SCOPE

1. (1) The purpose of this Scheme is to increase the level and scope of assistance rendered between Commonwealth Governments in criminal matters. It augments, and in no way derogates from existing forms of co-operation, both formal and informal; nor does it preclude the development of enhanced arrangements in other fora.

(2) This Scheme provides for the giving of assistance by the competent authorities of one country (the requested country) in respect of criminal matters arising in another country (the requesting country).

(3) Assistance in criminal matters under this Scheme includes assistance in

(a) identifying and locating persons;

(b) serving documents;

(c) examining witnesses;

(d) search and seizure;

(e) obtaining evidence;

(f) facilitating the personal appearance of witnesses;

(g) effecting a temporary transfer of persons in custody to appear as a witness;

(h) obtaining production of judicial or official records; and

(i) tracing, seizing and confiscating the proceeds or instrumentalities of crime.

MEANING OF COUNTRY

2. For the purposes of this Scheme, each of the following is a separate country, that is to say

(a) each sovereign and independent country within the Commonwealth together with any dependent territories which that country designates; and

(b) each country within the Commonwealth which, though not sovereign and independent, is not designated for the purposes of the preceding sub-paragraph.

CRIMINAL MATTER

3. (1) For the purposes of this Scheme, a criminal matter arises in a country if the Central Authority of that country certifies that criminal or forfeiture proceedings have been instituted in a court exercising jurisdiction in that country or that there is reasonable cause to believe that an offence has been committed in respect of which such criminal proceedings could be so instituted.

(2) "Offence", in the case of a federal country or a country having more than one legal system, includes an offence under the law of the country or any part thereof.

(3) "Forfeiture proceedings" means proceedings, whether civil or criminal, for an order

(a) restraining dealings with any property in respect of which there is reasonable cause to believe that it has been

(i) derived or obtained, whether directly or indirectly, from; or

(ii) used in, or in connection with,

the commission of an offence;

(b) confiscating any property derived or obtained as provided in paragraph (a)(i) or used as provided in paragraph (a)(ii); or

(c) imposing a pecuniary penalty calculated by reference to the value of any property derived or obtained as provided in paragraph (a)(i) or used as provided in paragraph (a)(ii).

CENTRAL AUTHORITIES

4. Each country shall designate a Central Authority to transmit and to receive requests for assistance under this Scheme.

ACTION IN THE REQUESTING COUNTRY

5. (1) A request for assistance under this Scheme may be initiated by any law enforcement agency or public prosecution or judicial authority competent under the law of the requesting country.

(2) The Central Authority of the requesting country shall, if it is satisfied that the request can properly be made under this Scheme, transmit the request to the Central Authority of the requested country and shall ensure that the request contains all the information required by the provisions of this Scheme.

(3) The Central Authority of the requesting country shall provide as far as practicable additional information sought by the Central Authority of the requested country.

ACTION IN THE REQUESTED COUNTRY

6. (1) Subject to the provisions of this Scheme, the requested country shall grant the assistance requested as expeditiously as practicable.

(2) The Central Authority of the requested country shall, subject to the following provisions of this paragraph, take the necessary steps to ensure that the competent authorities of that country comply with the request.

(3) If the Central Authority of the requested country considers

(a) that the request does not comply with the provisions of this Scheme, or

(b) that in accordance with the provisions of this Scheme the request for assistance is to be refused in whole or in part, or

(c) that the request cannot be complied with, in whole or in part, or

(d) that there are circumstances which are likely to cause a significant delay in complying with the request,

it shall promptly inform the Central Authority of the requesting country, giving reasons.

(4) The requested country may make the granting of assistance subject to the requesting country giving an undertaking that:

(a) the evidence provided will not be used directly or indirectly in relation to the investigation or prosecution of a specified person; or

(b) a court in the requesting country will determine whether or not the material is subject to privilege.

(5) If the requesting country refuses to give the undertaking under sub paragraph (4), the requested country may refuse to grant the assistance sought in whole or in part.

REFUSAL OF ASSISTANCE

7. (1) The requested country may refuse to comply in whole or in part with a request for assistance under this Scheme if the criminal matter appears to the Central Authority of that country to concern

(a) conduct which would not constitute an offence under the law of that country; or

(b) an offence or proceedings of a political character; or

(c) conduct which in the requesting country is an offence only under military law or a law relating to military obligations; or

(d) conduct in relation to which the person accused or suspected of having committed an offence has been acquitted or convicted by a court in the requested country.

(2) The requested country may refuse to comply in whole or in part with a request for assistance under this Scheme

(a) to the extent that it appears to the Central Authority of that country that compliance would be contrary to the Constitution of that country, or would prejudice the security, international relations or other essential public interests of that country; or

(b) where there are substantial grounds leading the Central Authority of that country to believe that compliance would facilitate the prosecution or punishment of any person on account of his race, religion, nationality or political opinions or would cause prejudice for any of these reasons to any person affected by the request.

(3) The requested country may refuse to comply in whole or in part with a request for assistance to the extent that the steps required to be taken in order to comply with the request cannot under the law of that country be taken in respect of criminal matters arising in that country.

(4) An offence shall not be an offence of a political character for the purposes of this paragraph if it is an offence within the scope of any international convention to which both the requesting and requested countries are parties and which imposes on the parties thereto an obligation either to extradite or prosecute a person accused of the commission of the offence.

MEASURES OF COMPULSION

8. (1) The competent authorities of the requested country shall in complying with a request under this Scheme use only such measures of compulsion as are available under the law of that country in respect of criminal matters arising in that country.

(2) Where under the law of the requested country measures of compulsion cannot be applied to any person to take the steps necessary to secure compliance with a request

under this Scheme but the person concerned is willing to act voluntarily in compliance or partial compliance with the terms of the request, the competent authorities of the requested country shall make available the necessary facilities.

SCHEME NOT TO COVER ARREST OR EXTRADITION

9. Nothing in this Scheme is to be construed as authorising the extradition, or the arrest or detention with a view to extradition, of any person.

CONFIDENTIALITY

10. The Central Authorities and the competent authorities of the requesting and requested countries shall use their best efforts to keep confidential a request and its contents and the information and materials supplied in compliance with a request except for disclosure in criminal proceedings and where otherwise authorised by the Central Authority of the other country.

LIMITATION OF USE OF INFORMATION OR EVIDENCE

11. The requesting country shall not use any information or evidence obtained in response to a request for assistance under this Scheme in connection with any matter other than the criminal matter specified in the request without the prior consent of the Central Authority of the requested country

EXPENSES OF COMPLIANCE

12. (1) Except as provided in the following provisions of this paragraph, compliance with a request under this Scheme shall not give rise to any claim against the requesting country for expenses incurred by the Central Authority or other competent authorities of the requested country.

(2) The requesting country shall be responsible for the travel and incidental expenses of witnesses travelling to the requesting country, including those of accompanying officials, for fees of experts, and for the costs of any translation required by the requesting country.

(3) If in the opinion of the requested country, the expenses required in order to comply with the request are of an extraordinary nature, the Central Authority of the requested country shall consult with the Central Authority of the requesting country as to the terms and conditions under which compliance with the request may continue, and in the absence of agreement the requested country may refuse to comply further with the request.

CONTENTS REQUEST FOR ASSISTANCE

13. (1) A request under the Scheme shall:

(a) specify the nature of the assistance requested;

(b) contain the information appropriate to the assistance sought as specified in the following provisions of this Scheme;

(c) indicate any time-limit within which compliance with the request is desired, stating reasons;

(d) contain the following information:

(i) the identity of the agency or authority initiating the request;

(ii) the nature of the criminal matter; and

(iii) whether or not criminal proceedings have been instituted.

(e) where criminal proceedings have been instituted, contain the following information:

(i) the court exercising jurisdiction in the proceedings;

(ii) the identify of the accused person;

(iii) the offences of which he stands accused, and a summary of the facts;

(iv) the stage reached in the proceedings; and

(v) any date fixed for further stages in the proceedings.

(f) where criminal proceedings have not been instituted, state the offence which the Central Authority of the requesting country has reasonable cause to believe to have been committed, with a summary of known facts.

(2) A request shall normally be in writing, and if made orally in the case of urgency, shall be confirmed in writing forthwith.

IDENTIFYING AND LOCATING PERSONS

14. (1) A request under this Scheme may seek assistance in identifying or locating persons believed to be within the requested country.

(2) The request shall indicate the purpose for which the information is requested and shall contain such information as is available to the Central Authority of the requesting country as to the whereabouts of the person concerned and such other information as it possesses as may facilitate the identification of that person.

SERVICE OF DOCUMENTS

15. (1) A request under this Scheme may seek assistance in the service of documents relevant to a criminal matter arising in the requesting country.

(2) The request shall be accompanied by the documents to be served and, where those documents relate to attendance in the requesting country, such notice as the Central Authority of that country is reasonably able to provide of outstanding warrants or other judicial orders in criminal matters against the person to be served.

(3) The Central Authority of the requested country shall endeavour to have the documents served:

(a) by any particular method stated in the request, unless such method is incompatible with the law of that country; or

(b) by any method prescribed by the law of that country for the service of documents in criminal proceedings.

(4) The requested country shall transmit to the Central Authority of the requesting country a certificate as to the service of the documents or, if they have not been served, as to the reasons which have prevented service.

(5) A person served in compliance with a request with a summons to appear as a witness in the requesting country and who fails to comply with the summons shall not by reason thereof be liable to any penalty or measure of compulsion in either the requesting or the requested country notwithstanding any contrary statement in the summons.

EXAMINATION OF WITNESSES

16. (1) A request under this Scheme may seek assistance in the examination of witnesses in the requested country.

(2) The request shall specify, as appropriate and so far as the circumstances of the case permit:

(a) the names and addresses or the official designations of the witnesses to be examined;

(b) the questions to be put to the witnesses or the subject matter about which they are to be examined;

(c) whether it is desired that the witnesses be examined orally or in writing;

(d) whether it is desired that the oath be administered to the witnesses (or, as the law of the requested country allows, that they be required to make their solemn affirmation);

(e) any provisions of the law of the requesting country as to privilege or exemption from giving evidence which appear especially relevant to the request; and

(f) any special requirements of the law of the requesting country as to the manner of taking evidence relevant to its admissibility in that country.

(3) The request may ask that, so far as the law of the requested country permits, the accused person or his legal representative may attend the examination of the witness and ask questions of the witness.

SEARCH AND SEIZURE

17. (1) A request under this Scheme may seek assistance in the search for, and seizure of property in the requested country.

(2) The request shall specify the property to be searched for and seized and shall contain, so far as reasonably practicable, all information available to the Central Authority of the requesting country which may be required to be adduced in an application under the law of the requested country for any necessary warrant or authorization to effect the search and seizure.

(3) The requested country shall provide such certification as may be required by the requesting country concerning the result of any search, the place and circumstances of seizure, and the subsequent custody of the property seized.

OTHER ASSISTANCE IN OBTAINING EVIDENCE

18. (1) A request under this Scheme may seek other assistance in obtaining evidence.

(2) The request shall specify, as appropriate and so far as the circumstance of the case permit:

(a) the documents, records or property to be inspected, preserved, photographed, copied or transmitted;

(b) the samples of any property to be taken, examined or transmitted; and

(c) the site to be viewed or photographed.

PRIVILEGE

19. (1) No person shall be compelled in response to a request under this Scheme to give any evidence in the requested country which he could not be compelled to give:

(a) in criminal proceedings in that country; or

(b) in criminal proceedings in the requesting country.

(2) For the purposes of this paragraph any reference to giving evidence includes references to answering any question and to producing any document.

PRODUCTION OF JUDICIAL OR OFFICIAL RECORDS

20. (1) A request under this Scheme may seek the production of judicial or official records relevant to a criminal matter arising in the requesting country.

(2) For the purposes of this paragraph "judicial records" means judgements, orders and decisions of courts and other documents held by judicial authorities and "official records" means documents held by government departments or agencies or prosecution authorities.

(3) The requested country shall provide copies of judicial or official records which are publicly available.

(4) The requested country may provide copies of judicial or official records not publicly available, to the same extent and under the same conditions as apply to the provision of such records to its own law enforcement agencies or prosecution or judicial authorities.

TRANSMISSION AND RETURN OF MATERIAL

21. (1) Where compliance with a request under this Scheme would involve the transmission to the requesting country of any document, record or property, the requested country

(a) may postpone the transmission of the material if it is required in connection with proceedings in that country, and in such a case shall provide certified copies of a document or record pending transmission of the original;

(b) may require the requesting country to agree to terms and conditions to protect third party interests in the material to be transmitted and may refuse to effect such transmission pending such agreement.

(2) Where any document, record or property is transmitted to the requesting country in compliance with a request under this Scheme, it shall be returned to the requested country when it is no longer required in connection with the criminal matter specified in the request unless that country has indicated that its return is not desired.

(3) The requested country shall authenticate material that is to be transmitted by that country.

AUTHENTICATION

22. A document or other material transmitted for the purposes of or in response to a request under this Scheme shall be deemed to be duly authenticated if it:

(a) purports to be signed or certified by a judge or Magistrate, or to bear in the stamp or seal of a Minister, government department or Central Authority; or

(b) is verified by the oath of a witness or of a public officer of the Commonwealth country from which the document or material emanates.

PERSONAL APPEARANCE OF WITNESSES IN THE REQUESTING COUNTRY

23. (1) A request under this Scheme may seek assistance in facilitating the personal appearance of the witnesses before a court exercising jurisdiction in the requesting country.

(2) The request shall specify

(a) the subject matter upon which it is desired to examine the witnesses;

(b) the reasons for which the personal appearance of the witnesses is required; and

(c) details of the travelling, subsistence and other expenses payable by the requesting country in respect of the personal appearance of the witnesses.

(3) The competent authorities of the requested country shall invite persons whose appearance as witnesses in the requesting country is desired; and

(a) ask whether they agree to appear;

(b) inform the Central Authority of the requesting country of their answer; and

(c) if they are willing to appear, make appropriate arrangements to facilitate the personal appearance of the witnesses.

(4) A person whose appearance as a witness is the subject of a request and who does not agree to appear shall not by reason thereof be liable to any penalty or measure of compulsion in either the requesting or requested country.

PERSONAL APPEARANCE OF PERSONS IN CUSTODY

24. (1) A request under this scheme may seek the temporary transfer of persons in custody in the requested country to appear as witnesses before a court exercising jurisdiction in the requesting country.

(2) The request shall specify:

(a) the subject matter upon which it is desired to examine the witnesses;

(b) the reasons for which the personal appearance of the witnesses is required;

(3) The requested country shall refuse to comply with a request for the transfer of persons in custody if the persons concerned do not consent to the transfer.

(4) The requested country may refuse to comply with a request for the transfer of persons in custody and shall be under no obligation to inform the requesting country of the reasons for such refusal.

(5) A person in custody whose transfer is the subject of a request and who does not consent to the transfer shall not by reason thereof be liable to any penalty or measure of compulsion in either the requesting or requested country.

(6) Where persons in custody are transferred, the requested country shall notify the requesting country of:

(a) the dates upon which the persons are due under the law of the requested country to be released from custody; and

(b) the dates by which the requested country requires the return of the persons

and shall notify any variations in such dates.

(7) The requesting country shall keep the persons transferred in custody, and shall return the persons to the requested country when their presence as witnesses in the requesting country is no longer required, and in any case by the earlier of the dates notified under sub paragraph (6).

(8) The obligation to return the persons transferred shall subsist notwithstanding the fact that they are nationals of the requesting country.

(9) The period during which the persons transferred are in custody in the requesting country shall be deemed to be service in the requested country of an equivalent period of custody in that country for all purposes.

(10) Nothing in this paragraph shall preclude the release in the requesting country without return to the requested country of any person transferred where the two countries and the person concerned agreed.

IMMUNITY OF PERSONS APPEARING

25. (1) Subject to the provisions of paragraph 24, witnesses appearing in the requesting country in response to a request under paragraph 23 or persons transferred to that country in response to a request under paragraph 24 shall be immune in that country from prosecution, detention or any other restriction of personal liberty in respect of criminal acts, omissions or convictions before the time of their departure from the requested country.

(2) The immunity provided for in that paragraph shall cease:

(a) in the case of witnesses appearing in response to a request under paragraph 23, when the witnesses having had, for a period of 15 consecutive days from the dates when they were notified by the competent authority of the requesting country that their presence was no longer required by the court exercising jurisdiction in the criminal matter, an opportunity of leaving have nevertheless remained in the requesting country, or having left that country have returned to it;

(b) in the case of persons transferred in response to a request under paragraph 24 and remaining in custody when they have been returned to the requested country.

TRACING THE PROCEEDS OR INSTRUMENTALITIES OF CRIME

26. (1) A request under this Scheme may seek assistance in identifying, locating and assessing the value of property believed to have been derived or obtained, directly or indirectly, from, or to have been used in, or in connection with, the commission of an offence and believed to be within the requested country.

(2) The request shall contain such information as is available to the Central Authority of the requesting country as to the nature and location of the property and as to any person in whose possession or control the property is believed to be.

SEIZING AND CONFISCATING THE PROCEEDS OF INSTRUMENTALITIES OF CRIME

27. (1) A request under this Scheme may seek assistance in securing:

(a) the making in the requested country of an order relating to the proceeds of instrumentalities of crime; or

(b) the recognition or enforcement in that country of such an order made in the requesting country.

(2) For the purpose of this paragraph, "an order relating to the proceeds of instrumentalities of crime" means:

(a) an order restraining dealings with any property in respect of which there is reasonable cause to believe that it has been derived or obtained, directly or indirectly, from, or used in, or in connection with, the commission of an offence;

(b) an order confiscating property derived or obtained, directly or indirectly, from, or used in or in connection with, the commission of an offence; and

(c) an order imposing a pecuniary penalty calculated by reference to the value of any property so derived, obtained or used.

(3) Where the requested country cannot enforce an order make in the requesting country, the requesting country may request the making of any similar order available under the law of the requested country.

(4) The request shall be accompanied by a copy of any order made in the requesting country and shall contain so far as reasonably practicable, all information available to the Central Authority of the requesting country which may be required in connection with the procedures to be followed in the requested country.

(5) The law of the requested country shall apply to determine the circumstances and manner in which an order may be made, recognised or enforced in response to the request.

(6) The law of the requested country may provide for the protection of the interests of bona fide third parties in property restrained or confiscated as a result of a request made pursuant to this Scheme, by providing:

(a) for the giving of notice of the making of orders restraining or confiscating property; and

(b) that any third party claiming an interest in property so restrained or confiscated may make an application to a court of competent jurisdiction for an order

(i) declaring that the interest of the applicant in the property or part thereof was acquired bona fide; and

(ii) restoring such property or the value of the interest therein to the applicant.

DISPOSAL OR RELEASE OF PROPERTY

28. (1) The law of the requested country shall apply to determine the disposal of any property

(a) forfeited; or

(b) obtained as a result of the enforcement of a pecuniary penalty order

as a result of a request under this Scheme.

(2) The law of the requested country shall apply to determine the circumstances in which property made the subject of interim seizure as a result of a request under this Scheme may be released from the effects of such seizure.

(3) The law of the requested country may provide that the proceeds of an order of the type referred to in sub-paragraphs 27(2)(b) and (c), or the value thereof, may be

(a) returned to the requesting country; or

(b) shared with the requesting country in such proportion as the requested country in its discretion deems appropriate in all the circumstances.

CONSULTATION

29. The Central Authorities of the requested and requesting countries shall consult promptly, at the request of either, concerning matters arising under this Scheme.

OTHER ASSISTANCE

30. After consultation between the requesting and the requested countries assistance not within the scope of this Scheme may be given in respect of a criminal matter on such terms and conditions as may be agreed by those countries.

NOTIFICATION OF DESIGNATIONS

31. Designations of dependent territories under paragraph 2 and of Central Authorities under paragraph 4 shall be notified to the Commonwealth Secretary-General.

Appendix 2

Commonwealth Scheme for the Transfer of Offenders

AS AMENDED IN 1990

GENERAL PRINCIPLES

1. A person convicted and sentenced to a term of imprisonment in one country ("the sentencing country") for an offence may be transferred, in accordance with the provisions of this scheme, to another country ("the administering country") in order that he may serve the remainder of that sentence in that other country.

DEFINITIONS

2. For the purposes of this Scheme -

(a) each of the following is a separate country, that is to say -

(i) each sovereign and independent country within the Commonwealth, together with any dependent territories which that country designates, and

(ii) each country within the Commonwealth which, although not sovereign and independent, is not designated for the purposes of the preceding sub-paragraph;

(b) (i) "administering country" means the country to which the convicted offender may be, or has been, transferred in order to serve his sentence;

(ii) "convicted offender" means a person upon whom a sentence has been imposed;

(iii) "judgment" means a decision or order of a court or tribunal imposing a sentence;

(iv) "sentence" means any punishment or measure involving deprivation of liberty ordered by a court o tribunal for a determinate or indeterminate period of time in the exercise of its criminal jurisdiction;

(v) "sentencing country" means the country in which the sentence was imposed on the convicted offender who may be, or has been, transferred.

TRANSFER OF CONVICTED OFFENDER

3. (1) A convicted offender to whom this Scheme may apply shall be informed by the sentencing country of the substance of the Scheme.

(2) A convicted offender may only be transferred following a request by either the sentencing country or the administering country, but the convicted offender may apply for his transfer.

(3) When a convicted offender applies for his transfer, the country which receives that application shall. as soon as practicable, so inform the other country.

CONDITIONS FOR TRANSFER

4. (1) A convicted offender may be transferred under the Scheme only on the following conditions -

(a) if that person -

(i) is a national of the administering country, notwithstanding that he may also be a national of any other country, including the sentencing
country, or

(ii) has close ties with the administering country of a kind that may be recognised by that country for the purposes of this Scheme; and

(b) if the judgment is final; and

(c) if at the time of receipt of the request for transfer, the convicted offender still has at least six months of the sentence to serve or if the sentence is indeterminate; and

(d) if the transfer is consented to by the convicted offender or, where In view of his age or his physical or mental condition one of the two countries considers it necessary, by a person entitled to act on behalf of the convicted offender; and

(e) if the sentencing and administering countries agree to the transfer.

(2) In exceptional cases it is open to the sentencing and administering countries to agree to a transfer even if the time to be served by the sentenced person is less than that specified in sub-paragraph (1)(c).

(3) A country may, at any time, define as far as it is concerned the term "national" for the purposes of this Scheme.

OBLIGATIONS TO FURNISH INFORMATION

5. (1) For the purposes of enabling a decision to be made on a request or an application under this Scheme, the sentencing country shall send the following information and documents to the administering country, unless either country has already decided that it will not agree to the transfer -

(a) the name, date and place of birth of the convicted offender;

(b) his address, if any, in the administering country;

(c) a certified copy of the judgment and a copy or account of the law on which it is based;

(d) a statement of the facts upon which the conviction and sentence were based;

(e) the nature, duration and date of commencement of the sentence;

(f) whenever appropriate, any medical or social reports on the convicted offender, information about his treatment in the sentencing country and any recommendation for his further treatment in the administering country; and

(g) any other information which the administering country may specify as required in all cases to enable it to consider the possibility of transfer and to enable it to inform the prisoner and the sentencing country of the full consequences of transfer for the prisoner under its law.

(2) The administering country, if requested by the sentencing country, shall send to it a document or statement indicating whether the convicted offender satisfies the requirements of paragraph 4(1)(a).

REQUESTS AND REPLIES

6. (1) Requests and applications for transfer and replies shall be made in writing.

(2) Communications between sentencing and administering countries shall be conducted through the channels notified in pursuance of paragraph 19.

SUPPORTING DOCUMENTS

7. Except as provided in paragraph 5(1)(c), documents sent in accordance with this Scheme need not be certified.

CONSENT AND ITS VERIFICATION

8. (1) The sentencing country shall ensure that the person required to give consent to the transfer in accordance with paragraph 4(1)(d) does so voluntarily and in writing with full knowledge of the legal consequences thereof. The procedure for giving such consent shall be governed by the law of the sentencing country.

(2) The sentencing country shall afford an opportunity to the administering country to verify that the consent is given in accordance with the conditions set out in sub-paragraph (1).

NOTIFICATION OF DECISIONS

9. A convicted offender shall be informed, in writing, of any action taken by the sentencing country or the administering country, as well as of any decision taken by either country, on a request for his transfer.

EFFECT OF TRANSFER FOR SENTENCING COUNTRY

10. The enforcement of the sentence by the administering country shall, to the extent that it has been enforced, have the effect of discharging that sentence in the sentencing country.

EFFECT OF TRANSFER FOR ADMINISTERING COUNTRY

11. (1) The competent authorities of the administering country shall continue the enforcement of the sentence immediately or through a court or administrative order under the conditions set out in paragraph 12.

(2) Subject to the provisions of paragraph 13, the enforcement of the sentence shall be governed by the law of the administering country and that country alone shall be competent to take all appropriate decisions.

(3) Any country which, according to its national law cannot avail itself of the procedure referred to in sub-paragraph (1) to enforce measures imposed in another country on a person who, for reasons of mental condition, has been held not criminally responsible for the commission of an offence, and which is prepared to receive such a person for further treatment, may Indicate the procedure it will follow in such a case.

CONTINUED ENFORCEMENT

12. (1) The administering country shall be bound by the legal nature and duration of the sentence as determined by the sentencing country.

(2) If, however, the sentence is by its nature or duration Incompatible with the law of the administering country, or its law so requires, that country may, by court or administrative order, adapt the sanction to a punishment or measure prescribed by its own law. AS to its nature the punishment or measure shall, as far as possible, correspond with that imposed by the judgment of the sentencing country. It shall not aggravate, by its nature or duration, the sanctions imposed in the sentencing country.

PARDON, AMNESTY, COMMUTATION, REVIEW

13. (1) Unless the sentencing and the administering countries otherwise agree the sentencing country alone may grant pardon, amnesty or commutation of the sentence in accordance with its constitution or other laws.

(2) The sentencing country alone may decide on any application for review of the judgment.

TERMINATION OF ENFORCEMENT

14. The administering country shall terminate enforcement of the sentence as soon as it is informed by the sentencing country of any decision or measure as a result of which the sentence ceases to be enforceable.

INFORMATION ON ENFORCEMENT

15. (1) The administering country shall notify the sentencing country -

(a) when it considers enforcement of the sentence to have been completed; or

(b) if the convicted offender escapes from custody before enforcement of the sentence has been completed.

(2) The sentencing country may, at any time, request a special report from the administering country concerning the enforcement of the sentence.

TRANSIT

16. Each country shall afford reasonable co-operation in facilitating the transit through its territory of convicted offenders who are being transferred between other countries pursuant to this Scheme. Advance notice of such transit shall
be given by the country intending to make the transfer.

COSTS

17. The cost of the transfer of a convicted offender shall be defrayed by the sentencing country and the administering country In such proportions as they may agree either generally or in regard to any particular transfer.

TEMPORAL APPLICATION

18. The Scheme shall be applicable to the enforcement of sentences imposed before as well as after its adoption.

ACCEPTANCE OF SCHEME

19. Any country which enacts legislation to give effect to this Scheme shall notify the Commonwealth Secretary-General of that fact and shall inform him of the proper channel for communication and deposit with him a copy of the legislation.

Section 2

EXTRADITION

> Extradition is an act of government, performed, normally in fulfilment of formal, reciprocal arrangements between states, by returning persons suspected or convicted of crime to the country which wishes to try or punish them for that crime. (Jones)

General Principles

Extradition treaties are a mechanism for the surrender of fugitive offenders from one country to another. Whilst extradition treaties are not always the only means by which a country may request or grant surrender of fugitive offenders, they are a reliable and effective means of doing so. This is because such treaties create an obligation at international law to extradite and are designed to accommodate extradition procedures of both countries. Effective treaties also make a State a less attractive haven for overseas offenders wishing to come to the country to evade justice in their own countries.

There is no common law power to detain a person for extradition. So if X flees from Country A to Country B, in the absence of any extradition arrangement between the two countries, Country B becomes a safe haven for X. Thus extradition can be demanded as of right only if arrangements are made by means of a bilateral or multi-lateral treaty or other arrangements, e.g. the Commonwealth Scheme (London Scheme on the Extradition of Offenders (set out below).

The provisions of Article 15 of the African Union Convention on Preventing and Combating Corruption provide a useful starting point for discussing the basics of extradition:

Article 15 Extradition

1. This Article shall apply to the offences established by the State Parties in accordance with this Convention.
2. Offences falling within the jurisdiction of this Convention shall be deemed to be included in the internal laws of State Parties as crimes requiring extradition. State Parties shall include such offences as extraditable offences in extradition treaties existing between or among them.
3. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from a State Party with which it does not have such treaty, it shall consider this Convention as a legal basis for all offences covered by this Convention.
4. A State Party that does not make extradition conditional on the existence of a treaty shall recognize offences to which this Convention applies as extraditable offences among themselves.
5. Each State Party undertakes to extradite any person charged with or convicted of offences of corruption and related offences, carried out on the territory of another State Party and whose extradition is requested by that State Party, in conformity

with their domestic law, any applicable extradition treaties, or extradition agreements or arrangements existing between or among the State Parties.

6. Where a State Party in whose territory any person charged with or convicted of offences is present and has refused to extradite that person on the basis that it has jurisdiction over offences, the Requested State Party shall be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution, unless otherwise agreed with the Requesting State Party, and shall report the final outcome to the Requesting State Party.
7. Subject to the provisions of its domestic law and any applicable extradition treaties, a Requested State Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the Requesting State Party, take into custody a person whose extradition is sought and who is present in its territory, or take other appropriate measures to ensure that the person is present at the extradition proceedings.

Getting the balance right

The 9th UN Conference on the Prevention of Crime and Treatment of Offenders has noted that constant efforts:-

> "are needed to balance the preservation of the rule of law, including respect for human rights, with the need for efficiency in the criminal justice system. That search for balance should take into account the removal of the unnecessary formalities and technicalities often associated with extradition, in order to protect matters of substance".

NATURE OF THE EXTRADITION PROCESS

In some states, the extradition process is entirely an executive responsibility and the judiciary is not involved except that in some instances it may review the executive decision. In many other states, including most common law states, the extradition process has distinct phases involving the judiciary and the executive. While there is clearly variation as to the specific roles of the judiciary and the executive in the extradition process, there are some general functions that can be identified.

The judicial function

The judicial authority decides if the conditions for extradition exist. These conditions are found in the relevant national law.

This means the judge must decide whether the request and supporting documentation presented are sufficient to meet the requirements for extradition. Domestic law and practice will determine to what extent the judiciary, as opposed to the executive, monitors treaty compliance or decides on the application of specific grounds of refusal. In most states, the initial judicial determination will be subject to appeal to a higher court level.

The role of the Executive

It is for the executive to decide whether or not the extradition should proceed. In most states, the executive authority will consider a range of factors in making the decision, including the personal circumstances of the individual,

general humanitarian issues as well as the obligations to its extradition partner.

In some systems, the executive is involved at the beginning and the end of the process. For example, proceedings on a formal request for extradition cannot proceed without the issuance of an authority to proceed by the designated Minister. The ultimate decision on whether to surrender or not then also falls to that Minister, after the judicial phase of proceedings.

While again this can vary from state to state, in most instances there is a review process available in relation to the executive decision, either by way of habeas corpus or a statutory mechanism.

FUNDAMENTAL REQUIREMENTS FOR EXTRADITION

EXTRADITABLE OFFENCES

Is the offence an "extraditable offence"?

The first question to be addressed in the extradition process is whether any particular offence is extraditable. This will depend on the provisions of the applicable treaty or other instrument.

Where the request is based on reciprocity between the states, the offences included will be those extraditable on a reciprocal basis. In the case of request based on comity, the law and practice of the requested state will govern.

The early extradition treaties and instruments defined extraditable offence by reference to a list of offences annexed to the treaty. The requesting state would then be required to demonstrate that the offence in question fell within one of the category of crimes in the list. This approach to defining extraditable crime proved to be very problematic. The lists included in the treaty quickly became outdated. For example, many of the Imperial treaties relied upon by Commonwealth States, dated from the late 1800's and early 1900's. As a result, the annexed list did not include offences such as drug trafficking or hijacking. Further, the requirement to establish not only dual criminality but also that the offence in question fell within the list, proved to be an extremely complex matter, because of the differences in the descriptions of offences as between the law of the relevant states and the generic terms used in the list. Finally, the interrelationship between the list and the requirements for dual criminality was difficult to define and apply in individual cases.

For these reasons, in recent years, there has been a clear trend away from the "list" or "enumerative" approach. Modem extradition treaties, the Commonwealth Scheme and most domestic statutes now employ a "penalty based" or "eliminative" approach where the extraditable offence is defined by a formula, generally based on the applicable penalty. So for example the London Scheme provides, in section 2(2):

> For the purpose of this Scheme a returnable offence is an offence however described which is punishable in the part of the Commonwealth where the

> fugitive is located and the part of the Commonwealth to which return is requested by imprisonment for two years or a greater penalty.

This approach greatly simplifies the determination of what is an extraditable offence. The question will be determined by an assessment of dual criminality and the applicable penalty in both states.

While this approach to extraditable offence has gained general acceptance, the language used in the relevant instruments or statutes can sometimes create confusion as to whether the prescribed term of imprisonment must be a minimum, maximum or only a possible penalty. Perhaps the clearest way to capture the concept is that the maximum punishment for the offence must be at least one or two years, whichever period is chosen. Thus there must be a possibility that if convicted, the offender could receive that term of imprisonment.

Dual Criminality

There is a fundamental requirement that the conduct for which extradition is sought constitutes an offence in both the requesting and requested state. In other words, the offence for which extradition is sought must be criminal in both the requesting and requested state in order for extradition to proceed.

The rationale for the principle is twofold. It is inherently linked to the concept of reciprocity that underlies international cooperation generally. Thus a state will not surrender a person for an offence, unless the requested state could demand extradition in return for that same offence. In a similar vein, the person sought should not be removed from the territory of a state for conduct that does not constitute a criminal offence in that state and for which the person could face no restrictions on their liberty under domestic law.

While that may be a simple principle to state, it can be extremely complex to establish in individual cases. The difficulty arises because of the divergence in the description of criminal offences, as well as the constituent elements of the offence. For example, fraud in one state may be classified as embezzlement in another. In some jurisdictions, the offence of conspiracy has as a constituent element, an act in furtherance of the conspiracy. In other states the proof of the agreement alone will constitute the offence. In essence while certain states generally criminalise similar types of conduct, the way in which they do so can vary dramatically from one jurisdiction to another.

The challenges posed by these differences have led to the development of principles for approaching a dual criminality determination. Those principles have arisen through case authority and can often now be found in bilateral treaties on extradition and in domestic law. The 1990 United Nations Model Extradition Treaty (www.un.org/documents/ga/res/45/a45r116.htm) describes these principles as follows:

> In determining whether an offence is an offence punishable under the laws of both Parties, it shall not matter whether:

(a) The laws of the Parties place the acts or omissions constituting the offence within the same category of offence or designate the offence by the same terminology;
(b) Under the laws of the Parties the constituent elements of the offence differ, it being understood that the totality of the acts or omissions as presented by the requesting State shall be taken into account.

These principles take the test for dual criminality away from an analysis of the legal classification of the offence to a consideration of the fundamental issue - *would this be criminal here*? The name of the offence, whether it is classified in the same manner or under the same type of statute or its description are not relevant considerations.

This leads to the most essential element of the modern dual criminality test: the "conduct-based" test. Look at the (alleged) conduct of the person sought, and see whether this would constitute a criminal offence in the requested state.

What evidence is required by the requested state?
There are a number of very different approaches. As ever, it is crucial that you know the evidence that is required by the requested state.

- *No evidence* (if the request for extradition is in order, there is no need to "go behind" the request. For example, a European Arrest Warrant is valid throughout the European Union has replaced extradition procedures between Member States of the enlarged Europe).
- *Prima facie case* (evidence of the alleged offence must be proved: i.e. the requesting state must submit evidence that is sufficient to justify the committal of that person under the law of the requested state)
- *Probable Cause* (same standard as for the issuing of a search warrant)
- *Record of the Case* (as with the prima facie case but no need for the evidence to comply with the domestic rules of evidence of the requested state: thus civil law countries can submit a "dossier" of the evidence to a common law country in order to support the request)

STAGES OF THE EXTRADITION PROCESS

The steps that will generally be taken in relation to an extradition request from a foreign state are as follows

i) Locating the fugitive

In many instances, before submitting a formal request, a state seeking extradition will have used police to police contacts, Interpol or Europol in order to try and find the person sought for extradition. This is discussed in Section 1 above.

ii) Provisional Arrest

Most, if not all, extradition regimes provide that in urgent cases, a state may seek the immediate arrest of the person sought, prior to the submission of the formal request and supporting documentation. This is known as "provisional arrest".

It is for the requested state to determine if the circumstances are sufficiently urgent so as to justify immediate arrest. Examples of urgency include where the person is expected to be in the territory of the requested state for a limited period of time, for example while he or she is in transit at an airport or where the person has been deliberately avoiding detection and arrest.

The nature of provisional arrest is such that the requesting state will only be required to provide a limited amount of critical information. While this can vary from state to state, in most instances this will include:

- a copy of the warrant or a statement that one has been issued,
- a brief description of the alleged offence, location and identification information,
- an indication of why the matter is considered urgent.

In each instance the requesting state will have to state that a formal request for extradition will be submitted. Because of their urgency, unlike formal requests for extradition, often requests for provisional arrest will be transmitted directly between Attorneys-General or Justice ministries or through Interpol.

If a request for provisional arrest is accepted by the requested state, the request will be actioned under the applicable domestic law. In most common law states, this requires that a magistrate either endorse the warrant of the foreign state or issue a separate domestic warrant, on the basis of information provided by the requested state.

Where a person is arrested provisionally, the requesting state will have a prescribed period of time within which to submit the formal extradition request and supporting documents. Generally this period will be between 45 and 60 days. If the material is not submitted, the person will be released from custody or any bail conditions if bail has been granted, but without prejudice to the ability of the requesting state to seek extradition again in the future.

iii) The formal request for extradition

In the absence of, or following provisional arrest, the actual extradition process is initiated by a formal request, which is generally transmitted through the diplomatic channel. This means that the request will be presented by one government to another, under cover of a diplomatic note. In practical terms, officials in the foreign affairs department either at an embassy or in the requested state will be the first to receive the relevant extradition documentation. The documentation will then go from those officials to the officials responsible for next phase of the process.

The actual content of an extradition request will be determined by the basis upon which the request is submitted. If it is presented under a bilateral or multilateral treaty, the contents of it will generally be specified therein. In other circumstances, it is the law of the requested state that will dictate the necessary materials.

In very general terms, most requests include a diplomatic note which briefly describes:

- the case and the person sought,
- a copy of the warrant, a copy of the charging document and applicable laws setting out the offence and penalty, and
- to the extent required by the requested state, either evidence or a description of the offence for which the person is sought for prosecution or service of a sentence, in sufficient detail for dual criminality to be determined.

In a conviction case, if the person has already served a portion of the sentence, a statement as to the time remaining to be served will also be included.

At this stage of the process, the request submitted will be reviewed by the relevant officials as to its sufficiency, in light of the requirements of any applicable instrument and domestic law, and a decision will be taken whether to proceed with the execution of it. If there is a problem with the request, this will be communicated to the requesting state, either formally or informally. Depending on the nature of the problem, additional information may be sought or amendments suggested enabling the request to be executed.

Depending on the applicable system, if a decision is made to proceed, a document authorising proceedings may issue or alternatively the matter will simply be brought before the relevant judicial authority for consideration.

iv) The extradition hearing

a) Nature and scope

The role of the judiciary in extradition will vary but some core functions appear across jurisdictions. A judicial authority (such as a magistrate or senior judge) will examine the extradition request submitted by the foreign state in relation in relation to the applicable law. It is the judge who will ensure that the right person is before the court and that the person in the dock is the same as the person named in the warrant.

The judicial authority will also determine, for the purpose of the dual criminality test, whether the conduct alleged would constitute an offence in the requested state. The nature and extent of any additional judicial inquiry will be determined by the applicable law in that state and in particular, the requirements, if any, with respect to the production of evidence. Generally he or she will determine that the material submitted is sufficient to meet the applicable standard be it reasonable cause to suspect or believe the offence has been committed, probable cause or prima facie case.

Generally, the judge will not delve into the question of whether there is an offence in the requesting state

What is also not considered at an extradition hearing is the guilt or innocence of the person. This is a matter for the courts in the requesting state that have jurisdiction to try the offence. *An extradition hearing is not a trial*. To the extent that evidence is considered at the hearing, these principles affect the nature of the evidence that may be adduced. Evidence will not be admitted to establish defence(s) that the accused may wish to raise at trial nor evidence that simply counters the material put forward by the requesting state.

b) Rule of non-inquiry

Historically under the common law, there is general principle often referred to as the "rule of non-inquiry". Here the courts in the requested state will not inquire into the means by which the evidence was gathered in the requesting state nor will that state examine the penal treatment that the offender may face. Thus, the judicial authority will not look into questions of whether the evidence submitted by the foreign state was obtained in an acceptable manner nor whether there has been an abuse of process by foreign authorities, so as to justify a stay of committal proceedings.

It is important to note that while this rule remains generally applicable in most common law jurisdictions, it does not mean that the person sought has no remedy or that the process is devoid of safeguards. In most instances, while the judicial authority will not examine such allegations involving a foreign state, the responsible executive authority may do so as part of the general discretion applicable to a decision on surrender.

v) The review

The Commonwealth Scheme provides as follows:

> *Habeas Corpus and Review*
> 9(1) It will be provided that an application may be made by or on behalf of a fugitive offender for a writ of habeas corpus or other like process.
> (2) It will be provided that an application may be made by or on behalf of the government of the requesting part of the Commonwealth for review of the decision of the competent judicial authority in committal proceedings.

This provision is reflected in the domestic law of states such that, either by statute or through the common law mechanism of habeas corpus, the decision of the judicial authority with respect to committal is subject to review. By far

the vast majority of Commonwealth jurisdictions maintain a process of review by habeas corpus in relation to extradition matters. In those instances where review is provided for by statute, the scope of the review and the jurisdiction of the appeal court will be governed by that statute.

In the case of habeas corpus, while the scope of the review may vary to some degree, generally the test is fairly consistent as between jurisdictions. The function of the court on habeas corpus is to determine if the detention is lawful. E.g. the writ might be used to inquire into whether the magistrate had jurisdiction, whether the offence charged is within the terms of the treaty of extradition, and at its most liberal, whether there was any evidence warranting the finding on committal. The process is therefore not a rehearing of committal proceedings nor is it analogous to an appeal.

vi) The Executive decision whether to return the fugitive

a) The decision on surrender

If a fugitive is committed for extradition, the matter then proceeds to the executive for a decision on surrender. The executive authority must then decide, taking into account any relevant treaty obligations and all the circumstances of the case, whether the person should be surrendered.

While as noted above, the actual authority charged with this responsibility will vary from jurisdiction to jurisdiction, the general functions are similar.

Generally, it is the executive authority that will consider such matters as the triviality of the case, whether it would be unjust or oppressive to surrender having regard to the circumstances, including such matters as the health of the person sought, or allegations of bad faith or abuse on the part of the requesting state or delay.

While it is variable, in some states specific grounds of refusal such as prejudice, offence of a political character and even matters such as double jeopardy will fall within the purview of the executive.

In the past several years, the process for the executive decision has become increasingly complex as fugitives choose to make extensive submissions in opposition to surrender. While the executive decision is clearly distinct from a judicial decision, there is still a need for the application of fundamental principles of fairness. Therefore, generally the person will be given an opportunity to present his or her submissions to the executive authority and the executive authority must consider the submissions presented in making his or her decision.

As this decision is generally a personal one for the relevant authority, often there is a process by which a summary of the case along with legal advice will be provided to that authority by officials in order to assist him or her in reaching a decision.

It should also be noted that in some jurisdictions, the executive authority makes two separate decisions, one at the commencement of proceedings, which is additional to the ultimate decision on surrender. The commencement

decision will relate to whether the extradition in question will proceed before the court. In some case this is a formal decision resulting in the issuance of an order or authority to proceed; in other instances it may be less formalised. In some jurisdictions, this decision, unlike that with respect to surrender, may be made by officials, as opposed to a personal determination by the executive authority.

b) Review of the decision

Here again, in most jurisdictions, the executive decision is subject to review either under a statutory regime for judicial review or by habeas corpus. Whichever method is employed, the scope of review is generally limited with the courts according much deference to the decisions of the executive in respect of matters that often touch on sensitive issues between states

MAKING THE REQUEST: THE PRACTICAL STEPS

The focus here is on the practical steps needed to put together an extradition packet that will be sufficient to support extradition under any applicable treaty and the law of the requested state.

PREPARATION OF DOCUMENTS

i) Meeting the treaty requirements

In preparing an extradition packet, the first step is to examine any applicable treaty to

- confirm that the offence is extraditable; and
- decide what material should be included.

If an old imperial treaty applies, it will not necessarily provide a description of the actual content of the request. However, it will define extraditable offences, generally by the list approach and the requirements with respect to evidence. Modern treaties will generally include articles that detail precisely what material should be submitted in support of a request for provisional arrest and extradition.

ii) Finding the requirements of the requested state

It is critical to know what is required under the national law of the requested state. There are various ways to get this information.

- Web sites: Some countries like Australia, Canada and the U.K., have their extradition legislation on the internet and they also have websites for relevant government departments that may provide additional detail.
- From the relevant embassies and high commissions or through the department of foreign affairs.
- From international organisations such as the Commonwealth Secretariat, Criminal Law Unit.

Practically speaking while you should try and gather information through all of these sources, there is no substitute for direct contact with officials in the relevant state. If you can obtain a contact name and number, that will be the best avenue to pursue in order to determine what the law is, what the evidence requirements are and what material should be incorporated in the request.

iii) Compiling the documents

Having determined the content and form of the request, the material needs to be compiled in accordance with those requirements. This includes:

- Providing an original or certified copy of the warrant and a brief description of the alleged offence.
- Depending on the jurisdiction, you may also wish to provide a copy of the relevant charging document.

- Information on location and identification. This will be set out either in the instructions for the diplomatic note or in some other manner. For this you will need to consult with the relevant law enforcement officers who should be able to provide attachments such as photographs and fingerprints.
- An affidavit or statement of the law, i.e. a copy or description of the offence and the applicable penalty. This statement should also address other general issues of law such as any applicable prescription period and the basis of jurisdiction if this is not a territorial case. If it is apparent that there may be an issue about a ground of refusal, it would be prudent to raise and discuss that in the legal materials. For example, if there is an issue of a previous conviction or acquittal, the applicable law on that point may be very relevant.
- Prepare evidence to meet the relevant standard. For civil law jurisdictions, a brief summary of the case sufficient for dual criminality will do. For probable cause or record of the case standards, an affidavit from an investigating officer, which summarises the evidence, will be needed. In the case of the prima facie standard, in consultation with the investigating officers, you will need to prepare affidavits for all of the witnesses that will be necessary to meet the standard.

Whatever the evidence standard may be, it is critical that the material submitted clearly links the case to the accused by way of identification. Thus, even in the probable cause and record of the case situations, there should be a clear identification of the individual, by photograph if possible, by the relevant witnesses.

Where the requested state requires proof of a prima facie case on the basis of first-person affidavits, there can be significant problems to overcome where some of the evidence is located outside of the requesting state. Where that evidence is in the requested state, it will most likely be necessary for the witness to be called or the document produced *viva voce.* While this can prove problematic in some instances, it should not pose an insurmountable difficulty. The cases which are most perplexing however are those where this evidence is located in a third state. Depending upon the law of the requested state it may not be possible to obtain the evidence in an admissible form. The problem lies in the requirements for certification of the affidavits for admission in the proceedings in the requested state. If the evidence is in the form of a sworn statement taken in the third state, it may not be possible for the requesting state to certify the documents in accordance with the requirements of treaty or law. For example, if the authentication must be as to the signature and office of the person taking the oath on the affidavit, officials in the requesting state will not be in a position to provide such certification. One possible solution would be to have the oath taken before consular officials of the requesting state in the third state but this may be difficult if not impossible to do for both legal and practical reasons.

Another form of the problem arises in those jurisdictions where the law provides specifically for the admission of evidence gathered in the requesting state. If the law is that specific, it will preclude the admission of affidavits gathered in a third state. In the case of critical evidence, the only recourse

may be for arrangements to be made to have the evidence from the third state adduced *viva voce*.

iv) Certification and authentication

Once the materials have been compiled, they must be certified and/or authenticated in accordance with the requirements of the treaty or the law of the requested state. Just as officials in the requested state must pay careful attention to this issue, so must those responsible for preparing the request be scrupulous with regard to the necessary certification and authentication requirements.

The first step in that regard will be determining precisely what are the applicable requirements by examining any applicable treaty or law.

v) Competence and the channel of communication

The prepared packet must now be transmitted to the foreign jurisdiction. In most instances, the foreign affairs department will be the competent authority for this, with the request being transmitted through the diplomatic channel. To ensure that all the relevant information is transmitted, it would be prudent to provide a covering letter and a letter of instruction for the diplomatic note, when transmitting the material to the foreign affairs officials.

In some cases, there may be tight deadlines with respect to a request, particularly if the person has been provisionally arrested. It is important to remember that the key issue is whether the requested state has received the material within the relevant time period. Generally, it will be sufficient if an authorised representative of the requested state is in receipt of the packet. In this regard, delivery to an embassy or high commission of the foreign state should be sufficient.

Representing the fugitive

It is rare that a person, who is the subject of a proposed extradition request, will know that a request for his or her extradition is being prepared by the requesting state and thus it is highly unlikely that counsel will be engaged to represent him or her at this stage of the proceedings. However, in the exceptional instance where a person suspects or comes to know that the request is being made, he or she might engage counsel for the purpose of liaising or negotiating with the authorities in the requesting state or to try and challenge the making of the request.

Challenging the Request in the Requesting State

While extradition legislation in many jurisdictions authorises the making of a request for extradition, rarely is there any statutory provision for a challenge to that process. Thus any such applications would have to be made on the basis of the general law, including seeking an appropriate writ to compel or prevent particular action.

As with an early challenge in the requested state, such an exceptional step would wisely be retained for only those cases when there is a solid factual basis upon which the request can be challenged.

Challenging the Request in the Requested State

If efforts to block the making of the request have failed in the requesting state, it may be possible to consider pre-emptive action in the requested state. Once again, counsel may be asked to contact the officials in the requested state to make submissions against the authorisation of the request. In addition, while there appear to be no cases on point in this regard, in theory it might be possible to seek an order from a court prohibiting the commencement of extradition on the basis of the case submitted. This would however be an extraordinary step to take and once again would have to be reserved for the most worthy of cases to have any chance of succeeding.

CONTENT OF AN EXTRADITION REQUEST

The following is a brief description of considerations for the review of the packet in respect of the key documents in an extradition case.

Person sought for prosecution

1. Original or certified copy of the warrant

In every jurisdiction the central extradition document is the warrant of arrest, which evidences that the person is wanted in the requesting state. The warrant submitted should be carefully reviewed for any technical defects relating to names, signatures, or dates, which may be open to attack.

Careful attention should be given to any description of the offence set out in the warrant and its consistency with other documents such as the diplomatic note or any charging document that may be provided.

2. Text or statement of the applicable law and penalty

Either a text or statement of the applicable law and penalty must be provided in most cases. This should be carefully reviewed. The offence provision, while not determinative, should be considered for any potential arguments with respect to dual criminality and in the case of a “list” treaty. The penalty provisions will be relevant particularly where that defines the "extraditable offence" and also with respect to any arguments regarding unjust or oppressive extradition or even constitutional issues.

Depending on the case and the applicable instrument, the statement of law may also address other issues such as prescription or jurisdiction. A statement of law should be considered not only as to what it contains but also what may not have been included. In particular, if there are potential grounds of refusal at play it may be important for there to be material in the statement of law.

3. Identification and location information and evidence

As in the case of provisional arrest, the request must include or be accompanied by information on identity and location, necessary on a practical level to affect an arrest. Those receiving the request will have to ensure that it provides sufficient information in this regard for the police to arrest the person.

However, with respect to identification more will be required. First, in order to obtain the arrest warrant on the basis of an extradition request, the magistrate or judge will have to be satisfied, based on the material adduced, that the person in the requested state is the same person as named in the warrant. This is the same procedure as applies in the case of provisional arrest. Normally this will be established by similarity of name and birth date as well as with the use of photographs and fingerprints. In order to have the warrant endorsed for execution or to obtain the domestic warrant the requested state will have to provide sufficient information on this point to satisfy the judge or magistrate asked to issue a warrant. The form by which this evidence will be adduced will vary but the packet must be considered in light of this requirement.

In addition, whether it is provided for explicitly or by implication, the judge or magistrate hearing the extradition case will have to be satisfied that the person in the dock is the person named in the warrant. This will be a legal as opposed to practical requirement at this stage. Depending on the applicable law it may be necessary to establish this aspect of identification by way of affidavit evidence from the foreign state.

Because sufficient information on this point must be adduced before a judge or magistrate to obtain the original warrant, in many instances neither counsel for the requesting state nor the person will necessarily focus on this point at the extradition hearing. But this is a point that should not be forgotten and both counsel should carefully consider in assessing the packet whether there is sufficient information on this point, adduced in a manner that is acceptable under the applicable law.

This identity information, which establishes that the person named in the warrant is the person in the requested state, is separate and apart from identification evidence that will form a necessary part of the evidentiary case, if that is required.

4. Evidence required

The issues and arguments to be advanced by both parties in relation to evidence will be considered in more detail in the context of the extradition hearing. However, the important point is that central authority officials, counsel for the requesting state and counsel for the fugitive should all be carefully and critically reviewing the evidence submitted in relation to the applicable evidentiary requirements.

If there is a requirement for a “prima facie” case to be adduced by way of admissible evidence, then this examination will have to be very detailed to determine that there is a sufficient case and that the material submitted as evidence is admissible. Under this system it will also be necessary for the packet to contain admissible evidence on identification of the accused person as the person who committed the offence alleged.

If under the applicable system no evidence is required, then the only concern will be that the description of the facts is sufficient to determine dual criminality.

In a record of the case system, the evidence, including identification evidence, will still need to be reviewed as to sufficiency, albeit the rules relating to admissibility will no longer be applicable.

Certification/Authentication

Under almost all existing regimes for extradition there is a requirement for both the certification and authentication of extradition packets.

The nature of those requirements will vary from state to state. For example in the United States, the requirement found in most extradition treaties is for the foreign request to be authenticated by an officer of the relevant legal Department (Justice Ministry/AG's office) and certified by the principle diplomatic or consular officer of the United States in the foreign state.

In many Commonwealth countries, the requirements for certification and authentication are drawn from the original UK legislation of the late 1800's. For an example of such provisions, regard can be had to the UK Fugitive Offenders Act 1881 which provided that:

> "Warrants and depositions, and copies thereof and official certificates of or judicial documents stating facts, shall be deemed duly authenticated for the purposes of this Act if they are authenticated in the manner provided for the time being by law, or if they purport to be signed by or authenticated by the signature of a judge, magistrate or officer of the part of Her Majesty 's dominions in which the same are issued, taken, or made, and are authenticated either by the oath of some witness, or by being sealed with the official seal of a Secretary of State, or with the public seal of a British possession, or with the official seal of a governor of a British possession, or of a colonial secretary, or of some secretary or minister administering a department of the government or a British possession."

It is critically important to remember that extradition may fail if these requirements are not strictly complied with and because of the detail and particularity of the procedures mandated, this is often a central area of controversy at an extradition hearing. Once again, therefore, it is vital that all counsel involved in the process examine the materials submitted with a view to compliance with the relevant provisions on certification and authentication.

GROUNDS FOR REFUSING EXTRADITION

There are several internationally recognised grounds for refusing extradition.

Political Offence

Until the early 1800's, extradition was directed almost exclusively to the return of fugitives sought for political or religious offences. Extradition was viewed as a means to protect the political order of states.

In modem times, the focus of extradition has changed completely to covering serious crimes, with political offences now generally being excluded from extradition regimes. The rationale is that those who struggle against tyranny

and in pursuit of a democratic government should not, if their efforts fail, face extradition but rather should receive asylum.

The definition of a political offence or an offence of a political character is an illusive one. There exists extensive case law on the subject and the complex issue generally is determined by a consideration of all the circumstances of a case.

However, in very general terms, the purely political offence is conduct directed against the government constituting opposition to a political, religious or other ideology or to its supporting structures, which does not have any of the elements of a common crime.

A second category relates to offences that are of a political character. These will include an element of a common crime but with political sub-text. There is much case law surrounding what constitutes an offence of political character and there are varying approaches to the matter amongst states. Within the common law there are some general criteria, developed through the years, which the courts will look for in determining whether the offence is one of a political character.

First, the offender must be politically motivated in committing the offence in question and the act must be committed for the purpose of promoting a political cause. This element is critically important and the absence of it will preclude a finding that the exception is applicable.

Secondly, the act must be directed against the state, to force a change in the government or its policies. Historically, the courts took a very narrow view of this, requiring a connection between the offence and an insurrection, uprising or struggle for power.

However in the benchmark decision of the House of Lords, *R. v. Governor of Brixton Prison, Ex Parte Schtraks* [1964] AC 556*,* the court took a more liberal view in interpreting what constitutes a political disturbance. The Lords were of the opinion that what was to be considered was whether the person was at odds with the state over an issue and the act was designed to bring about change related to that issue.

In considering this last criteria, the courts in different common law states may look at various considerations such as whether the act was within the context of a political disturbance, whether the person was the member of a political group or whether the act is sufficiently direct in respect of the government or its institutions to be classified as being directed against the government.

There is also a third category of cases within this exception, which is similar to the discrimination ground of refusal. It is essentially where the proceedings are taken to prosecute or punish the person for an offence of a political character. In these instances, while the offence for which extradition is requested is not of a political character, the prosecution is designed as punishment for political offences committed or the facts of the case give the offence a political character. In some instances, establishment of the

application of the exception in this third category requires evidence of bad faith on the part of the requesting state.

It is increasingly common for States to limit the scope of the exception by specifically excluding offences such as those governed by multilateral conventions (i.e. the offences in the counter terrorism conventions). Some states have gone so far as to exclude its application to all crimes of violence and serious property damage.

The rule of specialty

The rule of specialty provides that the requesting state cannot prosecute the person surrendered for any offence committed prior to his or her return, except for the offence or offences for which he or she was surrendered by the requested state, unless the requested state consents to additional charges or proceedings. Otherwise, the person must be given an opportunity to leave the jurisdiction and only if he or she chooses not to do so or after doing so, returns, will prosecution for additional matters be possible.

Specialty developed as a right as between states and it is still viewed as such today. It is a principle that was designed to ensure against a requesting state's breach of trust against a requested state and to avoid prosecutorial abuse after the person has been surrendered. In essence it protects the integrity of the process within both the requesting and requested state.

One complicating factor which can arise concerns the underlying question of whether the test is focused on facts or on offences. For example, if additional charges are brought but based on the identical conduct to which the original offence and extradition related, do those subsequent charges infringe the rule of specialty? Alternatively, if the prosecution adduces new and additional evidence in support of the same charges for which extradition was granted, does the issue of specialty arise?

On the latter point, arguably the fact that the prosecution may adduce additional evidence or that there are further aggravating or mitigating facts surrounding the event do not result in a prosecution for a different offence then that for which extradition was granted. In this regard, Article 20 of the Commonwealth Scheme includes a specific clause preserving the right of an accused to consent to other offences being taken into account by the court at the sentencing for the offence for which he or she was extradited.

The position is less clear in relation to the addition or substitution of other charges. As a general rule, provided the change is of a technical nature and the facts underlying the charge or charges are the same as those for which extradition was granted, there will be no violation of specialty. However, in some instances, if the new offence is much more severe in nature or the applicable penalties are substantially different, it may well be that prosecution in those circumstances could violate the rule of specialty. In essence, the question is whether the proceedings in the requesting state are substantially the same in terms of the underlying conduct at issue and the possible outcome such that it is consistent with the request and the determinations in the requested state.

Other grounds

There are a range of other possible grounds for refusal:

(i) Discrimination

(ii) Double jeopardy (no one should be tried twice for the same offence)

(iii) Nationality (most civil law countries do not extradite their nationals, e.g. Mozambique; most common law countries do extradite)

(iv) Possible implementation of the death penalty. Several Commonwealth states will not extradite for an offence carrying the death penalty in the requesting state: in such cases an undertaking is required from the requesting state that the death sentence will not be carried out. Note the case of *Soering v United Kingdom* (Judgment of 7 July 1989, Series A No. 161.) that was brought under Article 3 of the European Convention on Human Rights which states that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". The European Court of Human Rights held that Article 3 prohibits the extradition of a person who is threatened with torture or inhuman or degrading treatment or punishment in the requesting country. Extradition in such circumstances would, according to the Court, "plainly be contrary to the spirit and intendment of the Article" and would "hardly be compatible with the underlying values of the Convention".

(v) Lapse of time

(vi) Humanitarian grounds

(vii) General human rights

(ix) Fiscal offences

"ALTERNATIVES" TO EXTRADITION

As this section has demonstrated, the extradition process can be lengthy, costly and complex with no guarantee that it will lead to the return of the fugitive. This has led to states seeking to find "alternatives" to extradition.

(a) Use of immigration laws

If the fugitive is not a national of the requested state, it may be possible to send him/her to the requesting country merely by using local immigration laws. As a former Secretary of State for Home Affairs in the United Kingdom has noted:-

> "Before the 11 September attacks, I authorised surveillance on a number of people, including the man who had just been picked up in Leicester and transferred back to France. Having arrested him under the Terrorism Act, we got round the problems of human rights and extradition by releasing him and then detaining him on immigration grounds – namely that he had a false passport. We then reached agreement with the French that we would transfer him under immigration rules back to France, from where he had come, so that they could in turn arrest him."
> (from *The Blunkett Tapes"* D Blunkett, 2006, p.300)

Compare the following cases as to the view taken by courts of such arrangements:

R v Horseferry Road Magistrates' Court ex. parte Bennett [1993] 3 WLR 90; [1993] 3 All ER 138

The appellant was a New Zealand citizen accused of committing offences in the United Kingdom. He was located in South Africa and a decision was taken by the UK police, after consulting with the Crown Prosecution Service, that extradition from South Africa would not be sought. UK police spoke with South African police about the case and subsequently the appellant was "deported" from South Africa and, following a series of events both in and out of that country, he was placed on a plane to Heathrow. Upon arrival in the UK he was arrested. The appellant alleged collusion between the police forces of the UK and South Africa and forcible return to the UK against his will. The case came before the House of Lords upon certification of a question of law by the Divisional Court. That question was: "Whether in the exercise of its supervisory jurisdiction the court has power to inquire into the circumstances by which a person has been brought within the jurisdiction and if so what remedy is available if any to prevent his trial where that person has been lawfully arrested within the jurisdiction for a crime committed within the jurisdiction."

Held by the Court (Lord Oliver of Aylmerton dissenting), in allowing the appeal (and remitting the case for further consideration):

per Lord Griffiths

(i) that the judiciary should be willing to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. Accordingly, if it comes to the attention of the court that there has been a serious abuse of power it should express its disapproval by refusing to act upon it;

(ii) the courts should not stand idly by if police flout extradition procedures and deprive an accused of the safeguards built into the extradition process for his benefit. The courts can refuse to allow the police and prosecuting authorities to take advantage of abuse of power by regarding such behaviour as an abuse of process and thus prevent a prosecution;

(iii) where process of law is available to return an accused through extradition procedures the courts of the UK will refuse to try him if he has been forcibly brought within their jurisdiction in disregard of those procedures by a process to which police, prosecutors or other executive authorities have been knowing parties; and

(iv) if a serious question arises as to the deliberate abuse of extradition proceedings a magistrate should allow an adjournment so that an application can be made to the Divisional Court which is the proper forum in which such a decision should be taken.

per Lord Bridge of Harwich:

(i) When a person is arrested and charged with a criminal offence it is a valid ground of objection to the exercise of the court's jurisdiction to try him that the prosecuting authority secured his presence within the territorial jurisdiction of the court by forcibly abducting him from some other state ill violation of international law and of the law of the state from which he was abducted;

(ii) respect for the rule of law demands that courts do not turn "a blind eye to executive lawlessness beyond the territorial boundaries of the jurisdiction of

the courts; and
(iii) extradition (or abduction) comprises the effective commencement of the prosecution process and where it is abduction the prosecution process rests on an illegal foundation.

The case was then remitted to the Divisional Court which held that the assumption upon which the House of Lords had proceeded in allowing the appeal had been established by the evidence. Bennett was released but continued to stay in England as he had no passport. His presence then came to the attention of the Scottish authorities.

Bennett v H.M. Advocate (unreported, High Court of Justiciary, 1994. Noted in *Commonwealth Legal Assistance News,* Issue 6, p.5)
The petitioner was wanted in Scotland to face trial on two charges of fraud. He sought the suspension of a warrant for his arrest on the grounds, *inter alia*, that the execution of the warrant was in reliance upon actions leading to the presence of the petitioner within the United Kingdom which, he averred, were illegal.
He submitted that as a result of collusion between the English and South African authorities, he was deported from South Africa to New Zealand on a plane going via London Heathrow, where he was arrested. It was argued by the petitioner that this was a deliberate flouting of extradition procedures. He requested that the warrant be suspended for so long as the petitioner was present within the United Kingdom as a result of his arrest.
The High Court of Justiciary, in dismissing the petition for restraining the execution of the warrant of arrest held:
1. The Lord Advocate had played no part in the arrangements which led to the petitioner's arrest in London. Furthermore, having made his own inquiries, the Lord Advocate was entitled to conclude that there was no illegality or impropriety. Thus it was unreasonable, where there had been no collusion with the South African or English authorities, to insist that the police must refrain from arresting a person who was wanted for offences committed in Scotland when he arrived in the country simply because he was in transit to another country from where he could then be extradited.
2. There was no ground for restraining the execution of the warrant and to enforce the warrant would not be an abuse of the processes of the Scottish court and therefore, the petitioner could properly be tried in Scotland.

(b) Luring into the jurisdiction

A similar approach is taken by some courts to that of the House of Lords in Bennett (above). For example *R* v *Latif* [1996] 1 WLR 104

(c) Seizing of the suspect from another state

"A trial court need not inquire as to how [the defendant] came before it" *United States v Alvarez-Machain* 31 ILM 900 (1992)

(d) Use of so-called "extraordinary rendition"

This practice involves arranging the transfer of a person from one country to another, sometimes for criminal processes but increasingly for interrogation (at which, alleged, interrogators are willing to use a variety of coercive tactics).

It must be stressed that this is not a practice covered by extradition or immigration statutes.

APPENDIX 3

THE LONDON SCHEME FOR EXTRADITION WITHIN THE COMMONWEALTH

1. (1) The general provisions set out in this Scheme will govern the extradition of a person from the Commonwealth country, in which the person is found, to another Commonwealth country, in which the person is accused of an offence.

(2) Extradition will be precluded by law, or be subject to refusal by the competent executive authority, only in the circumstances mentioned in this Scheme.

(3) For the purpose of this Scheme a person liable to extradition as mentioned in paragraph (1) is described as a person sought and each of the following areas is described as a separate country:

(a) each sovereign and independent country within the Commonwealth together with any dependent territories which that country designates, and

(b) each country within the Commonwealth, which, though not sovereign and independent, is not a territory designated for the purposes of the preceding sub-paragraph.

EXTRADITION OFFENCES AND DUAL CRIMINALITY RULE

2. (1) A person sought will only be extradited for an extradition offence.

(2) For the purpose of this Scheme, an extradition offence is an offence however described which is punishable in the requesting and requested country by imprisonment for two years or a greater penalty.

(3) In determining whether an offence is an offence punishable under the laws of both the requesting and the requested country, it shall not matter whether:

(a) the laws of the requesting and requested countries place the acts or omissions constituting the offence within the same category of offence or denominate the offence by the same terminology;

(b) under the laws of the requesting and requested countries the elements of the offence differ, it being understood that the totality of the acts or omissions as presented by the requesting country constitute an offence under the laws of the requested country.

(4) An offence described in paragraph (2) is an extradition offence notwithstanding that the offence:

(a) is of a purely fiscal character; or

(b) was committed outside the territory of the requesting country

where extradition for such offences is permitted under the law of the requested country.

WARRANTS, OTHER THAN PROVISIONAL WARRANTS

3. (1) A person sought will only be extradited if a warrant for arrest has been issued in the country seeking extradition and either -

(a) that warrant is endorsed by a competent judicial authority in the requested country (in which case, the endorsed warrant will be sufficient authority for arrest), or

(b) a further warrant for arrest is issued by the competent judicial authority in the requested country, other than a provisional warrant issued in accordance with clause 4.

(2) The endorsement or issue of a warrant may be made conditional on the competent executive authority having previously issued an order to proceed.

PROVISIONAL WARRANTS

4. (1) Where a person sought is, or is suspected of being, in or on the way to any country but no warrant has been endorsed or issued in accordance with clause 3, the competent judicial authority in the destination country may issue a provisional warrant for arrest on such information and under such circumstances as would, in the authority's opinion, justify the issue of a warrant if the extradition offence had been an offence committed within the destination country.

(2) For the purposes of paragraph 1, information contained in an international notice issued by the International Criminal Police Organisation (INTERPOL) in respect of a person sought may be considered by the authority, either alone or with other information, in deciding whether a provisional warrant should be issued for the arrest of that person.

(3) A report of the issue of a provisional warrant, with the information in justification or a certified copy thereof, will be sent to the competent executive authority.

(4) The competent executive authority who receives the information under paragraph (3) may decide, on the basis of that information and any other information which may have become available, that the person should be discharged, and so order.

COMMITTAL PROCEEDINGS

5. (1) A person arrested under a warrant endorsed or issued in accordance with clause 3(1), or under a provisional warrant issued in accordance with clause 4, will be brought, as soon as practicable, before the competent judicial authority who will hear the case in the same manner and have the same jurisdiction and powers, as nearly as may be, including power to remand and admit to bail, as if the person were charged with an offence committed in the requested country.

(2) The competent judicial authority will receive any evidence which may be tendered to show that the extradition of the person sought is precluded by law.

(3) Where a provisional warrant has been issued in accordance with clause 4, but within such reasonable time as the competent judicial authority may fix:
(a) a warrant has not been endorsed or issued in accordance with clause 3(1), or
(b) where such endorsement or issue of a warrant has been made conditional on the issuance of an order to proceed, as mentioned in clause 3(2), no such order has been issued,
the competent judicial authority will order the person to be discharged.

(4) Where a warrant has been endorsed or issued in accordance with 3(1) the competent judicial authority may commit the person to prison to await extradition if -
(a) such evidence is produced as establishes a prima facie case that the person committed the offence; and
(b) extradition is not precluded by law
but, otherwise, will order the person to be discharged.

(5) Where a person sought is committed to prison to await extradition as mentioned in paragraph (4), notice of the fact will be given as soon as possible to the competent executive authority of the country in which committal took place.

OPTIONAL ALTERNATIVE COMMITTAL PROCEEDINGS

6. (1) Two or more countries may make arrangements under which clause 5(4) will be replaced by paragraphs 2-4 of this clause or by other provisions agreed by the countries involved.

(2) Where a warrant has been endorsed or issued as mentioned in clause 3(1), the competent judicial authority may commit the person sought to prison to await extradition if -

(a) the contents of a record of the case received, whether or not admissible in evidence under the law of the requested country, and any other evidence admissible under the law of the requested country, are sufficient to warrant a trial of the charges for which extradition has been requested; and

(b) extradition is not precluded by law,

but otherwise will order that the person be discharged.

(3) The competent judicial authority will receive a record of the case prepared by an investigating authority in the requesting country if it is accompanied by -

(a) an affidavit of an officer of the investigating authority stating that the record of the case was prepared by or under the direction of that officer, and that the evidence has been preserved for use in court; and

(b) a certificate of the Attorney General of the requesting country that in his or her opinion the record of the case discloses the existence of evidence under the law of the requesting country sufficient to justify a prosecution.

(4) A record of the case will contain -

(a) particulars of the description, identity, nationality and, to the extent available, whereabouts of the person sought;

(b) particulars of each offence or conduct in respect of which extradition is requested, specifying the date and place of commission, the legal definition of the offence and the relevant provisions in the law of the requesting country, including a certified copy of any such definition in the written law of that country;

(c) the original or a certified copy of any document of process issued in the requesting country against the person sought for extradition ;

(d) a recital of the evidence acquired to support the request for extradition; and

(e) a certified copy, reproduction or photograph of exhibits or documentary evidence.

SUPPLEMENTARY INFORMATION

7. (1) If it considers that the material provided in support of a request for extradition is insufficient, the competent authority in the requested country may seek such additional information as it considers necessary from the requesting country, to be provided within such reasonable period of time as it may specify.

(2) Where a request under paragraph (1) is made after committal proceedings have commenced the competent judicial authority in the requested country may grant an adjournment of the proceedings for such period as that authority may consider reasonable for the material to be furnished, which aggregate period should not exceed 60 days.

CONSENT ORDER FOR RETURN

8. (1) A person sought may waive committal proceedings, and if satisfied that the person sought has voluntarily and with an understanding of its significance requested such waiver, the competent judicial authority may make an order by consent for the committal of the person sought to prison, or for admission to bail, to await extradition.

(2) The competent executive authority may thereafter order extradition at any time, notwithstanding the provisions of clause 9.

(3) The provisions of clause 20 shall apply in relation to a person sought extradited under this clause unless waived by the person.

RETURN OR DISCHARGE BY EXECUTIVE AUTHORITY

9. After the expiry of 15 days from the date of the committal of a person sought, or, if a writ of habeas corpus or other like process is issued, from the date of the final decision of the competent judicial authority on that application (whichever date is the later), the competent executive authority will order extradition unless it appears to that authority that, in accordance with the

provisions set out in this Scheme, extradition is precluded by law or should be refused, in which case that authority will order the discharge of the person.

DISCHARGE BY JUDICIAL AUTHORITY

10. (1) Where after the expiry of the period mentioned in paragraph (2) a person sought has not been extradited an application to the competent judicial authority may be made by or on behalf of the person for a discharge and if -

(a) reasonable notice of the application has been given to the competent executive authority, and

(b) sufficient cause for the delay is not shown,

the competent judicial authority will order the discharge of the person.

(2) The period referred to in paragraph (1) will be prescribed by law and will be one expiring either -

(a) not later than two months from the person's committal to prison, or

(b) not later than one month from the date of the order for extradition made in accordance with clause 9.

HABEAS CORPUS AND REVIEW

11. (1) It will be provided that an application may be made by or on behalf of a person sought for a writ of habeas corpus or other like process.

(2) It will be provided that an application may be made by or on behalf of the government of the requesting country for review of the decision of the competent judicial authority in committal proceedings.

POLITICAL OFFENCE EXCEPTION

12. (1) (a) The extradition of a person sought will be precluded by law if the competent authority is satisfied that the offence is of a political character;

(b) Sub paragraph (a) shall not apply to:

(i) offences established under any multilateral international convention to which the requesting and the requested countries are parties, the purpose of which is to prevent or repress a specific category of offences and which imposes on the parties an obligation either to extradite or to prosecute the person sought;

(ii) offences for which the political offence or offence of political character ground of refusal is not applicable under international law.

(c) If the competent executive authority is empowered by law to certify that the offence of which a person sought is accused is an offence of a political character, and so certifies in a particular case, the certificate will be conclusive in the matter and binding upon the competent judicial authority for the purposes mentioned in this clause.

(2) (a) A country may provide by law that certain acts shall not be held to be offences of a political character including:

(i) an offence against the life or person of a Head of State or a member of the immediate family of a Head of State or any related offence (i.e. aiding and abetting, or counselling or procuring the commission of, or being an accessory before or after the fact to, or attempting or conspiring to commit such an offence),

(ii) an offence against the life or person of a Head of Government, or of a Minister of a Government, or any related offence as described above,

(iii) murder, or any related offence as described above,

(iv) any other offence that a country considers appropriate.

(b) A country may restrict the application of any of the provisions made under sub paragraph (b) to a request from a country which has made similar provisions in its laws.

13. The extradition of a person sought also will be precluded by law if -

(a) it appears to the competent authority that:
(i) the request for extradition although purporting to be made for an extradition offence was in fact made for the purpose of prosecuting or punishing the person on account of race, religion, sex, nationality or political opinions, or
(ii) that the person may be prejudiced at trial or punished, detained or restricted in personal liberty by reason of race, religion, sex, nationality or political opinions.

(b) the competent authority is satisfied that by reason of
(i) the trivial nature of the case, or
(ii) the accusation against the person sought not having been made in good faith or in the interests of justice, or
(iii) the passage of time since the commission of the offence, or
(iv) any other sufficient cause,
it would, having regard to all the circumstances be unjust or oppressive or too severe a punishment for the person to be extradited or, as the case may be, extradited before the expiry of a period specified by that authority.

(c) the competent authority is satisfied that the person sought has been convicted (and is neither unlawfully at large nor at large in breach of a condition of a licence to be at large), or has been acquitted, whether within or outside the Commonwealth, of the offence for which extradition is sought.

DISCRETIONARY BASIS FOR REFUSAL OF EXTRADITION

14. A request for extradition may be refused in the discretion of the competent authority of the requested country if

(a) judgment in the requesting country has been rendered in circumstances where the accused was not present; and
(i) no counsel appeared for the accused; or
(ii) counsel instructed and acting on behalf of the accused was not permitted to participate in the proceedings;

(b) the offence for which extradition is requested has been committed outside the territory of either the requesting or requested country and the law of the requested country does not enable it to assert jurisdiction over such an offence committed outside its territory in comparable circumstances;

(c) the person sought has, under the law of either the requesting [or requested] country become immune from prosecution or punishment because of [any reason, including] lapse of time or amnesty;

(d) the offence is an offence only under military law or a law relating to military obligations.

DISCRETIONARY GROUNDS OF REFUSAL

15. (1) Any country may adopt the provisions of this clause but, where they are adopted, any other country may in relation to the first country reserve its position as to whether it will give effect to the other clauses of the Scheme or will give effect to them subject to such exceptions and modifications as appear to it to be necessary or expedient or give effect to any arrangement made under clause 23(a).

(2) A request for extradition may be refused if the competent authority of the requested country determines -

(a) that upon extradition, the person is likely to suffer the death penalty for the extradition offence and that offence is not punishable by death in the requested country; and

(b) it would be, having regard to all the circumstances of the case and to the likelihood that the person would be immune from punishment if not extradited, unjust or oppressive or too severe a punishment for extradition to proceed.

(c) In determining under paragraph (a), whether a person would be likely to suffer the death penalty, the executive authority shall take into account any representations which the authorities of the requesting country may make with regard to the possibility that the death penalty, if imposed, will not be carried out.

(3) (a) A request for extradition may be refused on the basis that the person sought is a national or permanent resident of the requested country.

(b) For the purpose of sub paragraph a, a person shall be treated as a national of a country that is -

(i) a Commonwealth country of which he or she is a citizen; or

(ii) a country or territory his or her connection with which determines national status.

(c) The assessment under paragraph (b) should be at the date of the request.

ALTERNATIVE MEASURES IN THE CASE OF REFUSAL

16 (1) For the purpose of ensuring that a Commonwealth country cannot be used as a haven from justice, each country which reserves the right to refuse to extradite nationals or permanent residents in accordance with clause 15 paragraph (3), will take, subject to its constitution, such legislative action and other steps as may be necessary or expedient in the circumstances to facilitate the trial or punishment of a person whose extradition is refused on that ground.

(2) The legislative action necessary to give effect to paragraph (1) may include –

(a) providing that the case be submitted to the competent authorities of the requested country for prosecution;

(b) permitting:

(i) the temporary extradition of the person to stand trial in the requesting country on condition that, following trial and sentence, the person is returned to the requested country to serve his or her sentence; and

(ii) the transfer of convicted offenders; or

(c) enabling a request to be made to the relevant authorities in the requesting country for the provision to the requested country of such evidence and other information as would enable the authorities of the requested country to prosecute the person for the offence.

COMPETENT AUTHORITY

17 (1) The competent authorities for the purpose of clauses 12, 13, 14 and 15 will include

(a) any judicial authority which hears or is competent to hear an application described in clause 11, and

(b) the executive authority responsible for orders for extradition.

(2) It will be sufficient compliance with sub paragraphs 12, 13, 14 and 15 if a country decides that the competent authority for those purposes is exclusively the judicial authority or the executive authority**.**

POSTPONEMENT OF EXTRADITION AND TEMPORARY TRANSFER OF PRISONERS TO STAND TRIAL

18. (1) Subject to the following provisions of this clause, where a person sought -

(a) has been charged with an offence that may be tried by a court in the requested country or

(b) is serving a sentence imposed by a court in the requested country,

then until discharge (by acquittal, the expiration or remission of sentence, or otherwise) extradition will either be precluded by law or be subject to refusal by the competent executive authority as the law of the requested country may provide.

(2) Subject to the provisions of this Scheme, a prisoner serving such a sentence who is also a person sought may, at the discretion of the competent executive authority of the requested country, be extradited temporarily to the requesting country to enable proceedings to be brought against the prisoner in relation to the extradition offence on such conditions as are agreed between the respective countries.

PRIORITY WHERE TWO OR MORE REQUESTS MADE

19. (1) Where the requested country receives two or more requests from different countries for the extradition of the same person, the competent executive authority will determine which request will proceed and may refuse the other requests.

(2) In making a determination under paragraph (1), the authority will consider all the circumstances of the case and in particular -

(a) the relative seriousness of the offences,

(b) the relative dates on which the requests were made, and

(c) the citizenship or other national status and ordinary residence of the person sought.

SPECIALTY RULE

20. (1) This clause relates to a person sought who has been extradited from one country to another, so long as the person has not had a reasonable opportunity of leaving the second mentioned country.

(2) In the case of a person sought to whom this clause relates, detention or trial in the requesting country for any offence committed prior to extradition (other than the one for which the person was extradited or any lesser offence proved by the facts on which extradition was based), without the consent of the requested country, will be precluded by law.

(3) When considering a request for consent under paragraph (2) the executive authority of the requested country may seek such particulars as it may require in order that it may be satisfied that the request is otherwise consistent with the principles of this Scheme

(4) Consent under paragraph (2) shall not be unreasonably withheld but where, in the opinion of the requested country, it appears that, on the facts known to the requesting country at the time of the original request for extradition, application should have been made in respect of such offences at that time, that may constitute a sufficient basis for refusal of consent.

(5) The requesting country shall not extradite a person sought who has been surrendered to that country pursuant to a request for extradition, to a third country for an offence committed prior to extradition, without the consent of the requested country .

(6) In considering a request under paragraph (5) the requested country may seek the particulars referred to in paragraph (3) and shall not unreasonably withhold consent.

(7) Nothing in this clause shall prevent a court in the requesting country from taking into account any other offence, whether an extradition offence or not under this Scheme, for the purpose of passing sentence on a person convicted of an offence for which he or she was surrendered, where the person consents.

RETURN OF ESCAPED PRISONERS

21. (1) In the case of a person who -

(a) has been convicted of an extradition offence by a court in any country and is unlawfully at large before the expiry of the sentence for that offence, and

(b) is found in another country,

the provisions set out in this Scheme, as applied for the purposes of this clause by paragraph (2), will govern extradition to the country in which the person was convicted.

(2) For the purposes of this clause this Scheme shall be construed, subject to any necessary adaptations or modifications, as though the person unlawfully at large were accused of the offence for which there is a conviction and, in particular -

(a) any reference to a person sought shall be construed as including a reference to such a person as is mentioned in paragraph (1); and

(b) the reference in clause 5(4) to evidence that establishes a prima facie case shall be construed as a reference to such evidence as establishes that the person has been convicted.

(3) The references in this clause to a person unlawfully at large shall be construed as including reference to a person at large in breach of a condition of a licence to be at large.

ANCILLARY PROVISIONS

22. Each country will take, subject to its constitution, any legislative and other steps which may be necessary or expedient in the circumstances to facilitate and effectuate -

(a) the transit through its territory of a person sought who is being extradited under this Scheme;

(b) the delivery of property found in the possession of a person sought at the time of arrest which may be material evidence of the extradition offence; and

(c) the proof of warrants, certificates of conviction, depositions and other documents.

ALTERNATIVE ARRANGEMENTS AND MODIFICATIONS

23. Nothing in this Scheme shall prevent -

(a) the making of arrangements between Commonwealth countries for further or alternative provision for extradition, or

(b) the application of the Scheme with modifications by one country in relation to another which has not brought the Scheme fully into effect.

Section 3

ANTI-MONEY LAUNDERING STRATEGIES AND PROCEEDS OF CRIME

> *"[Offenders] smiled when they got a 15 or 20-year jail sentence, which they regard as an occupational hazard I suppose, but they literally burst into tears when they lost their favourite Rolls-Royce, the family home, the kids' private education and the wife's luxurious lifestyle. Police have started seeing forfeiture as a way of hurting and getting at these guys."*
> (Willie Hofmeyr, former Head of the Asset Forfeiture Unit, South Africa)

A key strategy for tackling crime is putting in place mechanisms designed to ensure that those involved in crime do not derive any financial benefit from their unlawful actions as their assets will be **found**, **frozen** and **forfeited** no matter where in the world they seek to deposit them. This is potentially an invaluable deterrent in that it hits where it hurts most: in their pocket.

This strategy includes a transnational element where the proceeds of crime are moved abroad, often with the aim of laundering them through the international financial system.

This section will therefore examine (i) the international efforts to counter money laundering and (ii) the basic principles relating to the finding, freezing and forfeiture of the proceeds of crime.

ANTI MONEY LAUNDERING STRATEGIES

Definition and purpose of money laundering

Article 3 of the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances criminalises:

- The conversion or transfer of property, knowing that such property is derived from any offence or offences established [under the convention], or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions;
- The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established [under the convention] or from an act of participation in such an offence or offences;
- The acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from an offence or offences established [under the convention] or from an act of participation in such offence or offences.

As the *Guidance Notes for Mainstream Banking, Lending and Deposit Taking Activities* (1995*)* explain:

> "Money laundering is the process by which criminals attempt to conceal the true origin and ownership of the proceeds of their criminal activities. If undertaken successfully, it also allows them to maintain control over those proceeds, and, ultimately, to provide a legitimate cover for their source of income."

This is emphasised by International Money Laundering Information Network (IMOLIN)

> "The goal of a large number of criminal acts is to generate a profit for the individual or group that carries out the act. Money laundering is the processing of these criminal proceeds to disguise their illegal origin. This process is of critical importance, as it enables the criminal to enjoy these profits without jeopardising their source.
>
> Illegal arms sales, smuggling, and the activities of organised crime, including for example drug trafficking and prostitution rings, can generate huge sums. Embezzlement, insider trading, bribery and computer fraud schemes can also produce large profits and create the incentive to 'legitimise' the ill-gotten gains through money laundering.
>
> When a criminal activity generates substantial profits, the individual or group involved must find a way to control the funds without attracting attention to the underlying activity or the persons involved. Criminals do this by disguising the sources, changing the form, or moving the funds to a place where they are less likely to attract attention.
>
> Enterprising, criminals of every sort, from stock fraudsters to corporate embezzlers to commodity smugglers, must launder the money flow for two reasons. The first is that the money trail itself can become evidence against the perpetrators of the offence, the second is that the money per se can be the target of investigation and action.
>
> Legitimate business corporations, too, might have recourse to the techniques of laundering whenever they need to disguise the payment of a bribe or kickback. In the current climate, where there has been a highly publicized backlash against corporate and public-sector corruption, laundering in bribery cases is likely to attract an increasing amount of attention. In fact even Governments make occasional use of the same apparatus -- to dodge reparations, evade the impact of sanctions or covertly fund political interference in some rival state."
> (see www.imolin.org/imolin/gpml.html)

Money laundering techniques

Regardless of who actually puts the apparatus of money-laundering to use, or what strange twists and turns it takes, the operational principles are essentially the same. Strictly speaking, money-laundering should be construed as a dynamic three-stage process that requires: firstly, moving the funds from direct association with the crime; secondly, disguising the trail to foil pursuit; and, thirdly, making the money available to the criminal once again with its occupational and geographic origins hidden from view. In this respect money-laundering is more than merely smuggling or hiding tainted funds, although those acts may constitute essential constituents of the process.

Perhaps the most logical way to keep the nature of the process of laundering distinct from some of its constituent parts is to stress the difference between hiding the existence of criminal money and disguising its nature. If criminal money is hidden from the view of the law, for example if it is spent in the form of anonymous cash or moved to a jurisdiction where there are no sanctions against the use of money of illegal origin, it can scarcely be described as "laundered". All that has happened is that criminally derived money has had its existence hidden from the law enforcement authorities of the place where the underlying offence has been perpetrated. However, if the money is given the appearance of legitimate provenance in a place where sanctions against its illegal origins do exist, then and only then can it be said to be truly laundered-it has had its nature disguised.

Traditionally money laundering is seen as a three-stage cycle: *placement, layering and integration*.

> "*Placement* describes how cash, such as small denomination notes typically generated by drugs trafficking, are quickly dispersed away from the scene of crime and placed in the financial system. Beforehand, the cash may pass through a series of businesses that trade on a cash basis, such as shops and restaurants. This is to mix up the amounts involved and otherwise disguise its distinguishing characteristics. The cash is then banked in amounts designed to avoid cash deposit or suspicious activity report filing requirements, a process known in some instances as 'smurfing'.
>
> The illicit nature of the assets can then be hidden further by the process of *layering*. This basically involves repeated banking and commercial transactions designed to make the real origin of the assets as hard as possible to identify and to prevent the construction of an audit trail leading back to the proceeds of the original crime and its perpetrators.
>
> The final stage is *integration*, when laundered assets from one or more crimes are collected ready for open use. Well integrated into the system, they have all the appearance of legitimate funds and need not be laundered further.
>
> Unfortunately, reality is never as easy as text book descriptions. It is hard sometimes to work out where on stage begins and another ends. Some stages may be combined by money launderers if it is safe to so do. Nonetheless, the three stages are a useful way of understanding the "big picture" of what goes on, not only with cash, but also with other forms of proceeds."
> (John Howell *The Prevention of Money Laundering and Terrorist Financing* ICC Commercial Crime Services, 2006, pp.1-2)

Some fundamental principles

- The more successful a money-laundering apparatus is in imitating the patterns and behaviour of legitimate transactions, the less the likelihood of it being exposed

- The more deeply embedded illegal activities are within the legal economy, the less their institutional and functional separation, the more difficult to detect money-laundering

- The lower the ratio of illegal to legal financial flows through any given business institution, the more difficult will be the detection of money-laundering

- The higher the ratio of "services" to physical goods production in any economy, the more easily money-laundering can be conducted in that economy

- The more the business structure of production and distribution of non-financial goods and services is dominated by small and independent firms or self-employed individuals, the more difficult the job of separating legal from illegal transactions

- The greater the facility of using cheques, credit cards and other non-cash instruments for effecting illegal financial transactions, the more difficult is the detection of money-laundering

- The greater the degree of financial deregulation for legitimate transactions, the more difficult will be the job of tracing and neutralising criminal money flows

"Financial Havens, Banking Secrecy and Money Laundering" *(J. Blum et al**)***

Criminal money is frequently moved abroad and then cycled through the international payments system to obscure the audit trail. Despite a myriad of complications, there is a simple structure that underlies almost all international money-laundering activities during this stage of the process. The launderer often calls on one of the many jurisdictions that offer an instant-corporation manufacturing business. Many sell "offshore" corporations, which are licensed to conduct business only outside the country of incorporation, are free of tax or regulation and are protected by corporate secrecy laws. Once the corporation is set up in the offshore jurisdiction, a bank deposit is made in the haven country in the name of that offshore company, particularly one whose owner's identity is protected *by corporate secrecy laws*. Thus, between the law enforcement authorities and the launderer there is one level of bank secrecy, one level of corporate secrecy and possibly the additional protection of *lawyer-client privilege* if counsel in the corporate secrecy haven has been designated to establish and run the company. In addition, many laundering schemes involve a third layer of cover, that of the *offshore trust*, which is usually protected by secrecy laws and may have an additional level of insulation in the form of a "flee clause" that permits, indeed compels, the trustee to shift the domicile of the trust whenever the trust is threatened.

In essence, the rule in successful money-laundering is always to approximate, as closely as possible, legal transactions. As a result, the actual devices used are themselves minor variations on methods employed routinely by legitimate businesses. In the hands of criminals, transfer-pricing between affiliates of transnational corporations turns into phony invoicing; inter-affiliate real estate transactions become reverse-flip property deals; back-to-back loans turn into loan-back scams; hedge or insurance trading in stocks or options becomes matched- or cross-trading; and compensating balances develop into the so-called underground banking schemes. On the surface it may be impossible to differentiate between the legal and illegal variants; the distinction becomes clear only once a particular criminal act has been targeted and the authorities subsequently begin to unravel the money trail.

There have been a number of developments in the international financial system during recent decades that have made the three *F's - finding, freezing and forfeiting* - of criminally derived income and assets all the more difficult. These are the

"dollarization" (i.e. the use of the United States dollar in transactions); the general trend towards financial deregulation and the progress of the Euromarket and the proliferation of financial secrecy havens.

Fuelled by advances in technology and communications, the financial infrastructure has developed into a perpetually operating global system in which "megabyte money" (i.e. money in the form of symbols on computer screens) can move anywhere in the world with speed and ease. The world of offshore financial centres and bank secrecy jurisdictions is a key part of this but can also be understood as a system with distinct but complementary and reinforcing components, many of which are readily amenable to manipulation by criminals.

The characteristics of off-shore financial centres and bank secrecy jurisdictions can he understood as a tool kit that can be used not only to launder the proceeds of drug trafficking and other crimes hut also to commit certain kinds of financial crime. Not all jurisdictions are equally lax.

In this context, some issues meriting further consideration include:

- The misuse of States' sovereignty to provide safe havens for criminal proceeds.
- The proliferation of international business corporations (IBCs), which are routinely used in money-laundering schemes because they provide an impenetrable layer of protection around the ownership of assets. They have few commercial or financial justifications, except to conceal the origin and destination of goods in international commerce, to circumvent arms control laws and to evade taxes by moving profits and assets out of the reach of the tax collector.
- The abuse of offshore trusts.
- The role played by some professionals protected by legal privileges.
- The effect of the "dollarization" of the global market and likely effect, in the years to come, of the introduction of the Euro on financial markets.
- The usefulness of free trade zones for legitimate purposes, since tariffs have declined.
- The vulnerability of casinos to money-laundering operations and the crucial need for the industry be more carefully regulated.
- The need to develop and more efficiently exchange financial crime intelligence.
- The proposal that financial centre countries publish data, including information on both the asset holdings and the flows of finds through accounts of all types, in a reasonably coordinated way to form a basis for informed answers to serious policy questions.
- The quasi-absence of regulation of offshore banking, and excessive bank secrecy protection, that sometimes even block regulators in a country from effectively supervising branches of their home country's financial institutions branches located in those centres.
- The importance of improving financial investigators' training in order to equip them to deal with complex schemes, and the proposal of an international graduate programme for mid-career law enforcement, legal, judicial and private sector compliance officials.

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Note: The full text of the paper is available free of charge from:
www.cardiff.ac.uk/schoolsanddivisions/academicschools/socsi/staff/acad/12722.dld

Prevention and Criminalisation

In order to combat the threat, States must have in place effective procedures to detect and prevent money laundering. These include:

- establishing legal and regulatory anti-money laundering (AML) systems across the financial services sector
- developing good industry practice in AML procedures
- assisting firms design and implement AML systems and controls
- maintaining an efficient Financial Intelligence Unit (see discussion in Section 1)

The development of AML systems worldwide has much to do with the work of the Financial Action Task Force.

The Financial Action Task Force

The Financial Action Task Force (FATF) is an inter-governmental body with 33 members whose purpose is the development and promotion of policies, both at national and international levels, to combat money laundering and terrorist financing. The Task Force is therefore a "policy-making body" which works to generate the necessary political will to bring about national legislative and regulatory reforms in these areas. For full details see www.fatf-gafi.org/.

The FATF monitors members' progress in implementing necessary measures, reviews money laundering and terrorist financing techniques and counter-measures, and promotes the adoption and implementation of appropriate measures globally. In performing these activities, the FATF collaborates with other international bodies involved in combating money laundering and the financing of terrorism.

The FATF does not have a tightly defined constitution or an unlimited life span. The Task Force reviews its mission periodically and only continues if the member governments agree that this is necessary. In 2004, its mandate was extended to 2012.

The current mandate of the FATF focuses on the following:

- Establishing international standards for combating money laundering and terrorist financing
- Ensuring FATF members have implemented the 40 Recommendations in their entirety and in an effective manner
- Enhancing the relationship between FATF and FATF-style regional bodies, the Off-Shore Group of Banking Supervisors and non-member countries

The FATF Forty Recommendations

The Forty Recommendations set out the framework for anti-money laundering efforts and are designed for universal application. They provide a complete set of counter-measures against money laundering covering the criminal justice system and law enforcement, the financial system and its regulation, and international co-operation.

Though not a binding international convention, many countries in the world have made a political commitment to combat money laundering by implementing the Forty Recommendations.

Key responsibilities on States:

A. Apply the crime of money laundering to all serious offences

B. Require financial institutions and non-financial businesses and professions to take measures to prevent money laundering and terrorist financing. These must include:

- Ensuring that financial institution secrecy laws do not inhibit the implementation of the FATF Recommendations
- Need for customer due diligence measures: e.g. Know Your Customer (KYC) requirements
- Financial institutions should take additional precautions in relation to "Politically Exposed Persons" i.e. individuals who hold prominent public functions in their own country
- Financial institutions should pay special attention to all complex, unusual large transactions and all unusual patterns of transactions, which have no apparent economic or visible purpose
- Financial institutions must report "suspicious transactions" (STRs) (if suspicion or reasonable grounds to suspect the funds are the proceeds of crime) to a Financial Intelligence Unit

The 40 Recommendation and Interpretative Notes are in Appendix 4 below.

Ensuring compliance

The FATF Non-Cooperative Countries and Territories (NCCT) Initiative was developed to reduce the vulnerability of the financial system to money laundering by ensuring that all financial centres adopt and implement measures for the prevention, detection and punishment of money laundering according to internationally recognised standards. In order to provide some "teeth" to the work of FATF, note the wording of Recommendation 21:

> "Financial institutions should give special attention to business relationships and transactions with persons, including companies and financial institutions, which do not or insufficiently apply the FATF recommendations."

In addition to the possible use of Recommendation 21, the FATF recommends that

> "the application of further counter-measures which should be gradual, proportionate and flexible regarding their means and taken in concerted action towards a common objective. The FATF believes that enhanced surveillance and reporting of financial transactions and other relevant actions involving these jurisdictions would now be required, including the possibility of:
>
> - Stringent requirements for identifying clients and enhancement of advisories, including jurisdiction-specific financial advisories, to financial institutions for identification of the beneficial owners before business relationships are established with individuals or companies from these countries;
> - Enhanced relevant reporting mechanisms or systematic reporting of financial transactions on the basis that financial transactions with such countries are more likely to be suspicious;

- In considering requests for approving the establishment in FATF member countries of subsidiaries or branches or representative offices of banks, taking into account the fact that the relevant bank is from an NCCT;
- Warning non-financial sector businesses that transactions with entities within the NCCTs might run the risk of money laundering.

A total of 23 countries were listed as NCCTs in 2000 and in 2001. The effectiveness of the initiative is demonstrated by the fact that as of October 2006 all 23 have now satisfied FATF as to their anti money laundering measures and have been removed from the list. None have been added.
See further:
www.fatf-gafi.org/document/51/0,2340,en_32250379_32236992_33916403_1_1_1_1,00.html

Monitoring the implementation of the Forty Recommendations
All FATF member countries have their implementation of the Forty Recommendations monitored through a two-pronged approach: an annual self-assessment exercise and the more detailed mutual evaluation procedure.

See generally: *Methodology of Assessing Compliance with the FATF 40 Recommendations and FATF 9 Special Recommendations* (2006) available at www.fatf-gafi.org/dataoecd/45/15/34864111.pdf.

The FATF describes the process as follows:

> "The mutual evaluation process represents a central pillar of the work of the FATF over the last ten years. Through this process, the FATF has monitored the implementation of the FATF Forty Recommendations and has assessed the effectiveness of the anti-money laundering systems in FATF member jurisdictions.
>
> The FATF started a third round of mutual evaluations for its members in January 2005. The assessment of the implementation of FATF standards is the major focus of FATF's current work. These evaluations are based on the Forty Recommendations 2003 and the Nine Special Recommendations 2001 and use the Anti-Money Laundering/Combating Terrorist Financing (AML/CFT) Methodology 2004.
>
> The scope of these evaluations is to assess whether the necessary laws, regulations or other measures required under the new standards are in force and effect, that there has been a full and proper implementation of all necessary measures and that the system in place is effective.
>
> The evaluations are conducted by a team of experts (from the financial, legal and law enforcement areas) and the FATF Secretariat. A key feature of the process is an on-site visit to the jurisdiction and comprehensive meetings with government officials and the private sector over a two week period. The FATF has developed comprehensive and detailed procedures to conduct its mutual

evaluations, and these help to ensure fair, proper and consistent evaluations. The *Handbook for Countries and Assessors* lays out the necessary instructions and guidance for all countries and bodies that are conducting assessments.

The findings of the FATF assessment team are compiled in a *Mutual Evaluation Report,* which describes in detail the system in place and assesses and rates its effectiveness. As part of the new process, a summary of each Report will be published on the FATF website and FATF members have agreed in principle to make public the full mutual evaluation reports (with the ultimate decision being left to each FATF member for its own report). The FATF intends to provide comprehensive information on its members' actions in combating money laundering and terrorist financing."

Note: Both documents are available from the FATF web site: www.fatf-gafi.org

Reviewing money laundering trends and countermeasures ("typologies" exercise)
Money laundering is an evolving activity, the trends of which are monitored. FATF members gather information on and knowledge of money laundering trends so as ensure that the Forty Recommendations remain up to date and effective.

See, for example, the 2006 *Report on New Payment Methods* which report is one in a series of thematic studies carried out by the FATF to provide an in-depth look at money laundering and terrorist financing typologies. In the report he FATF has examined the way in which money can be laundered through the exploitation of new payment technologies (prepaid cards, Internet payment systems, mobile payments, and digital precious metals). The report found that, while there is a legitimate market demand for these payment methods, money laundering and terrorist financing vulnerabilities exist. Specifically, cross-border providers of new payment methods may pose more risk than providers operating within a particular country. The report recommends continued vigilance to further assess the impact of evolving technologies on cross-border and domestic regulatory frameworks. The full report is available free of charge from www.fatf-gafi.org/dataoecd/30/47/37627240.pdf.

Other FATF regional and international anti-money laundering initiatives
Several regional or international bodies such as the APG (Asia/Pacific Group on Money Laundering), CFATF (Caribbean Financial Action Task Force), the ESAAMLG (Eastern and Southern Africa Anti-Money Laundering Group), GAFISUD (Financial Action Task Force for South America), the MONEYVAL Committee of the Council of Europe (the Select Committee of experts on the evaluation of anti-money laundering measures) and the OGBS (Offshore Group of Banking Supervisors), either exclusively or as part of their work, perform similar tasks for their members as the FATF does for its own membership.

This co-operation forms a critical part of the FATF's strategy to ensure that all countries in the world implement effective counter-measures against money

laundering. Thus the APG, the CFATF, GAFISUD, the MONEYVAL Committee and OGBS carry out mutual evaluations for their members, which assess the progress they have made in implementing the necessary anti-money laundering measures. In the same vein, APG, CFATF and the MONEYVAL also review regional money laundering trends.

FATF members (2006)
Argentina. Australia. Austria. Belgium. Brazil. Canada. Denmark. European Commission. Finland. France. Germany. Greece. Gulf Co-operation Council. Hong Kong, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, Kingdom of the Netherlands, New Zealand, Norway, Portugal, Russian Federation, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States.

Developing National Anti-Money Laundering Responsibilities
It may be helpful to provide an example of the manner in which a state seeks to address both its AML prevention and criminalisation responsibilities. The United Kingdom approach provides a useful illustration.

UK Government
Home Office:
- UK primary legislation (Proceeds of Crime Act 2002 (POCA), Terrorism Act 2000 and Anti-terrorism, Crime and Security Act 2001)
- Police strategy and resourcing
- Asset recovery strategy
- Chairs (jointly with HM Treasury) Money Laundering Advisory Committee (MLAC), a forum for key stakeholders to coordinate the AML regime and review its efficiency and effectiveness

HM Treasury
- Represents UK in EU and FATF
- Implements EU Directives, principally through the Money Laundering Regulations
- Approves industry guidance under POCA, Terrorism Act and Money Laundering Regulations
- Chairs (jointly with Home Office) Money Laundering Advisory Committee (MLAC), a forum for key stakeholders to coordinate the AML regime and review its efficiency and effectiveness
- Implements the UK's financial sanctions regime

Law enforcement, other investigating bodies and prosecutors
Serious Organised Crime Agency brings together:
- National Crime Squad and NCIS
- HM Revenue and Customs investigative branches
- Parts of the Home Office Immigration Service

UK's financial intelligence unit receives suspicious activity reports (about money laundering and terrorist financing) and sends cleared intelligence to law enforcement agencies for investigation. It also assesses organised crime threats

Police

- 52 forces in the UK investigate crime, money laundering and terrorism

HM Revenue and Customs

- Investigates money laundering, drug trafficking and certain tax offences
- Licenses money service businesses and dealers in high value goods

Assets Recovery Agency

1. Powers under POCA to recover the proceeds of crime through criminal, civil, or tax recovery processes
2. Supports law enforcement agencies
3. Trains financial investigators

The Revenue and Customs Prosecutions Office

- Prosecutes money laundering, drug trafficking and certain tax offences investigated by HMRC

Crown Prosecution Service

- Prosecutes crime, money laundering and terrorism offences in England and Wales

Procurator Fiscal

- Prosecutes crime, money laundering and terrorism offences in Scotland

Public Prosecution Service of Northern Ireland

- Prosecutes crime, money laundering and terrorism offences in Northern Ireland

Bank of England

- Administers the UK's financial sanctions regime, on behalf of HM Treasury

Regulator

Financial Services Authority

- UK's financial regulator
- Statutory objectives (under Financial Services and Markets Act 2000) include reduction of financial crime
- Approves persons to perform "controlled functions" (including money laundering reporting officer function)
- Makes, supervises and enforces, amongst other things, rules on money laundering
- Power to prosecute firms under the Money Laundering Regulations (except in Scotland)

Industry

Joint Money Laundering Steering Group

- Industry body made up of 16 financial sector trade bodies
- Produces guidance on compliance with legal and regulatory requirements and good practice

FINDING AND FREEZING THE PROCEEDS OF CRIME: AN OVERVIEW

Proceeds of crime legislation is designed to give a state the power to freeze property believed to be the proceeds of crime and then to confiscate it. What constitute "proceeds of crime" in any particular jurisdiction will depend on how the term is defined although the underlying crime(s) are normally referred to as the "predicate offences".

The predicate offences

Because much of the initial proceeds of crime legislation was enacted to implement the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, many jurisdictions began with legislation relating only to proceeds of drug offences.

However, there is a growing trend, recognised and encouraged in international fora such as the Financial Action Task Force, to extend offences to which proceeds of crime legislation applies to all serious crime. As noted earlier, the United Nations Convention Against Corruption sees the return of assets acquired through corruption as a fundamental principle of the Convention.

Even so, there can be significant variation between jurisdictions on the scope of the predicate offence. The need for a transnational approach to proceeds matters is emphasised by the fact that with the use of modern technology, monies and other assets can be moved around the world or hidden easily and with great speed. In proceeds of crime investigations and prosecutions, it can be critically important therefore to prevent the movement or disposal of assets pending the outcome of the prosecution and forfeiture proceedings.

The nature of the orders

In most countries, the tool employed for this purpose is a restraining or freezing order. Here an application is made to a court for an order to prevent the movement or disposition of assets. While such orders may be described differently in different regimes, the underlying principle of them is the same.

The nature of the orders may also vary. In the UK and those jurisdictions following that model, the restraint order is made "*in personam*" in that it restrains **persons** - the defendant and third parties - from dealing with the relevant property. In Australia and jurisdictions with that model, the order is directed towards the **property** (i.e. "*in rem*" proceedings) so as to prevent anyone from dealing with it without the authority of a court.

The details of the procedures for obtaining a restraint order or, in the case of civil confiscation or recovery, interim receiving, administration or preservation orders, will of course flow from the particular legislation. Generally though an application will be brought to a court for the order. In most jurisdictions, this will be done through the filing of an application or motion to the court, along with supporting material such as an affidavit from a police officer or a prosecutor's statement.

Critically, most legislation provides that such an application will be made *ex parte* (i.e. without the other party knowing about the application). This because of the danger that otherwise the assets will be removed from the jurisdiction before the freezing order can be made.

The UNCAC approach to forfeiture

The United Nations Convention Against Corruption provides a useful guide to addressing issues relating to proceeds of crime. As will be seen, many of the issues relate to maintaining effective mutual legal assistance arrangements. Here reference should be made to the discussion on this topic in Section 1 of the model curriculum.

Article 52: Prevention and Detection of Transfers of Proceeds of Crime

1. Without prejudice to article 14 of this Convention, each State Party shall take such measures as may be necessary, in accordance with its domestic law, to require financial institutions within its jurisdiction to verify the identity of customers, to take reasonable steps to determine the identity of beneficial owners of funds deposited into high-value accounts and 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. Such enhanced scrutiny shall be reasonably designed to detect suspicious transactions for the purpose of reporting to competent authorities and should not be so construed as to discourage or prohibit financial institutions from doing business with any legitimate customer.
2. In order to facilitate implementation of the measures provided for in paragraph 1 of this article, each State Party, in accordance with its domestic law and inspired by relevant initiatives of regional, interregional and multilateral organizations against money-laundering, shall:
    (a) Issue advisories regarding the types of natural or legal person to whose accounts financial institutions within its jurisdiction will be expected to apply enhanced scrutiny, the types of accounts and transactions to which to pay particular attention and appropriate account-opening, maintenance and record-keeping measures to take concerning such accounts: and
    (b) Where appropriate, notify financial institutions within its jurisdiction, at the request of another State Party or on its own initiative, of the identity of particular natural or legal persons to whose accounts such institutions will be expected to apply enhanced scrutiny, in addition to those whom the financial institutions may otherwise identify.
3. In the context of paragraph 2 (a) of this article, each State Party shall implement measures to ensure that its financial institutions maintain adequate records, over an appropriate period of time, of accounts and transactions involving the persons mentioned in paragraph 1 of this article, which should, as a minimum, contain information relating to the identity of the customer as well as, as far as possible, of the beneficial owner.
4. With the aim of preventing and detecting transfers of proceeds of offences established in accordance with this Convention, each State Party shall implement appropriate and effective measures to prevent, with the help of its regulatory and oversight bodies, the establishment of banks that have no physical presence and that are not affiliated with a regulated financial group. Moreover, States Parties may consider requiring their financial institutions to refuse to enter into or continue a correspondent banking relationship with such institutions and to guard against establishing relations with foreign financial institutions that permit their

accounts to be used by banks that have no physical presence and that are not affiliated with a regulated financial group.

5. Each State Party shall consider establishing, in accordance with its domestic law, effective financial disclosure systems for appropriate public officials and shall provide for appropriate sanctions for non-compliance. Each State Party shall also consider taking such measures as may be necessary to permit its competent authorities to share that information with the competent authorities in other States Parties when necessary to investigate, claim and recover proceeds of offences established in accordance with this Convention.
6. Each State Party shall consider taking such measures as may be necessary, in accordance with its domestic law, to require appropriate public officials having an interest in or signature or other authority over a financial account in a foreign country to report that relationship to appropriate authorities and to maintain appropriate records related to such accounts. Such measures shall also provide for appropriate sanctions for non-compliance.

Article 53 Measures for Direct Recovery of Property

Each State Party shall, in accordance with its domestic law:

(a) Take such measures as may be necessary to permit another State Party to initiate civil action in its courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with this Convention;
(b) Take such measures as may be necessary to permit its courts to order those who have committed offences established in accordance with this Convention to pay compensation or damages to another State Party that has been harmed by such offences; and
(c) Take such measures as may be necessary to permit its courts or competent authorities, when having to decide on confiscation, to recognize another State Party's claim as a legitimate owner of property acquired through the commission of an offence established in accordance with this Convention.

Article 54 Mechanisms for recovery of property through international cooperation in confiscation

1. Each State Party, in order to provide mutual legal assistance pursuant to article 55 of this Convention with respect to property acquired through or involved in the commission of an offence established in accordance with this Convention, shall, in accordance with its domestic law:

(a) 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;
(b) Take such measures as may be necessary to permit its competent authorities, where they have jurisdiction, to order the confiscation of such property of foreign origin by adjudication of an offence of money-laundering or such other offence as may be within its jurisdiction or by other procedures authorized under its domestic law; and
(c) 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 appropriate cases.

2. Each State Party, in order to provide mutual legal assistance upon a request made pursuant to paragraph 2 of article 55 of this Convention, shall, in accordance with its domestic law:

(a) Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a freezing or seizure order issued by a court or competent authority of a requesting State Party that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation for purposes of paragraph 1 (a) of this article;
(b) Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a request that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation for purposes of paragraph 1 (a) of this article; and
(c) Consider taking additional measures to permit its competent authorities to preserve property for confiscation, such as on the basis of a foreign arrest or criminal charge related to the acquisition of such property.

Article 55 International Cooperation for Purposes of Confiscation

1. A State Party that has received a request from another State Party having jurisdiction over an offence established in accordance with this Convention for confiscation of proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, of this Convention situated in its territory shall, to the greatest extent possible within its domestic legal system:
(a) Submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect to it; or
(b) Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by a court in the territory of the requesting State Party in accordance with articles 31, paragraph 1, and 54, paragraph 1 (a), of this Convention insofar as it relates to proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, situated in the territory of the requested State Party.
2. Following a request made by another State Party having jurisdiction over an offence established in accordance with this Convention, the requested State Party shall take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, of this Convention for the purpose of eventual confiscation to be ordered either by the requesting State Party or, pursuant to a request under paragraph 1 of this article, by the requested State Party.
3. The provisions of article 46 of this Convention are applicable, mutatis mutandis, to this article. In addition to the information specified in article 46, paragraph 15, requests made pursuant to this article shall contain:
(a) In the case of a request pertaining to paragraph 1 (a) of this article, a description of the property to be confiscated, including, to the extent possible, the location and, where relevant, the estimated value of the property and a statement of the facts relied upon by the requesting State Party sufficient to enable the requested State Party to seek the order under its domestic law;
(b) In the case of a request pertaining to paragraph 1 (b) of this article, a legally admissible copy of an order of confiscation upon which the request is based issued by the requesting State Party, a statement of the facts and information as to the extent to which execution of the order is requested, a statement specifying the measures taken by the requesting

State Party to provide adequate notification to bona fide third parties and to ensure due process and a statement that the confiscation order is final;

(c) In the case of a request pertaining to paragraph 2 of this article, a statement of the facts relied upon by the requesting State Party and a description of the actions requested and, where available, a legally admissible copy of an order on which the request is based.

4. The decisions or actions provided for in paragraphs 1 and 2 of this article shall be taken by the requested State Party in accordance with and subject to the provisions of its domestic law and its procedural rules or any bilateral or multilateral agreement or arrangement to which it may be bound in relation to the requesting State Party.
5. Each State Party shall furnish copies of its laws and regulations that give effect to this article and of any subsequent changes to such laws and regulations or a description thereof to the Secretary-General of the United Nations.
6. If a State Party elects to make the taking of the measures referred to in paragraphs 1 and 2 of this article conditional on the existence of a relevant treaty, that State Party shall consider this Convention the necessary and sufficient treaty basis.
7. Cooperation under this article may also be refused or provisional measures lifted if the requested State Party does not receive sufficient and timely evidence or if the property is of a *de minimis* value.
8. Before lifting any provisional measure taken pursuant to this article, the requested State Party shall, wherever possible, give the requesting State Party an opportunity to present its reasons in favour of continuing the measure.
9. The provisions of this article shall not be construed as prejudicing the rights of bona fide third parties.

FINDING THE PROCEEDS OF CRIME

The location of proceeds of crime is not an easy matter for investigating and prosecuting authorities. In addition to normal investigative tools such as search warrants and witness interviews, there are special investigative mechanisms that are essential for the effective detection and location of proceeds of crime.

i) Dealing with bank secrecy/confidentiality issues

Proceeds cannot be traced or located without access to records and accounts held by banking or other financial institutions. In most jurisdictions such information is protected by secrecy laws, which prevent access except by the relevant account holders. Similarly, those working in financial institutions are often under an obligation, either legal or ethical, to maintain confidentiality with respect to information or records held by the institution.

But also in most jurisdictions, bank secrecy may always be overridden by court order where the court is satisfied on a relevant standard that the information is required in relation to a criminal investigation. Jurisdictions with particularly strong protections for banking institutions will often have very detailed specific legislation governing the circumstances in which bank secrecy and confidentiality may be overridden. Also note the terns of the FATF 40 Recommendations (Recommendations 4 and 5): see Appendix 4 below.

ii) Monitoring orders

Given the importance of tracking the flow of funds in relation to these investigations, a tool provided for in several jurisdictions is a monitoring order. These orders are directed to financial institutions and they require the financial institutions to give information on transactions relating to specified accounts. The orders can relate to a broad range of transactions such as the making of fixed term deposits or the opening or use of a deposit box. Several Caribbean jurisdictions such as Grenada, Barbados, Jamaica and Antigua employ this useful investigative tool.

Generally, there are accompanying obligations on the institutions to retain original documents for specified periods and to refrain from disclosing the existence of the monitoring order. There is also usually a protection afforded to the institutions and their staff in relation to the disclosure of this information.

iii) Production orders

Another useful tool found in proceeds of crime legislation is the production order. More efficient then a cumbersome search and seizure process, these orders require the person or institution served to produce the records specified therein. While often used to obtain financial records, the orders can also be applicable to corporate records, share registries and other business documents. Generally, the legislation provides that an order can be obtained from a judge upon satisfying a prescribed standard.

iv) Compulsory Questioning and Disclosure of information

One additional investigative tool that may be available in some jurisdictions is the capacity to compel persons to provide statements and produce documents relevant to the investigation. This power is unusual for generally the power to compel statements is restricted to compelling a witness to attend a judicial proceeding (preliminary or trial).

In some jurisdictions this power exists in relation to specific types of crimes and is restricted in application to compelled statements from witnesses. This type of power can be found, for example, with regard to the Serious Fraud Office in England and Wales. In addition, some countries, like Canada, have this power under the mutual legal assistance legislation such that witnesses can be compelled to provide statements in response to a request from a foreign state.

There may well be concerns about self-incrimination arising from such powers. However, one means by which these are addressed is by ensuring that evidence gathered by compulsion cannot be used against the person providing the statement, in any subsequent criminal proceedings.

In the Canadian case of *Canada (Attorney General) v. Cuenca* **(**1995 CanLII 5570) the power under the Mutual Legal Assistance Act was challenged as being a violation of the “right to remain silent”. In rejecting this argument, the Quebec Court of Appeal held that the right to silence is not an absolute one. Individuals can be compelled to provide statements during an investigation without constitutional violation of the fundamental principles of justice. What is important is that information so compelled is not subsequently used against

the person who has given it and in the particular case, the use and derivative use protections provided were sufficient to ensure that this was not the case.

In the context of proceeds of crime legislation, there is an even more broad ranging power in some of the legislation, particularly that modelled on the UK "benefit" approach. For example under the Proceeds of Crime Act 2002 (UK) a court, in considering whether the individual has a criminal lifestyle and any benefit arising from it, can order the defendant to provide specified information. If he or she fails to do so, the court may draw any "assumptions" from the failure to respond.

While this provision would appear to raise even more significant self-incrimination issues, the argument in response is that the information from the person is sought at the post-conviction stage and it is thus unrelated to the question of guilt or innocence.

v. The development of Financial Intelligence Units (FIU)

As noted in Section 1, over 100 countries have now established financial intelligence units. Their function is to receive the reports of financial and related institutions regarding "suspicious" transactions.

A good example of a FIU is the Financial Intelligence Centre in South Africa (Financial Intelligence Centre Act, No. 38, 2001). Its responsibilities include receiving and analysing information, informing and cooperating with law enforcement agencies, monitoring and giving guidance to institutions and keeping records for a prescribed period.

FREEZING THE PROCEEDS OF CRIME

Purpose

Given the ease with which money and other assets can be moved or hidden easily and with great speed, in a proceeds of crime investigation and prosecution, it can be critically important to prevent the movement or disposal of assets pending the outcome of the prosecution and forfeiture proceedings.

The tool employed for this purpose, in most, if not all systems, is a restraining order. Generally, an application will be made to a court for orders to prevent the movement or disposition of assets. While the orders may be described differently in different regimes, the underlying principle of them is the same.

As noted earlier, the nature of the orders may also vary depending upon whether the order is made "*in personam*" or "*in rem*".

Process and procedures

(i) Application, notice, supporting material and hearings

The details of the procedures for obtaining a restraint order or, in the case of civil confiscation or recovery, interim receiving, administration or preservation orders, will of course flow from the particular legislation. Generally though an application will be brought to a court for the order. In most jurisdictions, this will be accomplished through the filing of an actual application or motion to the court, along with supporting material such as an affidavit from a police officer or a prosecutor's statement.

Most legislation provides that such an application will be made *ex parte,* because of the danger of assets being removed. One important constitutional challenge on this point was considered in 2003 by the Constitutional Court of South Africa in *National Director of Public Prosecutions v Mohamed N.O*. 2002 (4) SA 843 (CC). Here the making of an *ex parte* "preservation order" (i.e. a freezing order) was challenged on the ground that it unjustifiably limited the fair hearing component of the right of access to a court guaranteed by the Constitution of South Africa. However, the Constitutional Court held that even if the making of the preservation order constituted a limitation on the enjoyment of a constitutional right, the public interest objectives of the relevant Act fully justified such limitation.

The statutory prerequisites for the order will vary but usually there will be reference to when the application can be brought and the basis for the need for the order.

The question of timing in conviction based systems has been a problem area in practice. Under the pre-2002 legislation in the United Kingdom and in Australia, restraint could only be sought at the time or shortly before charges were to be brought. This posed major difficulties in that often the underlying investigation would take a period of time and there was a real risk of having the assets shifted to another jurisdiction during that period.

For that reason, the Proceeds of Crime Act 2002 in the UK now provides that the application may be made as early as the beginning of an investigation.

However, some existing legislation which followed the original UK or Australian models may well still be limited to circumstances where proceedings have commenced or are about to commence.

In terms of the basis of the order this will depend on the nature of the system. In a value based system such as the UK it will be necessary to show reasonable cause to believe that the person has benefited from criminal conduct. In systems that require a link between the offence and the property there will need to be grounds to believe that the property represents proceeds of crime. By statute or interpretation, in some jurisdictions it will also be necessary to demonstrate that there is a reasonable apprehension of the dissipation of assets.

Under the Australian model, except in the case of a serious offence where restraint orders relating to the defendant's property are virtually automatic upon establishment that he or she has been or is about to be charged within 48 hours and the appropriate undertakings are given, there are very specific provisions as to what must be established to the court. For example, in the case of specific tainted property, there must be an affidavit from a police officer that establishes reasonable grounds to believe the property is tainted property and the defendant derived a benefit from the offence. Similar specific requirements are set out for each type of restraint order available (e.g. all the defendant's property, property held by third parties etc.). As noted, for all restraint orders under this model, the application will have to demonstrate that the person has been charged or will be charged within 48 hours such that the materials filed in support will have to address each of these considerations before the court will issue the relevant restraint orders. Interestingly, the Australian model specifically provides for the application to be on notice to the owner and any other persons with an interest in the property. The DPP may however opt not to provide notice in which case the order issued will be limited to 14 days in length.

The use of a receiver

It is often possible to appoint a receiver as a tool for controlling the defendant's assets to prevent dissipation. Because of the expense this will entail, it is only resorted to in complex cases where the assets are many and varied or of such a nature that day-to-day management will be necessary, e.g. the running of an hotel.

Such an application would require, in addition to the normal prerequisites for restraint, the establishment of the factors that support the extra step of a receiver in such a case.

A form of restraint is also available under the non-conviction based schemes. For example under the UK legislation, an application may be made for an interim receiving order for the detention, custody or preservation of property and for the appointment of a receiver.

In the South African system, the civil forfeiture process begins with an application for a preservation order with respect to the relevant property which

order will preclude any person from dealing in any manner with the property in question subject to specified exclusions or conditions.

In all cases, whatever the scheme, the restraint application will have to be properly supported by material describing the relevant property and assets to be restrained. Where the order is going to relate to all of the assets of the individual, there will have to be investigative work undertaken using the various tools available (production, inspection etc.) to ensure that the relevant assets are identified and described in the application material.

It is vital to follow the actual detailed procedures for such applications, e.g. forms of documentation or notices to be given to third parties.

ii) Timing, Duration and Standard

The timing for an application for a restraint order, as well as the duration of the order will also vary between jurisdictions. For example, in Australia, there are strict rules with respect to timing. In other than conviction cases, the application will made where the person has been or is about to be charged. If the application is made with notice to the owner and interested parties, there is no specified time limit for the order. Otherwise it is 14 days, unless the Court extends the period upon application. If the order has been made on the basis that the person will be charged, that must occur within 48 hours or the order will be discharged.

Under the UK conviction-based system, the application can be made when the person is charged or the decision has been taken that he or she will be charged. There are no specified limits however as to the length of the order.

While the standard to be met for the issuance of a restraining order may vary, generally the court will have to be satisfied that there are reasonable grounds to believe the person committed the offence and that a forfeiture order may be made.

iii) Indemnities/Securities

Because of the potential for damage arising from the restraint of property and assets, in some systems there is provision for undertakings or indemnities to be given by the relevant government authority. This can range from discretion in the judge (Australia) to a mandatory prerequisite (Canada). Interestingly, there is no such provision for undertakings in the United Kingdom.

iv) Administration of Seized Assets

One of the most challenging aspects of restraint is the management of the restrained assets. In most systems, there is provision for some form of professional management of restrained assets because of the various complicated issues related thereto. In cases where the property itself is restrained this usually involves the use of in-house or engaged consultants to manage the seized property. In the case of *in personam* systems, there is usually provision to apply to the court for a receiver/manager to be appointed during the restraint period.

If the assets are not sufficient to merit the appointment of a receiver, difficult and time-consuming issues may arise as to any decision that must be taken with respect to the property. For example, the question of the transfer of assets from one account to another (e.g. to take advantage of a better interest rate) will require court approval because the "owner" will be restrained from dealing with those assets in any manner.

Since, in most regimes, the government undertakes to compensate in the case of any loss arising from the restraint, the administration of restrained assets can become one of the central concerns of any forfeiture regime.

v) Access to funds to pay legal fees

An issue of some controversy is the ability of the accused to access the restrained funds to pay for legal expenses. While some consider it inappropriate to allow for “judicially sanctioned possession of proceeds” most legislative schemes provide for such access generally on the basis of court order. As a counter balance there are however, generally restrictions on the amounts that can be used.

FORFEITURE

General features

There are essentially three approaches to the forfeiture of proceeds of crime:
1. Administrative, 2. Conviction-based, 3. Civil-based.

Some jurisdictions, like the United States, employ all three methods, applying the method, which is considered most appropriate on a case by case basis. Other jurisdictions like Australia and Canada, employ almost exclusively the conviction-based approach, with some limited administrative seizure powers, although this is now changing. In the UK, the Proceeds of Crime Act 2002 has revamped conviction based forfeiture and introduced, for the first time, civil forfeiture.

Another fundamental division is that between "*in personam*" proceedings and "*in rem*" proceedings.

- "*In personam*" proceedings are one directed at the person convicted
- "*In rem*" proceedings relate to the property in question.

There are some variations. For example, in Canada, where charges have been instituted but the person has died or absconded, proceedings “in rem” may be conducted and if the judge is satisfied beyond reasonable doubt that the property is proceeds of crime, a confiscation order may be made.

In some countries a link between the property sought to be confiscated and the crime must be proved. In others, there is a value or benefit system where evidence is required to link the property to the accused person. i.e. D obtained $1m from corrupt practices. $1m of her property (however obtained) will be liable to confiscation as the proceeds of crime.

Administrative confiscation

This is often employed in the context of customs legislation. Generally administrative forfeiture occurs without judicial order as it arises by operation of law as a result of the occurrence of a prohibited event in relation to the property.

In general terms, under such a system, where property is seized by authorities in accordance with applicable legislation, upon service of relevant notices, the property will be forfeited to the government unless a challenge is brought before a court. Thus in the context of administrative forfeiture, it is for the claimant to establish that the property should not be forfeited.

Legislation also commonly provides for forfeiture of the "instrumentalities" used to commit the offence (e.g. the vehicle used to carry the smuggled items).

Conviction-based confiscation

By far the most common approach to forfeiture is that which is premised upon the conviction of a person.

As usual, the actual process and applicable procedures for confiscation or forfeiture orders will be dependant upon the underlying legislative scheme. However, some general comments can be made.

(i) Application

The legislation will set out what application needs to be made and during what time period. For example, under the UK conviction based scheme while the Court may itself initiate a consideration of confiscation it is most likely that the process will be triggered by an application by the prosecutor or the Assets Recovery Agency.

Under the Australian scheme, generally there will be a requirement for the DPP to bring the application for either forfeiture or a pecuniary penalty order after conviction and within a specified time period from conviction.

(ii) Notices

The required notices will again depend upon the applicable legislation. Under the UK system, generally there are no statutory requirements for notice, other than the notice by the prosecutor to commence the proceedings. This is understandable given that the focus of the proceedings is a determination of benefit and assets and is not directed to the forfeiture of specified property as can be the case under the Australian model. Under the latter model, in the case of an application for the forfeiture of property, generally this will be on notice to the person and any person with an interest in the property. In addition the court will have the capacity to order publication of the proceedings. Persons so notified may then appear and adduce evidence at the hearing.

(iii) Hearing

The procedure at the hearing will be directly related to the nature of the determination to be made by the court. The UK proceedings are civil proceedings (i.e. post-conviction) that focus on relevant financial calculations of the benefit of the person from illegal activity and the realisable assets of the defendant. There are various legislative provisions that will be considered in the process of making the calculation including those governing how to deal with tainted gifts and certain assumptions that may operate depending on the calculation being made.

Thus the hearing may be a complex one involving witnesses and documentary evidence or it could be very simple were there are few issues in dispute between the parties.

It follows that in any confiscation hearing, the nature, scope and form of the hearing as well as the material that both counsel will adduce will depend on the legislative standard to be met.

Civil forfeiture

In some situations it may not be possible to obtain a conviction, for example, due to the lack of evidence or the disappearance or death of the suspect. The existence of a civil-based forfeiture system can help overcome such problems.

Civil forfeiture involves a proceeding brought against the property in question i.e. an *in rem* action. While civil confiscation requires a proceeding before a court, there is obviously no requirement for an underlying conviction of any person. In addition, as the proceedings are directed to the property and not the person, they are not generally limited to property held by an offender, although the property must be linked to an offence. The standard of proof to be met in an application for civil forfeiture is that applicable in civil proceedings, which in most common law jurisdictions is the balance of probabilities.

In some jurisdictions the burden of proof is reversed such that it is for a person to show that the property is not derived indirectly or directly from crime.

(i) Application
Here again the process for pursuing the relevant order will be initiated in accordance with the legislation. Under the South African scheme the Director may make an application to the High Court in relation to property that is the subject of a preservation order (earlier application analogous to restraint). Under the UK system the proceedings are initiated by the authority against the person holding the property.

The actual supporting documents to be filed will clearly depend on the legislative scheme and established practice.

(ii) Notices
All of the schemes provide for notice to those who may have an interest in the property though the nature and scope of the provisions may vary. For example, as the South African application comes after an initial preservation order against the property the notice requirement for the forfeiture proceedings is tied to the original proceedings. When a preservation order is made, the National Director gives notice to all persons known to have an interest in the property and the notice is also published. Interested parties wishing to oppose forfeiture can then enter an appearance and it is to those persons that notice will be given 14 days in advance of any forfeiture hearing.

The UK scheme is structured quite differently. While it is an action brought against property, as indicated, the actual application will make reference to the person holding the property. That will obviously constitute sufficient notice to the central person with an interest in that property. However in addition, unless the court dispenses with the requirement in particular circumstances, notice will also need to be served on others known to have an interest by way of tenancy in common, specified interest or ownership of property within which the recoverable property subsists.

(iii) Hearing
The nature of the hearing process will be dependent entirely on the structure of the legislative scheme and the determination that the court must make. Under the UK scheme, the court needs to be satisfied that the property is recoverable by the agency meaning that it is or represents property obtained through unlawful conduct inside or outside the UK. In addition the hearing will

consider any arguments by the respondent relating to good faith acquisition which would result in the property being excluded from a recovery order. There are also complex provisions as to how to deal with associated property that may become the subject of the proceedings. Obviously the evidence adduced therefore at the proceedings would relate to these underlying issues.

The South African scheme is much more straightforward. The Court needs to determine on a balance of probabilities if the property is the instrumentality of a specified offence or is the proceeds of unlawful activity. Those with an interest in the property who have filed an appearance may attend at the hearing and advance arguments for the exclusion of their interests from the forfeiture order on the basis that they acquired the interest legally without knowledge or reasonable grounds to suspect that the property was proceeds or instrumentalities. Thus the National Director would adduce evidence on the tainted nature of the property and those with an interest evidence to demonstrate legal and innocent acquisition.

Disposal of Assets

There are many approaches to the distribution of confiscated assets. For example, at one end of the scale, in the United States, the Attorney General or the Secretary of the Treasury or the Postal Services, as applicable, has a discretion to distribute the assets or the funds to another federal agency, a state or federal law enforcement agency that, participated in or contributed to, the seizure, a financial regulatory agency or a foreign state.

In Australia there is a fund for the proceeds of confiscated assets, administered by the official trustee. After the deduction of payment of shares to state or foreign governments that participated in the case, the remainder of the funds will be distributed to reimburse government agencies for costs, to law enforcement agencies chosen by the Attorney General or to drug rehabilitation programs.

Canada employs yet again a different system, with a fund managed under detailed legislation and regulations with provision only for distribution to state or foreign governments, with the remainder being transmitted to general revenues.

The equitable sharing of confiscated assets between the requesting and requested state is a potentially major incentive to encourage cooperation, particularly where the requested state has limited resources.

Role of an asset recovery agency

A significant development relating to proceeds of crime in several Commonwealth countries is the establishment of asset recovery agencies. The aims of such agencies are to disrupt organised criminal enterprises through the recovery of criminal assets, and to promote the use of financial investigation as an integral part of criminal investigations.

Such agencies are generally multidisciplinary with investigative, litigation and revenue functions. See for example, the Assets Recovery Agency (UK) www.assetsrecovery.gov.uk/.

Other key considerations

(a) Third Party Interests

Generally, all proceeds legislation, or at least that which is conviction-based, provides protections for the rights of third parties. In some jurisdictions, there is specific provision for notice to be given to any identifiable third parties, and an opportunity for such parties to be heard before a confiscation order is issued. In other systems, the process of calculating the realisable assets of the accused will include a consideration of third party interests.

One special area of concern in this regard is the inter-relationship of such schemes with the rights of victims. Some schemes specifically recognize the rights of victims in this regard. For example, under the UK scheme there are special protections accorded to victims as a result of the legislative scheme for compensation orders and its relationship to the confiscation scheme. In addition, it is open to victims to launch civil proceedings at any stage and if properly timed, this can affect the nature of the orders that the court might make in relation to confiscation.

In every case, it is important that the prosecution considers early on the impact of an application for confiscation on any possible victims in the case. In some instances in fact, the prosecution may opt against seeking confiscation because of the interests of the victims and the need to keep all assets available for confiscation.

(b) Constitutional issues

Depending upon the legal regime, a scheme directed at confiscating the property and assets of individuals can raise constitutional issues. This is particularly the case with respect to civil or administrative regimes, which employ a lower standard of proof or a reverse burden. In some federal states, with constitutional divisions of power between state provincial and federal governments, there may be problems arising from divided responsibility for criminal law and civil and property rights.

The use of evidentiary presumptions, such as those employed in the UK in the case of convictions for more then one offence or those under the Australian model that provide for a presumption with respect to evidence found in the possession of the accused, may also run foul of constitutional requirements.

INTERNATIONAL COOPERATION IN PROCEEDS OF CRIME CASES

Enforcement of Foreign Orders v Making of Local Orders

There are two general models for international cooperation in respect of the restraint and forfeiture of proceeds of crime, flowing from the optional approaches reflected in the 1988 Drug Convention. A jurisdiction will either enforce foreign restraint and confiscation orders directly or alternatively, use the orders, information or request transmitted by the foreign state to obtain a domestic order of restraint or forfeiture.

Australia, Hong Kong and the United Kingdom all employ a direct enforcement regime, which allows for the registration and enforcement of the orders of the foreign state. All the systems provide for enforcement of the orders in accordance with domestic process after they are appropriately registered and they all include various safeguards and protections for third party interests. Canada and the United States both adopt a system of using domestic provisions for restraint and forfeiture.

The system of indirect enforcement raises several complicated issues. For example, both restraint and forfeiture orders are tied to criminal proceedings under domestic law. It may be difficult however to institute charges or undertake to do so when the accused is not located within the jurisdiction and extradition is unlikely. Even if charges are brought, the matter cannot proceed to a confiscation stage until a prosecution has been conducted successfully. This will not be possible in the absence of the accused.

Dual Criminality

Another complicated issue in relation to international cooperation is the question of dual criminality of predicate offences. Whether using a direct enforcement or local order system, there will be a requirement that the underlying offence is a predicate offence in the jurisdiction enforcing the restraint or confiscation order or request. Given the broad variation between jurisdictions on this issue, this can often prove to be an insurmountable hurdle to international cooperation.

One other similar point is that in cases of local orders, it becomes imperative that the legislated predicate offences include those offences committed in a foreign jurisdiction. Without this, it will be virtually impossible to enforce the foreign order.

Costs

Whatever mechanism is employed, restraint and forfeiture in response to a foreign order or request will take place within the foreign state. Thus, in most systems there will be a built in capacity to recover any costs related to such an action before any funds are transmitted to the foreign state. In the absence of provision for pre-distribution, cost recovery, the requested state should be able to seek a share of the forfeited funds from the requesting state to off set the costs of enforcement.

The more difficult issue is the question of costs or damages resulting from an unsuccessful restraint or confiscation action taken on the basis of a foreign

request. Because of problems in that respect, some jurisdictions require the provision of an undertaking or indemnity by the foreign state, prior to pursuit of an enforcement action.

Repatriation of Proceeds of Crime

There is much controversy surrounding the repatriation of assets, not with the concept but rather with the methods used to secure the assets.

A central issue is the practice of the United States of "voluntary" repatriations undertaken generally as a part of a plea bargaining process. In those cases, a defendant will agree as a term of his or her plea bargain to arrange for the movement of monies or other assets from a foreign jurisdiction, to the United States in order that the assets can then be forfeited to the United States government under the agreement. When this is accomplished without informing the foreign state, it can create difficult situations. In addition to sovereignty concerns, in moving assets known to be proceeds of crime, the individual may well be violating the money laundering laws of that foreign state.

These concerns are less pronounced when the voluntary repatriation is carried out with the knowledge and agreement of the foreign state. In some circumstances, the foreign state may seek a share of the funds ultimately confiscated in such a scenario.

The United Kingdom proceeds legislation has been interpreted to allow for court ordered repatriation from foreign jurisdictions. Where a confiscation order issues, the court in the UK is empowered to order the repatriation of assets held in a foreign state to be applied to that confiscation order and to enforce non-action by way of contempt of court proceedings. Here, again this would involve the movement of funds that are potentially “proceeds of crime” albeit under the UK system the money is not specifically identified as tainted. Also, in this scenario the action taken is judicially sanctioned as distinct from the plea bargain process employed within the United States. The sovereignty issues however are no less significant, if this is accomplished without the knowledge of the foreign state.

A much more accepted practice with respect to confiscated assets is formal state to state arrangements for asset sharing. The general principle, which is applied under most legislation and treaties with respect to confiscated assets, is that the state that confiscates retains the asset. Increasingly though, in recognition of the importance of international cooperation in these cases and in acknowledgement of assistance provided, states are entering into agreements and arrangements to allow for assets to be shared with foreign states.

While there are a multitude of approaches to asset sharing, the general principle is that where the assistance of a state has contributed to a conviction and/or confiscation order, a portion of the confiscated assets or proceeds thereof, determined by the confiscating state, will be shared with the assisting state. In some instances, asset share is the subject of detailed regulations, for example Canada, while in other cases, it is within the discretion of officials, for

example the United States. In most cases, sharing will be carried out pursuant to an ad hoc or general sharing arrangement although this too will depend on the legal regime governing the sharing.

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APPENDIX 4

FINANCIAL ACTION TASK FORCE 40 RECOMMENDATIONS

Introduction

Money laundering methods and techniques change in response to developing counter-measures. In recent years, the Financial Action Task Force (FATF)[1] has noted increasingly sophisticated combinations of techniques, such as the increased use of legal persons to disguise the true ownership and control of illegal proceeds, and an increased use of professionals to provide advice and assistance in laundering criminal funds. These factors, combined with the experience gained through the FATF's Non-Cooperative Countries and Territories process, and a number of national and international initiatives, led the FATF to review and revise the Forty Recommendations into a new comprehensive framework for combating money laundering and terrorist financing. The FATF now calls upon all countries to take the necessary steps to bring their national systems for combating money laundering and terrorist financing into compliance with the new FATF Recommendations, and to effectively implement these measures.

The review process for revising the Forty Recommendations was an extensive one, open to FATF members, non-members, observers, financial and other affected sectors and interested parties. This consultation process provided a wide range of input, all of which was considered in the review process.

The revised Forty Recommendations now apply not only to money laundering but also to terrorist financing, and when combined with the Nine Special Recommendations on Terrorist Financing provide an enhanced, comprehensive and consistent framework of measures for combating money laundering and terrorist financing. The FATF recognises that countries have diverse legal and financial systems and so all cannot take identical measures to achieve the common objective, especially over matters of detail. The Recommendations therefore set minimum standards for action for countries to implement the detail according to their particular circumstances and constitutional frameworks. The Recommendations cover all the measures that national systems should have in place within their criminal justice and regulatory systems; the preventive measures to be taken by financial institutions and certain other businesses and professions; and international co-operation.

The original FATF Forty Recommendations were drawn up in 1990 as an initiative to combat the misuse of financial systems by persons laundering drug money. In 1996 the Recommendations were revised for the first time to reflect evolving money laundering typologies. The 1996 Forty Recommendations have been endorsed by more than 130 countries and are the international anti-money laundering standard.

In October 2001 the FATF expanded its mandate to deal with the issue of the financing of terrorism, and took the important step of creating the Nine Special Recommendations on Terrorist Financing. These Recommendations contain a set of measures aimed at combating the funding of terrorist acts and terrorist organisations, and are complementary to the Forty Recommendations.[2]

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[1] The FATF is an inter-governmental body which sets standards, and develops and promotes policies to combat money laundering and terrorist financing. It currently has 33 members: 31 countries and governments and two international organisations; and more than 20 observers: five FATF-style regional bodies and more than 15 other international organisations or bodies. A list of all members and observers can be found on the FATF website at http://www.fatf-gafi.org/Members_en.htm

[2] The FATF Forty and Nine Special Recommendations have been recognised by the International Monetary Fund and the World Bank as the international standards for combating money laundering and the financing of terrorism.

A key element in the fight against money laundering and the financing of terrorism is the need for countries systems to be monitored and evaluated, with respect to these international standards. The mutual evaluations conducted by the FATF and FATF-style regional bodies, as well as the assessments conducted by the IMF and World Bank, are a vital mechanism for ensuring that the FATF Recommendations are effectively implemented by all countries.

LEGAL SYSTEMS
Scope of the criminal offence of money laundering

Recommendation 1
Countries should criminalise money laundering on the basis of United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (the Vienna Convention) and United Nations Convention against Transnational Organized Crime, 2000 (the Palermo Convention).

Countries should apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences. Predicate offences may be described by reference to all offences, or to a threshold linked either to a category of serious offences or to the penalty of imprisonment applicable to the predicate offence (threshold approach), or to a list of predicate offences, or a combination of these approaches.

Where countries apply a threshold approach, predicate offences should at a minimum comprise all offences that fall within the category of serious offences under their national law or should include offences which are punishable by a maximum penalty of more than one year's imprisonment or for those countries that have a minimum threshold for offences in their legal system, predicate offences should comprise all offences, which are punished by a minimum penalty of more than six months imprisonment.

Whichever approach is adopted, each country should at a minimum include a range of offences within each of the designated categories of offences.[3]

Predicate offences for money laundering should extend to conduct that occurred in another country, which constitutes an offence in that country, and which would have constituted a predicate offence had it occurred domestically. Countries may provide that the only prerequisite is that the conduct would have constituted a predicate offence had it occurred domestically.

Countries may provide that the offence of money laundering does not apply to persons who committed the predicate offence, where this is required by fundamental principles of their domestic law.

Recommendation 2
Countries should ensure that:
(a) The intent and knowledge required to prove the offence of money laundering is consistent with the standards set forth in the Vienna and Palermo Conventions, including the concept that such mental state may be inferred from objective factual circumstances.

(b) Criminal liability, and, where that is not possible, civil or administrative liability, should apply to legal persons. This should not preclude parallel criminal, civil or administrative proceedings with respect to legal persons in countries in which such forms of liability are available. Legal persons should be subject to effective, proportionate and dissuasive sanctions. Such measures should be without prejudice to the criminal liability of individuals.

Provisional measures and confiscation

Recommendation 3
Countries should adopt measures similar to those set forth in the Vienna and Palermo Conventions, including legislative measures, to enable their competent authorities to confiscate property laundered, proceeds from money laundering or predicate offences,

[3] See the definition of "designated categories of offences" in the Glossary.

instrumentalities used in or intended for use in the commission of these offences, or property of corresponding value, without prejudicing the rights of bona fide third parties.

Such measures should include the authority to: (a) identify, trace and evaluate property which is subject to confiscation; (b) carry out provisional measures, such as freezing and seizing, to prevent any dealing, transfer or disposal of such property; (c) take steps that will prevent or void actions that prejudice the State's ability to recover property that is subject to confiscation; and (d) take any appropriate investigative measures.

Countries may consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction, or which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law.

MEASURES TO BE TAKEN BY FINANCIAL INSTITUTIONS AND NON-FINANCIAL BUSINESSES AND PROFESSIONS TO PREVENT MONEY LAUNDERING AND TERRORIST FINANCING

Customer due diligence and record-keeping

Recommendation 4
Countries should ensure that financial institution secrecy laws do not inhibit implementation of the FATF Recommendations.

Recommendation 5
Financial institutions should not keep anonymous accounts or accounts in obviously fictitious names.

Financial institutions should undertake customer due diligence measures, including identifying and verifying the identity of their customers, when:

- establishing business relations;
- carrying out occasional transactions: (i) above the applicable designated threshold; or (ii) that are wire transfers in the circumstances covered by the Interpretative Note to Special Recommendation VII;
- there is a suspicion of money laundering or terrorist financing; or
- the financial institution has doubts about the veracity or adequacy of previously obtained customer identification data.

The customer due diligence (CDD) measures to be taken are as follows:

(a) Identifying the customer and verifying that customer's identity using reliable, independent source documents, data or information.[4]
(b) Identifying the beneficial owner, and taking reasonable measures to verify the identity of the beneficial owner such that the financial institution is satisfied that it knows who the beneficial owner is. For legal persons and arrangements this should include financial institutions taking reasonable measures to understand the ownership and control structure of the customer.
(c) Obtaining information on the purpose and intended nature of the business relationship.
(d) Conducting ongoing due diligence on the business relationship and scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer, their business and risk profile, including, where necessary, the source of funds.

Financial institutions should apply each of the CDD measures under (a) to (d) above, but may determine the extent of such measures on a risk sensitive basis depending on the type of customer, business relationship or transaction. The measures that are taken should be consistent with any guidelines issued by competent authorities. For higher risk categories,

[4] Reliable, independent source documents, data or information will hereafter be referred to as "identification data".

financial institutions should perform enhanced due diligence. In certain circumstances, where there are low risks, countries may decide that financial institutions can apply reduced or simplified measures.

Financial institutions should verify the identity of the customer and beneficial owner before or during the course of establishing a business relationship or conducting transactions for occasional customers. Countries may permit financial institutions to complete the verification as soon as reasonably practicable following the establishment of the relationship, where the money laundering risks are effectively managed and where this is essential not to interrupt the normal conduct of business.

Where the financial institution is unable to comply with paragraphs (a) to (c) above, it should not open the account, commence business relations or perform the transaction; or should terminate the business relationship; and should consider making a suspicious transactions report in relation to the customer.

These requirements should apply to all new customers, though financial institutions should also apply this Recommendation to existing customers on the basis of materiality and risk, and should conduct due diligence on such existing relationships at appropriate times.

(*See Interpretative Notes: Recommendation 5 and Recommendations 5, 12 and 16*)

Recommendation 6
Financial institutions should, in relation to politically exposed persons, in addition to performing normal due diligence measures:

(a) Have appropriate risk management systems to determine whether the customer is a politically exposed person.
(b) Obtain senior management approval for establishing business relationships with such customers.
(c) Take reasonable measures to establish the source of wealth and source of funds.
(d) Conduct enhanced ongoing monitoring of the business relationship.
(See Interpretative Note to Recommendation 6))

Recommendation 7
Financial institutions should, in relation to cross-border correspondent banking and other similar relationships, in addition to performing normal due diligence measures:

(a) Gather sufficient information about a respondent institution to understand fully the nature of the respondent's business and to determine from publicly available information the reputation of the institution and the quality of supervision, including whether it has been subject to a money laundering or terrorist financing investigation or regulatory action.
(b) Assess the respondent institution's anti-money laundering and terrorist financing controls.
(c) Obtain approval from senior management before establishing new correspondent relationships.
(d) Document the respective responsibilities of each institution.
(e) With respect to "payable-through accounts", be satisfied that the respondent bank has verified the identity of and performed on-going due diligence on the customers having direct access to accounts of the correspondent and that it is able to provide relevant customer identification data upon request to the correspondent bank.

Recommendation 8
Financial institutions should pay special attention to any money laundering threats that may arise from new or developing technologies that might favour anonymity, and take measures, if needed, to prevent their use in money laundering schemes. In particular, financial institutions should have policies and procedures in place to address any specific risks associated with non-face to face business relationships or transactions.

Recommendation 9
Countries may permit financial institutions to rely on intermediaries or other third parties to perform elements (a) – (c) of the CDD process or to introduce business, provided that the

criteria set out below are met. Where such reliance is permitted, the ultimate responsibility for customer identification and verification remains with the financial institution relying on the third party.

The criteria that should be met are as follows:

(a) A financial institution relying upon a third party should immediately obtain the necessary information concerning elements (a) – (c) of the CDD process. Financial institutions should take adequate steps to satisfy themselves that copies of identification data and other relevant documentation relating to the CDD requirements will be made available from the third party upon request without delay.
(b) The financial institution should satisfy itself that the third party is regulated and supervised for, and has measures in place to comply with CDD requirements in line with Recommendations 5 and 10.

It is left to each country to determine in which countries the third party that meets the conditions can be based, having regard to information available on countries that do not or do not adequately apply the FATF Recommendations.
(See Interpretative Note to Recommendation 9)

Recommendation 10
Financial institutions should maintain, for at least five years, all necessary records on transactions, both domestic or international, to enable them to comply swiftly with information requests from the competent authorities. Such records must be sufficient to permit reconstruction of individual transactions (including the amounts and types of currency involved if any) so as to provide, if necessary, evidence for prosecution of criminal activity.

Financial institutions should keep records on the identification data obtained through the customer due diligence process (e.g. copies or records of official identification documents like passports, identity cards, driving licenses or similar documents), account files and business correspondence for at least five years after the business relationship is ended.

The identification data and transaction records should be available to domestic competent authorities upon appropriate authority.
(See Interpretative Note to Recommendation 10)

Recommendation 11
Financial institutions should pay special attention to all complex, unusual large transactions, and all unusual patterns of transactions, which have no apparent economic or visible lawful purpose. The background and purpose of such transactions should, as far as possible, be examined, the findings established in writing, and be available to help competent authorities and auditors.
(See Interpretative Note to Recommendation 11)

Recommendation 12
The customer due diligence and record-keeping requirements set out in Recommendations 5, 6, and 8 to 11 apply to designated non-financial businesses and professions in the following situations:

(a) Casinos – when customers engage in financial transactions equal to or above the applicable designated threshold.
(b) Real estate agents - when they are involved in transactions for their client concerning the buying and selling of real estate.
(c) Dealers in precious metals and dealers in precious stones - when they engage in any cash transaction with a customer equal to or above the applicable designated threshold.
(d) Lawyers, notaries, other independent legal professionals and accountants when they prepare for or carry out transactions for their client concerning the following activities:

- buying and selling of real estate;
- managing of client money, securities or other assets;
- management of bank, savings or securities accounts;

- organisation of contributions for the creation, operation or management of companies;
- creation, operation or management of legal persons or arrangements, and buying and selling of business entities.

(e) Trust and company service providers when they prepare for or carry out transactions for a client concerning the activities listed in the definition in the Glossary.

(See Interpretative Note to Recommendation 12)

Reporting of suspicious transactions and compliance

Recommendation 13
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).
(See Interpretative Note to Recommendation 13)

Recommendation 14
Financial institutions, their directors, officers and employees should be:

(a) 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.
(b) Prohibited by law from disclosing the fact that a suspicious transaction report (STR) or related information is being reported to the FIU.
(See Interpretative Note to Recommendation 14)

Recommendation 15
Financial institutions should develop programmes against money laundering and terrorist financing. These programmes should include:

(a) The development of internal policies, procedures and controls, including appropriate compliance management arrangements, and adequate screening procedures to ensure high standards when hiring employees.
(b) An ongoing employee training programme.
(c)An audit function to test the system.
(See Interpretative Note to Recommendation 15)

Recommendation 16
The requirements set out in Recommendations 13 to 15, and 21 apply to all designated non-financial businesses and professions, subject to the following qualifications:
(a) 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.
(b) 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.
(c) 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.
(See Interpretative Notes: Recommendation 16 and Recommendations 5, 12, and 16)

Other measures to deter money laundering and terrorist financing

Recommendation 17
Countries should ensure that effective, proportionate and dissuasive sanctions, whether criminal, civil or administrative, are available to deal with natural or legal persons covered by these Recommendations that fail to comply with anti-money laundering or terrorist financing requirements.

Recommendation 18
Countries should not approve the establishment or accept the continued operation of shell banks. Financial institutions should refuse to enter into, or continue, a correspondent banking relationship with shell banks. Financial institutions should also guard against establishing relations with respondent foreign financial institutions that permit their accounts to be used by shell banks.

Recommendation 19 *[deleted on 22 October 2004]*

Recommendation 20
Countries should consider applying the FATF Recommendations to businesses and professions, other than designated non-financial businesses and professions, that pose a money laundering or terrorist financing risk.

Countries should further encourage the development of modern and secure techniques of money management that are less vulnerable to money laundering.

Measures to be taken with respect to countries that do not or insufficiently comply with the FATF Recommendations

Recommendation 21
Financial institutions should give special attention to business relationships and transactions with persons, including companies and financial institutions, from countries which do not or insufficiently apply the FATF Recommendations. Whenever these transactions have no apparent economic or visible lawful purpose, their background and purpose should, as far as possible, be examined, the findings established in writing, and be available to help competent authorities. Where such a country continues not to apply or insufficiently applies the FATF Recommendations, countries should be able to apply appropriate countermeasures.

Recommendation 22
Financial institutions should ensure that the principles applicable to financial institutions, which are mentioned above are also applied to branches and majority owned subsidiaries located abroad, especially in countries which do not or insufficiently apply the FATF Recommendations, to the extent that local applicable laws and regulations permit. When local applicable laws and regulations prohibit this implementation, competent authorities in the country of the parent institution should be informed by the financial institutions that they cannot apply the FATF Recommendations.

Regulation and supervision

Recommendation 23
Countries should ensure that financial institutions are subject to adequate regulation and supervision and are effectively implementing the FATF Recommendations. Competent authorities should take the necessary legal or regulatory measures to prevent criminals or their associates from holding or being the beneficial owner of a significant or controlling interest or holding a management function in a financial institution.
For financial institutions subject to the Core Principles, the regulatory and supervisory measures that apply for prudential purposes and which are also relevant to money laundering, should apply in a similar manner for anti-money laundering and terrorist financing purposes.

Other financial institutions should be licensed or registered and appropriately regulated, and subject to supervision or oversight for anti-money laundering purposes, having regard to the risk of money laundering or terrorist financing in that sector. At a minimum, businesses providing a service of money or value transfer, or of money or currency changing should be licensed or registered, and subject to effective systems for monitoring and ensuring compliance with national requirements to combat money laundering and terrorist financing. *(See Interpretative Note to Recommendation 23)*

Recommendation 24
Designated non-financial businesses and professions should be subject to regulatory and supervisory measures as set out below.

(a) Casinos should be subject to a comprehensive regulatory and supervisory regime that ensures that they have effectively implemented the necessary anti-money laundering and terrorist-financing measures. At a minimum:

- casinos should be licensed;
- competent authorities should take the necessary legal or regulatory measures to prevent criminals or their associates from holding or being the beneficial owner of a significant or controlling interest, holding a management function in, or being an operator of a casino
- competent authorities should ensure that casinos are effectively supervised for compliance with requirements to combat money laundering and terrorist financing.

(b) Countries should ensure that the other categories of designated non-financial businesses and professions are subject to effective systems for monitoring and ensuring their compliance with requirements to combat money laundering and terrorist financing. This should be performed on a risk-sensitive basis. This may be performed by a government authority or by an appropriate self-regulatory organisation, provided that such an organisation can ensure that its members comply with their obligations to combat money laundering and terrorist financing.

Recommendation 25
The competent authorities should establish guidelines, and provide feedback which will assist financial institutions and designated non-financial businesses and professions in applying national measures to combat money laundering and terrorist financing, and in particular, in detecting and reporting suspicious transactions.
(See Interpretative Note to Recommendation 25)

INSTITUTIONAL AND OTHER MEASURES NECESSARY IN SYSTEMS FOR COMBATING MONEY LAUNDERING AND TERRORIST FINANCING

Competent authorities, their powers and resources

Recommendation 26
Countries should establish a 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.
(See Interpretative Note to Recommendation 26)

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. Countries are also encouraged to use other effective mechanisms such as the use of permanent or temporary groups specialised in asset investigation, and co-operative investigations with appropriate competent authorities in other countries.
(See Interpretative Note to Recommendation 27)

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.

Recommendation 29
Supervisors should have adequate powers to monitor and ensure compliance by financial institutions with requirements to combat money laundering and terrorist financing, including the authority to conduct inspections. They should be authorised to compel production of any information from financial institutions that is relevant to monitoring such compliance, and to impose adequate administrative sanctions for failure to comply with such requirements.

Recommendation 30
Countries should provide their competent authorities involved in combating money laundering and terrorist financing with adequate financial, human and technical resources. Countries should have in place processes to ensure that the staff of those authorities are of high integrity.

Recommendation 31
Countries should ensure that policy makers, the FIU, law enforcement and supervisors have effective mechanisms in place which enable them to co-operate, and where appropriate co-ordinate domestically with each other concerning the development and implementation of policies and activities to combat money laundering and terrorist financing.

Recommendation 32
Countries should ensure that their competent authorities can review the effectiveness of their systems to combat money laundering and terrorist financing systems by maintaining comprehensive statistics on matters relevant to the effectiveness and efficiency of such systems. This should include statistics on the STR received and disseminated; on money laundering and terrorist financing investigations, prosecutions and convictions; on property frozen, seized and confiscated; and on mutual legal assistance or other international requests for co-operation.

Transparency of legal persons and arrangements

Recommendation 33
Countries should take measures to prevent the unlawful use of legal persons by money launderers. 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. In particular, countries that have legal persons that are able to issue bearer shares should take appropriate measures to ensure that they are not misused for money laundering and be able to demonstrate the adequacy of those measures. Countries could consider measures to facilitate access to beneficial ownership and control information to financial institutions undertaking the requirements set out in Recommendation 5.

Recommendation 34
Countries should take measures to prevent the unlawful use of legal arrangements by money launderers. In particular, countries should ensure that there is adequate, accurate and timely information on express trusts, including information on the settlor, trustee and beneficiaries, that can be obtained or accessed in a timely fashion by competent authorities. Countries could consider measures to facilitate access to beneficial ownership and control information to financial institutions undertaking the requirements set out in Recommendation 5.

INTERNATIONAL CO-OPERATION

Recommendation 35
Countries should take immediate steps to become party to and implement fully the Vienna Convention, the Palermo Convention, and the 1999 United Nations International Convention for the Suppression of the Financing of Terrorism. Countries are also encouraged to ratify and implement other relevant international conventions, such as the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the 2002 Inter-American Convention against Terrorism.

Mutual legal assistance and extradition

Recommendation 36
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. In particular, countries should:

(a) Not prohibit or place unreasonable or unduly restrictive conditions on the provision of mutual legal assistance.
(b) Ensure that they have clear and efficient processes for the execution of mutual legal assistance requests.
(c) Not refuse to execute a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.
(d) Not refuse to execute a request for mutual legal assistance on the grounds that laws require financial institutions to maintain secrecy or confidentiality.

Countries should ensure that the powers of their competent authorities required under Recommendation 28 are also available for use in response to requests for mutual legal assistance, and if consistent with their domestic framework, in response to direct requests from foreign judicial or law enforcement authorities to domestic counterparts.

To avoid conflicts of jurisdiction, consideration should be given to devising and applying mechanisms for determining the best venue for prosecution of defendants in the interests of justice in cases that are subject to prosecution in more than one country.

Recommendation 37
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.

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 co-ordinating seizure and confiscation proceedings, which may include the sharing of confiscated assets.
(See Interpretative Note to Recommendation 38)

Recommendation 39
Countries should recognise money laundering as an extraditable offence. Each country should either extradite its own nationals, or where a country does not do so solely on the grounds of nationality, that country should, at the request of the country seeking extradition, submit the case without undue delay to its competent authorities for the purpose of prosecution of the offences set forth in the request. Those authorities should take their decision and conduct their proceedings in the same manner as in the case of any other offence of a serious nature under the domestic law of that country. The countries concerned

should cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecutions.

Subject to their legal frameworks, countries may consider simplifying extradition by allowing direct transmission of extradition requests between appropriate ministries, extraditing persons based only on warrants of arrests or judgements, and/or introducing a simplified extradition of consenting persons who waive formal extradition proceedings.

Other forms of co-operation

Recommendation 40
Countries should ensure that their competent authorities provide the widest possible range of international co-operation to their foreign counterparts. There should be clear and effective gateways to facilitate the prompt and constructive exchange directly between counterparts, either spontaneously or upon request, of information relating to both money laundering and the underlying predicate offences. Exchanges should be permitted without unduly restrictive conditions. In particular:

(a) Competent authorities should not refuse a request for assistance on the sole ground that the request is also considered to involve fiscal matters.
(b) Countries should not invoke laws that require financial institutions to maintain secrecy or confidentiality as a ground for refusing to provide co-operation.
(c) Competent authorities should be able to conduct inquiries; and where possible, investigations; on behalf of foreign counterparts.

Where the ability to obtain information sought by a foreign competent authority is not within the mandate of its counterpart, countries are also encouraged to permit a prompt and constructive exchange of information with non-counterparts. Co-operation with foreign authorities other than counterparts could occur directly or indirectly. When uncertain about the appropriate avenue to follow, competent authorities should first contact their foreign counterparts for assistance.

Countries should establish controls and safeguards to ensure that information exchanged by competent authorities is used only in an authorised manner, consistent with their obligations concerning privacy and data protection.
(See Interpretative Note to Recommendation 40)

GLOSSARY

BENEFICIAL OWNER
the natural person(s) who ultimately owns or controls a customer and/or the person on whose behalf a transaction is being conducted. It also incorporates those persons who exercise ultimate effective control over a legal person or arrangement.

CORE PRINCIPLES
the Core Principles for Effective Banking Supervision issued by the Basel Committee on Banking Supervision, the Objectives and Principles for Securities Regulation issued by the International Organization of Securities Commissions, and the Insurance Supervisory Principles issued by the International Association of Insurance Supervisors.

DESIGNATED CATEGORIES OF OFFENCES
- participation in an organised criminal group and racketeering;
- terrorism, including terrorist financing;
- trafficking in human beings and migrant smuggling;
- sexual exploitation, including sexual exploitation of children;
- illicit trafficking in narcotic drugs and psychotropic substances;
- illicit arms trafficking;
- illicit trafficking in stolen and other goods;
- corruption and bribery;

- fraud;
- counterfeiting currency;
- counterfeiting and piracy of products;
- environmental crime;
- murder, grievous bodily injury;
- kidnapping, illegal restraint and hostage-taking;
- robbery or theft;
- smuggling;
- extortion;
- forgery;
- piracy; and
- insider trading and market manipulation.

When deciding on the range of offences to be covered as predicate offences under each of the categories listed above, each country may decide, in accordance with its domestic law, how it will define those offences and the nature of any particular elements of those offences that make them serious offences.

DESIGNATED NON-FINANCIAL BUSINESSES AND PROFESSIONS

a. Casinos (which also includes internet casinos).
b. Real estate agents.
c. Dealers in precious metals.
d. Dealers in precious stones.
e. Lawyers, notaries, other independent legal professionals and accountants – this refers to sole practitioners, partners or employed professionals within professional firms. It is not meant to refer to 'internal' professionals that are employees of other types of businesses, nor to professionals working for government agencies, who may already be subject to measures that would combat money laundering.
f. Trust and Company Service Providers refers to all persons or businesses that are not covered elsewhere under these Recommendations, and which as a business, provide any of the following services to third parties:

- acting as a formation agent of legal persons;
- acting as (or arranging for another person to act as) a director or secretary of a company, a partner of a partnership, or a similar position in relation to other legal persons;
- providing a registered office; business address or accommodation, correspondence or administrative address for a company, a partnership or any other legal person or arrangement;
- acting as (or arranging for another person to act as) a trustee of an express trust;
- acting as (or arranging for another person to act as) a nominee shareholder for another person.

DESIGNATED THRESHOLD

the amount set out in the Interpretative Notes.

FATF RECOMMENDATIONS

refers to the Forty Recommendations and to the FATF Special Recommendations on Terrorist Financing

FINANCIAL INSTITUTIONS

means any person or entity who conducts as a business one or more of the following activities or operations for or on behalf of a customer:

1. Acceptance of deposits and other repayable funds from the public.[5]
2. Lending. [6]

[5] This also captures private banking.
[6] This includes inter alia: consumer credit; mortgage credit; factoring, with or without recourse; and finance of commercial transactions (including forfaiting).

3. Financial leasing.[7]
4. The transfer of money or value.[8]
5. Issuing and managing means of payment (e.g. credit and debit cards, cheques, traveller's cheques, money orders and bankers' drafts, electronic money).
6. Financial guarantees and commitments.
7. Trading in:
   - money market instruments (cheques, bills, CDs, derivatives etc.);
   - foreign exchange;
   - exchange, interest rate and index instruments;
   - transferable securities;
   - commodity futures trading.
8. Participation in securities issues and the provision of financial services related to such issues.
9. Individual and collective portfolio management.
10. Safekeeping and administration of cash or liquid securities on behalf of other persons.
11. Otherwise investing, administering or managing funds or money on behalf of other persons.
12. Underwriting and placement of life insurance and other investment related insurance.[9]
13. Money and currency changing.

When a financial activity is carried out by a person or entity on an occasional or very limited basis (having regard to quantitative and absolute criteria) such that there is little risk of money laundering activity occurring, a country may decide that the application of anti-money laundering measures is not necessary, either fully or partially.

In strictly limited and justified circumstances, and based on a proven low risk of money laundering, a country may decide not to apply some or all of the Forty Recommendations to some of the financial activities stated above.

LEGAL ARRANGEMENTS
express trusts or other similar legal arrangements.

LEGAL PERSONS
bodies corporate, foundations, anstalt, partnerships, or associations, or any similar bodies that can establish a permanent customer relationship with a financial institution or otherwise own property.

PAYABLE-THROUGH ACCOUNTS
correspondent accounts that are used directly by third parties to transact business on their own behalf.

POLITICALLY EXPOSED PERSONS (PEPS)
individuals who are or have been entrusted with prominent public functions in a foreign country, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials. Business relationships with family members or close associates of PEPs involve reputational risks similar to those with PEPs themselves. The definition is not intended to cover middle ranking or more junior individuals in the foregoing categories.

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[7] This does not extend to financial leasing arrangements in relation to consumer products.
[8] This applies to financial activity in both the formal or informal sector e.g. alternative remittance activity. See the Interpretative Note to Special Recommendation VI. It does not apply to any natural or legal person that provides financial institutions solely with message or other support systems for transmitting funds. See the Interpretative Note to Special Recommendation VII.
[9] This applies both to insurance undertakings and to insurance intermediaries (agents and brokers).

SHELL BANK
a bank incorporated in a jurisdiction in which it has no physical presence and which is unaffiliated with a regulated financial group.

STR
suspicious transaction reports.

SUPERVISORS
the designated competent authorities responsible for ensuring compliance by financial institutions with requirements to combat money laundering and terrorist financing.

THE INTERPRETATIVE NOTES TO THE FATF RECOMMENDATIONS WERE ADOPTED BY THE PLENARY OF THE FATF ON THE 22ND OCTOBER 2003.

General information

1. Reference in this document to "countries" should be taken to apply equally to "territories" or "jurisdictions".
2. Recommendations 5-16 and 21-22 state that financial institutions or designated non-financial businesses and professions should take certain actions. These references require countries to take measures that will oblige financial institutions or designated non-financial businesses and professions to comply with each Recommendation. The basic obligations under Recommendations 5, 10 and 13 should be set out in law or regulation, while more detailed elements in those Recommendations, as well as obligations under other Recommendations, could be required either by law or regulation or by other enforceable means issued by a competent authority.
3. Where reference is made to a financial institution being satisfied as to a matter, that institution must be able to justify its assessment to competent authorities.
4. To comply with Recommendations 12 and 16, countries do not need to issue laws or regulations that relate exclusively to lawyers, notaries, accountants and the other designated non-financial businesses and professions so long as these businesses or professions are included in laws or regulations covering the underlying activities.
5. The Interpretative Notes that apply to financial institutions are also relevant to designated non-financial businesses and professions, where applicable.

Interpretative Note to Recommendations 5, 12 and 16

The designated thresholds for transactions (under Recommendations 5 and 12) are as follows:

- Financial institutions (for occasional customers under Recommendation 5) - USD/EUR 15,000.
- Casinos, including internet casinos (under Recommendation 12) - USD/EUR 3000.
- For dealers in precious metals and dealers in precious stones when engaged in any cash transaction (under Recommendations 12 and 16) - USD/EUR 15,000.
  Financial transactions above a designated threshold include situations where the transaction is carried out in a single operation or in several operations that appear to be linked.

(See Recommendation 5, Recommendation 12 and Recommendation 16)

Interpretative Note to Recommendation 5 *(Thresholds Interpretative Note)*

Customer due diligence and tipping off

1. If, during the establishment or course of the customer relationship, or when conducting occasional transactions, a financial institution suspects that transactions relate to money laundering or terrorist financing, then the institution should:

a) Normally seek to identify and verify the identity of the customer and the beneficial owner, whether permanent or occasional, and irrespective of any exemption or any designated threshold that might otherwise apply.

b) Make a STR to the FIU in accordance with Recommendation 13.

2. Recommendation 14 prohibits financial institutions, their directors, officers and employees from disclosing the fact that an STR or related information is being reported to the FIU. A risk exists that customers could be unintentionally tipped off when the financial institution is seeking to perform its customer due diligence (CDD) obligations in these circumstances. The customer's awareness of a possible STR or investigation could compromise future efforts to investigate the suspected money laundering or terrorist financing operation.

3. Therefore, if financial institutions form a suspicion that transactions relate to money laundering or terrorist financing, they should take into account the risk of tipping off when performing the customer due diligence process. If the institution reasonably believes that performing the CDD process will tip-off the customer or potential customer, it may choose not to pursue that process, and should file an STR. Institutions should ensure that their employees are aware of and sensitive to these issues when conducting CDD.

CDD for legal persons and arrangements

4. When performing elements (a) and (b) of the CDD process in relation to legal persons or arrangements, financial institutions should:

a) Verify that any person purporting to act on behalf of the customer is so authorised, and identify that person.

b) Identify the customer and verify its identity - the types of measures that would be normally needed to satisfactorily perform this function would require obtaining proof of incorporation or similar evidence of the legal status of the legal person or arrangement, as well as information concerning the customer's name, the names of trustees, legal form, address, directors, and provisions regulating the power to bind the legal person or arrangement.

c) Identify the beneficial owners, including forming an understanding of the ownership and control structure, and take reasonable measures to verify the identity of such persons. The types of measures that would be normally needed to satisfactorily perform this function would require identifying the natural persons with a controlling interest and identifying the natural persons who comprise the mind and management of the legal person or arrangement. Where the customer or the owner of the controlling interest is a public company that is subject to regulatory disclosure requirements, it is not necessary to seek to identify and verify the

identity of any shareholder of that company.

The relevant information or data may be obtained from a public register, from the customer or from other reliable sources.

Reliance on identification and verification already performed

5. The CDD measures set out in Recommendation 5 do not imply that financial institutions have to repeatedly identify and verify the identity of each customer every time that a customer conducts a transaction. An institution is entitled to rely on the identification and verification steps that it has already undertaken unless it has doubts about the veracity of that information. Examples of situations that might lead an institution to have such doubts could be where there is a suspicion of money laundering in relation to that customer, or where there is a material change in the way that the customer's account is operated which is not consistent with the customer's business profile.

Timing of verification

6. Examples of the types of circumstances where it would be permissible for verification to be completed after the establishment of the business relationship, because it would be essential not to interrupt the normal conduct of business include:

- Non face-to-face business.
- Securities transactions. In the securities industry, companies and intermediaries may be required to perform transactions very rapidly, according to the market conditions at the time the customer is contacting them, and the performance of the transaction may be required before verification of identity is completed.
- Life insurance business. In relation to life insurance business, countries may permit the identification and verification of the beneficiary under the policy to take place after having established the business relationship with the policyholder. However, in all such cases, identification and verification should occur at or before the time of payout or the time where the beneficiary intends to exercise vested rights under the policy.

7. Financial institutions will also need to adopt risk management procedures with respect to the conditions under which a customer may utilise the business relationship prior to verification. These procedures should include a set of measures such as a limitation of the number, types and/or amount of transactions that can be performed and the monitoring of large or complex transactions being carried out outside of expected norms for that type of relationship. Financial institutions should refer to the Basel CDD paper (section 2.2.6.) (Guidance Paper on Customer Due Diligence for Banks issued by the Basel Committee on Banking Supervision in October 2001) for specific guidance on examples of risk management measures for non-face to face business.

Requirement to identify existing customers

8. The principles set out in the Basel CDD paper concerning the identification of existing customers should serve as guidance when applying customer due diligence processes to institutions engaged in banking activity, and could apply to

other financial institutions where relevant.

Simplified or reduced CDD measures

9. The general rule is that customers must be subject to the full range of CDD measures, including the requirement to identify the beneficial owner. Nevertheless there are circumstances where the risk of money laundering or terrorist financing is lower, where information on the identity of the customer and the beneficial owner of a customer is publicly available, or where adequate checks and controls exist elsewhere in national systems. In such circumstances it could be reasonable for a country to allow its financial institutions to apply simplified or reduced CDD measures when identifying and verifying the identity of the customer and the beneficial owner.

10. Examples of customers where simplified or reduced CDD measures could apply are:

- Financial institutions – where they are subject to requirements to combat money laundering and terrorist financing consistent with the FATF Recommendations and are supervised for compliance with those controls.
- Public companies that are subject to regulatory disclosure requirements.
- Government administrations or enterprises.

11. Simplified or reduced CDD measures could also apply to the beneficial owners of pooled accounts held by designated non financial businesses or professions provided that those businesses or professions are subject to requirements to combat money laundering and terrorist financing consistent with the FATF Recommendations and are subject to effective systems for monitoring and ensuring their compliance with those requirements. Banks should also refer to the Basel CDD paper (section 2.2.4.), which provides specific guidance concerning situations where an account holding institution may rely on a customer that is a professional financial intermediary to perform the customer due diligence on his or its own customers (i.e. the beneficial owners of the bank account). Where relevant, the CDD Paper could also provide guidance in relation to similar accounts held by other types of financial institutions.

12. Simplified CDD or reduced measures could also be acceptable for various types of products or transactions such as (examples only):

- Life insurance policies where the annual premium is no more than USD/EUR 1000 or a single premium of no more than USD/EUR 2500.
- Insurance policies for pension schemes if there is no surrender clause and the policy cannot be used as collateral.
- A pension, superannuation or similar scheme that provides retirement benefits to employees, where contributions are made by way of deduction from wages and the scheme rules do not permit the assignment of a member's interest under the scheme.

13. Countries could also decide whether financial institutions could apply these simplified measures only to customers in its own jurisdiction or allow them to do for customers from any other jurisdiction that the original country is satisfied is in compliance with and has effectively implemented the FATF Recommendations.

Simplified CDD measures are not acceptable whenever there is suspicion of

money laundering or terrorist financing or specific higher risk scenarios apply.

(See Recommendation 5)

Interpretative Note to Recommendation 6

Countries are encouraged to extend the requirements of Recommendation 6 to individuals who hold prominent public functions in their own country.

(See Recommendation 6)

Interpretative Note to Recommendation 9

This Recommendation does not apply to outsourcing or agency relationships.

This Recommendation also does not apply to relationships, accounts or transactions between financial institutions for their clients. Those relationships are addressed by Recommendations 5 and 7.

(See Recommendation 9)

Interpretative Note to Recommendation 10 and 11

In relation to insurance business, the word “transactions” should be understood to refer to the insurance product itself, the premium payment and the benefits.

(See Recommendation 10 and Recommendation 11)

Interpretative Note to Recommendation 12

The designated thresholds for transactions (under Recommendations 5 and 12) are as follows:

- Financial institutions (for occasional customers under Recommendation 5) - USD/EUR 15,000.
- Casinos, including internet casinos (under Recommendation 12) - USD/EUR 3000.
- For dealers in precious metals and dealers in precious stones when engaged in any cash transaction (under Recommendations 12 and 16) - USD/EUR 15,000.
  Financial transactions above a designated threshold include situations where the transaction is carried out in a single operation or in several operations that appear to be linked.

(See Recommendation 12)

Interpretative Note to Recommendation 13

The reference to criminal activity in Recommendation 13 refers to:

a) all criminal acts that would constitute a predicate offence for money laundering in the jurisdiction; or

b) at a minimum to those offences that would constitute a predicate offence as required by Recommendation 1.

Countries are strongly encouraged to adopt alternative (a). All suspicious transactions, including attempted transactions, should be reported regardless of the amount of the transaction.

In implementing Recommendation 13, suspicious transactions should be reported by financial institutions regardless of whether they are also thought to involve tax matters. Countries should take into account that, in order to deter financial institutions from reporting a suspicious transaction, money launderers may seek to state inter alia that their transactions relate to tax matters.

(See Recommendation 13)

Interpretative Note to Recommendation 14 *(tipping off)*

Where lawyers, notaries, other independent legal professionals and accountants acting as independent legal professionals seek to dissuade a client from engaging in illegal activity, this does not amount to tipping off.

(See Recommendation 14)

Interpretative Note to Recommendation 15

The type and extent of measures to be taken for each of the requirements set out in the Recommendation should be appropriate having regard to the risk of money laundering and terrorist financing and the size of the business.

For financial institutions, compliance management arrangements should include the appointment of a compliance officer at the management level.

(See Recommendation 15)

Interpretative Note to Recommendation 16 *(Thresholds Interpretative Note)*

1. It is for each jurisdiction to determine the matters that would fall under legal professional privilege or professional secrecy. This would normally cover information lawyers, notaries or other independent legal professionals receive from or obtain through one of their clients: (a) in the course of ascertaining the legal position of their client, or (b) in performing their task of defending or representing that client in, or concerning judicial, administrative, arbitration or mediation proceedings. Where accountants are subject to the same obligations of secrecy or privilege, then they are also not required to report suspicious transactions.

2. Countries may allow lawyers, notaries, other independent legal professionals and accountants to send their STR to their appropriate self-regulatory organisations, provided that there are appropriate forms of co-operation between these organisations and the FIU.

(See Recommendation 16)

Interpretative Note to Recommendation 19

(Recommendation deleted 22 October 2004)

(See Recommendation 19)

Interpretative Note to Recommendation 23

Recommendation 23 should not be read as to require the introduction of a system of regular review of licensing of controlling interests in financial institutions merely for anti-money laundering purposes, but as to stress the desirability of suitability review for controlling shareholders in financial institutions (banks and non-banks in particular) from a FATF point of view. Hence, where shareholder suitability (or "fit and proper") tests exist, the attention of supervisors should be drawn to their relevance for anti-money laundering purposes.

(See Recommendation 23)

Interpretative Note to Recommendation 25

When considering the feedback that should be provided, countries should have regard to the FATF Best Practice Guidelines on Providing Feedback to Reporting Financial Institutions and Other Persons.

(See Recommendation 25)

Interpretative Note to Recommendation 26

Where a country has created an FIU, it should consider applying for membership in the Egmont Group. Countries should have regard to the Egmont Group Statement of Purpose, and its Principles for Information Exchange Between Financial Intelligence Units for Money Laundering Cases. These documents set out important guidance concerning the role and functions of FIUs, and the mechanisms for exchanging information between FIU.

(See Recommendation 26)

Interpretative Note to Recommendation 27

Countries should consider taking measures, including legislative ones, at the national level, to allow their competent authorities investigating money laundering cases to postpone or waive the arrest of suspected persons and/or the seizure of the money for the purpose of identifying persons involved in such activities or for evidence gathering. Without such measures the use of procedures such as controlled deliveries and undercover operations are precluded.

(See Recommendation 27)

Interpretative Note to Recommendation 38

Countries should consider:

a) Establishing an asset forfeiture fund in its respective country into which all or a portion of confiscated property will be deposited for law enforcement, health,

education, or other appropriate purposes.

b) Taking such measures as may be necessary to enable it to share among or between other countries confiscated property, in particular, when confiscation is directly or indirectly a result of co-ordinated law enforcement actions.

(See Recommendation 38)

Interpretative Note to Recommendation 40

1. For the purposes of this Recommendation:

- "Counterparts" refers to authorities that exercise similar responsibilities and functions.
- "Competent authority" refers to all administrative and law enforcement authorities concerned with combating money laundering and terrorist financing, including the FIU and supervisors.

2. Depending on the type of competent authority involved and the nature and purpose of the co-operation, different channels can be appropriate for the exchange of information. Examples of mechanisms or channels that are used to exchange information include: bilateral or multilateral agreements or arrangements, memoranda of understanding, exchanges on the basis of reciprocity, or through appropriate international or regional organisations. However, this Recommendation is not intended to cover co-operation in relation to mutual legal assistance or extradition.

3. The reference to indirect exchange of information with foreign authorities other than counterparts covers the situation where the requested information passes from the foreign authority through one or more domestic or foreign authorities before being received by the requesting authority. The competent authority that requests the information should always make it clear for what purpose and on whose behalf the request is made.

4. FIUs should be able to make inquiries on behalf of foreign counterparts where this could be relevant to an analysis of financial transactions. At a minimum, inquiries should include:

- Searching its own databases, which would include information related to suspicious transaction reports.
- Searching other databases to which it may have direct or indirect access, including law enforcement databases, public databases, administrative databases and commercially available databases.

Where permitted to do so, FIUs should also contact other competent authorities and financial institutions in order to obtain relevant information.

(See Recommendation 40)