

國際學碩士學位論文

Possibilities and Limitations of Patriot Act
for Combating Financing Terrorism :

Analysis of Title III of PATRIOT Act and Case Studies

대테러자금 차단에 있어 애국법의 가능성과 한계 :

애국법 3장에 대한 분석과 사례 연구 중심으로

2008年 2月

서울大學校 國際大學院

國際學科 國際協力 專攻

姜 聲 容

© Copyrights by Sung Yong Kang 2008

All rights reserve

【Abstract】

Sung Yong Kang

After September 11 attack, Bush administration needed to open a new front of war against terrorism, Combating Financing of Terrorism, to supplement former strategies that have failed. To win the war on Financing of Terrorism, US took initiative role to establish strong Anti-Money Laundering system in international community, which is essential to detect the money laundering, indispensable component of Financing Terrorism. One of measures US took was legislating PATRIOT act. Especially, Title III of PATRIOT act(INTERNATIONAL MONEY LAUNDERING ABATEMENT AND ANTI-TERRORIST FINANCING ACT OF 2001) established strong Anti-Money Laundering provisions into domestic financial institutions not to be used by terrorists for money laundering and gave Secretary of Treasury power to impose special measures, which can be regarded as smart bombs to non-cooperative foreign jurisdictions or financial institutions.

In this thesis, I analyzed Title III of The PATRIOT act, researched the process of enforcing SEC.311 of PATRIOT act to foreign states and financial institutions, and its effects to them, by analyzing three cases(Myanmar and its financial institutions, Banco Delta Asia, Commercial Bank of Syria) which special measures were imposed on Primary money laundering concerns.

Through the research, I found that PATRIOT act provided enhanced possibilities to combat financing terrorism by establishing International Anti-Money Laundering

Regime and Suppressing States sponsoring Terrorism and its illicit activities.

However, I recognized that there still exist many obstacles to overcome and new obstacles would appear, even if International Anti-money Laundering Regime is perfectly established. In addition, sanction effects of PATRIOT act to suppress states sponsoring terrorism have conditions to be activated and limitations on its effect to terrorism.

The PATRIOT act of U.S. have made enormous progress for combating financing terrorism, by increasing the possibility to win the war on Financing of Terrorism and lessening the limitations than before, though still remain. No one can assure that Terrorism can be completely eradicated, but, as long as there exist possible improvement, U.S. should keep its initiative role for combating financing terrorism to win the war on Terrorism and this initiative role of US would be better to be exercised in the collective framework of International organizations not to be regarded as pursuing Neo-colonialism.

Key words : Combating Financing of Terrorism, Anti-Money Laundering, Title III of the Patriot Act, SEC. 311 of PATRIOT act

【Table of Contents】

I . Introduction	1
II. PATRIOT Act as a tool for Combating Financing of Terrorism	3
1. Title III of the PATRIOT Act	3
2. General AML obligations to Financial institutions	3
2.1 Establishing AML programs(USAPA 321, 352)	3
2.2 Reporting Suspicious Activities	4
2.3 Verifying the Identity of Customers	5
2.4 Due diligence Measures for Certain Types of Accounts Involving Foreign Persons	5
2.5 Ban of ties with by U.S. Banks with Foreign Shell banks	6
2.6 Information Sharing	6
2.7 Sanctions for failure	7
3. Smart Bomb to Money Laundering	7
III. Application of SEC.311 of PATRIOT Act in practice	9
1. Overall review	9
2. Myanmar Case	12
2.1 Allegations	12
2.1-1 Myanmar	12
2.1-2 Asian Wealth Bank(AWB) and May Flower Bank(MFB)	15
2.2 Effects to Myanmar and AWB and MFB	16
3. Banco Delta Asia Case	21

3.1 allegations	21
3.2 Effects to BDA	24
3.3 Effects to Macao	29
3.4 Effects to North Korea	30
4. Commercial Bank of Syria	37
4.1 Allegations	37
4.2 Effects to Syria and Commercial bank of Syria	40
IV. Possibilities and Limitations of PATRIOT Act	45
1. Making International Anti-Money Laundering Regime - Rule making effects	45
1.1 Conflict with Political motivations	52
1.2 Using Non-bank channels and underground economy	55
1.3 Low cost of terrorist attacks	57
1.4 Difficulties in identifying source of funding	59
2. Suppressing state sponsoring terrorism and its illicit activities- collective Sanction effects	60
2.1 Economic calculation : NK - soft target, Syria - Hard Target ..	64
2.2 Increasing Terrorist organizations and Terrorists, decreasing sponsoring states	66
V. Implications and Recommendations	68
【Bibliography】	73
【국문초록】	78

I . Introduction

The September 11th attack made U.S. recognize that U.S. war on terrorism can no longer be limited to arresting terrorist after they have infiltrated its territory, but rather it must be fought on multiple fronts. It was determined from the September 11th attack that the efforts of the U.S. to fight against terrorism by seeking out their social network and human resources(directors, operators, or other terrorist members) and bringing them to justice through the use of the military had failed. In addition, terrorist groups are becoming smaller and more decentralized by using more advanced skills, so tracking them is becoming more difficult. In addition, even if someone in a high position of authority within a terrorist group is arrested, it is not difficult for the group to find someone else replace him in their decentralized organization.

Therefore, the Bush administration needed to open a new front of war against terrorism, by waging a war against the financing of terrorism, which intends to eradicate the terrorist and its organizations by looking to prevent them from accessing their assets and funds. This new strategy made the war be fought not on the battle field but in the halls of financial institutions, and winning by the destruction of checkbooks.¹⁾

In response to the September 11th attack, Bush issued an executive order to starve the terrorist of financial support by freezing the assets of

1) Ayers, A, "The financial Action Task Force : The war on Terrorism will not be fought on the battlefield", New York school Journal of Human Right, (2002), pp.449~459.

individuals, entities and corporations who commit, threaten to commit or support terrorism,²⁾ on September 25th, 2001.

In order to win the war on financing terrorism, it required not only freezing the money itself, but it was also essential to eradicate the mechanism of financing. Since the financing of terrorism always use the process of money laundering to make it difficult for investigators to track the source of money, the measures to detect and punish the money laundering activities were needed.

Before the September 11th attack, legislation for Anti-money laundering(hereinafter AML) have been stalled in Congress by the opposition of the Financial Industry over the concern of privacy issues. However, after the attack, The National Commission on Terrorist Attacks upon the United States, commonly known as the 9-11 Commission, recommended that "vigorous efforts to track terrorist financing must remain front and center in U.S. counterterrorism efforts."³⁾ and Congress moved to address this concern with strong resolve, by passing the PATRIOT Act. The PATRIOT Act is a substantial anti-terrorism package, covering 350 different subjects areas and referencing 40 different agencies. Among those, I will focus my attention on Title III of the PATRIOT Act(INTERNATIONAL MONEY LAUNDERING ABATEMENT AND ANTI-TERRORIST FINANCING ACT OF 2001) which consisted of provisions dealing with anti-money laundering in

2) Executive Order No.13224, 66 C.F.R. 186 (Sept.25, 2001)

3) NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, "THE 9-11 COMMISSION REPORT", p.382.

order to combat the financing of terrorism and find its possibilities and limitations by analyzing the cases of how Title III of the PATRIOT Act was applied.

II. PATRIOT Act as a tool for Combating Financing of Terrorism

1. Title III of the PATRIOT Act

Title III of the PATRIOT Act contained extensive provisions designed to improve the government's anti-money laundering efforts. The act not only strengthens the existing BSA system by expanding the types of financial institutions covered, but it also vests in the Treasury with broad new powers to examine financial institutions and prohibit suspects accounts.⁴⁾

2. General AML obligations to Financial institutions

2.1 Establishing AML programs(USAPA 321, 352)

The PATRIOT Act broadens its scope and toughens its requirement for financial institutions in establishing these AML programs. The banks have been obligated to maintain these programs since 1987 and while establishing

4) Eric J.Gouvin, "Bringing out the big guns::The USA PATRIOT Act, Money laundering, and the War on Terrorism", Baylor law review vol. 55:3, 2003, p. 970.

these programs is nothing new for the banks, it has had a huge impact on non-bank financial institutions, such as broker dealers and investment companies.⁵⁾ It extends the scope of the BSA to non-bank financial institutions, such as Futures commission merchant, commodity trading adviser, commodity pool operator, and so on, as defined in its SEC.321.

By requiring financial institutions to include AML programs⁶⁾ which were defined in its SEC.352, the PATRIOT Act enforces the BSA's requirements for institutions to establish anti-money laundering programs according to the size, location, and activities of the financial institutions as well as maintain these formal anti-money laundering programs.

2.2 Reporting Suspicious Activities

To attract utmost cooperation from financial institutions, SEC. 351 of PATRIOT Act provides the financial institutions which voluntarily files suspicious activities liabilities for such disclosure or for any failure to provide notice of such disclosure to the person who is the subject of such disclosure or any other person identified in the disclosure. Moreover, it widened its scope of obligations to registered brokers and dealers⁷⁾, futures commission merchants, commodity trading advisors, and commodity pool operators⁸⁾, and even to underground banking systems⁹⁾.

5) Id, p. 971

6) Patriot act SEC.352(a) *(A) the development of internal policies, procedures, and controls;(B) the designation of a compliance officer;(C) an ongoing employee training program; and (D) an independent audit function to test programs.*

7) Patriot act SEC.351(a)

2.3 Verifying the Identity of Customers

Prior to the PATRIOT Act, banks were only required to know their customer in three specific situations ; (1) to "verify and record the name and address of the individual presenting a transaction" when a CTR filing was required; (2) when customers purchased certain monetary instruments, such as cashier's check and money orders. and (3)in certain wire transfers.¹⁰⁾ However, the PATRIOT Act allows the Secretary of Treasury to sets the minimum requirement for regulations¹¹⁾establishing standards for financial institutions regarding the identity of customers opening accounts in its 326(a)'(2).

2.4 Due diligence Measures for Certain Types of Accounts Involving Foreign Persons

SEC. 312 of the PATRIOT Act requires financial institutions to establish due diligence policies and procedures to detect suspected money laundering through correspondent accounts and private banking accounts of foreigners. Moreover, it requires additional standards for certain correspondent

8) Patriot act SEC.351(b)

9) Patriot act SEC.359

10) Eric J.Gouvin, supra note 4, p. 971.

11) Patriot act SEC.326, (a)'(2) *(A) verifying the identity of any person seeking to open an account to the extent reasonable and practicable;` (B) maintaining records of the information used to verify a person's identity, including name, address, and other identifying information; and` (C) consulting lists of known or suspected terrorists or terrorist organizations provided to the financial institution by any government agency to determine whether a person seeking to open an account appears on any such list.*

accounts¹²⁾ and requires financial institutions to take reasonable steps to adjust to these standards.

2.5 Ban of ties with by U.S. Banks with Foreign Shell banks

In its SEC. 313, The PATRIOT Act prohibits financial institutions from establishing, maintaining, administering and managing correspondent accounts with unaffiliated foreign shell banks which do not have physical presence in any country. It requires financial institutions to take reasonable steps to ensure that a corresponding net account being maintained or administered by a financial institutions in the United States is not being used indirectly to provide services to a foreign shell bank.

2.6 Information Sharing

After the 9.11 incident, there were criticisms that it could have been prevented, if information between each government agencies were connected and shared appropriately. Due to the importance of information to detect and prevent terrorism, the PATRIOT Act established a host of provisions

12) Patriot act SEC.312(a)(2)(A) (i) *under an offshore banking license; or` (ii) under a banking license issued by a foreign country that has been designated--` (I) as noncooperative with international anti-money laundering principles or procedures by an intergovernmental group or organization of which the United States is a member, with which designation the United States representative to the group or organization concurs; or` (II) by the Secretary of the Treasury as warranting special measures due to money laundering concerns.*

designed to encourage, or in some cases compel, the sharing of information among financial institutions, regulators and law enforcement authorities.¹³⁾

2.7 Sanctions for failure

The PATRIOT Act required federal banking agencies to consider a financial institution's record of combating money laundering when reviewing applications in connection with a bank merger or acquisition,¹⁴⁾ and it also made financial institutions follow the AML by increasing civil¹⁵⁾ and criminal penalties¹⁶⁾ for failure to comply with the money laundering provisions. In essence, the PATRIOT Act has the ability to impose greater sanctions on institutions that fall short of following these guidelines.

3. Smart Bomb to Money Laundering

13) Patriot act, SEC.314,(a)(1)*The Secretary shall, within 120 days after the date of enactment of this Act, adopt regulations to encourage further cooperation among financial institutions, their regulatory authorities, and law enforcement authorities, with the specific purpose of encouraging regulatory authorities and law enforcement authorities to share with financial institutions information regarding individuals, entities, and organizations engaged in or reasonably suspected based on credible evidence of engaging in terrorist acts or money laundering activities.*

14) Patriot act, SEC.327,(b)(1)(B)

15) Patriot act SEC.363, (a) '(7)*The Secretary may impose a civil money penalty in an amount equal to not less than 2 times the amount of the transaction, but not more than \$1,000,000, on any financial institution or agency that violates any provision of subsection (i) or (j) of section 5318 or any special measures imposed under section 5318A.*'

16) Patriot act SEC.363, (b) '(d) *A financial institution or agency that violates any provision of subsection (i) or (j) of section 5318, or any special measures imposed under section 5318A, or any regulation prescribed under subsection (i) or (j) of section 5318 or section 5318A, shall be fined in an amount equal to not less than 2 times the amount of the transaction, but not more than \$1,000,000.*'

In the globalized financial community, if terrorists or Terrorist organizations are able to hide and circumvent their transactions easily by simply moving its money to other states which may have weaker regulations, the efforts that PATRIOT Act imposes on its financial institutions would be futile for combating the financing of terrorism. Moreover, these regulations would serve only to damage its financial institutions by losing its competitive ability due to its rigid financial system which is obliged to the PATRIOT Act, but without achieving its intended end.

Imposing AML to its domestic financial institutions was not enough. It was imperative in making foreign jurisdiction, and their financial institutions to establish strong AML programs as well. SEC.311 of the PATRIOT Act was an effective means to reach this end by requiring both domestic financial institutions and domestic financial agencies to take one or more of five special measures. If the Secretary finds that reasonable grounds exist for concluding that a jurisdiction outside of the United States, one or more financial institutions operating outside of the United States, one or more classes of transactions within, or involving, a jurisdiction outside of the United States, or one or more types of accounts is of primary money laundering concern.¹⁷⁾ Putting measures on other entities in other jurisdictions using its domestic financial institutions which wield enormous power in the international financial institutions greatly enhances its ability to control and affect those within a suspicious jurisdiction, and their financial

17) Patriot act SEC.311, (a)'(a)'(I)

institutions. David Aufhauser has called this 311 of the PATRIOT Act as the "Smart bomb of terrorist financing".¹⁸⁾

There are five measures which include (1)Recordkeeping and reporting of certain financial transactions (2)Information relating to beneficial ownership (3)Information relating to certain payable-through accounts(4)Information relating to certain correspondent accounts(5)Prohibition or conditions on opening or maintaining certain correspondent or payable through accounts.¹⁹⁾

The fifth measure²⁰⁾ of the five special measures is the most powerful weapon which can isolate jurisdictions or financial institutions designated as a primary money laundering concern for the international financial community.

III. Application of SEC.311 of PATRIOT Act in practice

1. Overall review

18) Remarks by Micheal A.Dawson, "Critical Infrastructure Protection and Compliance Policy", Department of the Treasury, July 16, 2003.

19) Patriot act SEC.311, (a)'(b)

20) Patriot act SEC.311, (a)'(b)` (5) *PROHIBITIONS OR CONDITIONS ON OPENING OR MAINTAINING CERTAIN CORRESPONDENT OR PAYABLE-THROUGH ACCOUNTS- If the Secretary finds a jurisdiction outside of the United States, 1 or more financial institutions operating outside of the United States, or 1 or more classes of transactions within, or involving, a jurisdiction outside of the United States to be of primary money laundering concern, the Secretary, in consultation with the Secretary of State, the Attorney General, and the Chairman of the Board of Governors of the Federal Reserve System, may prohibit, or impose conditions upon, the opening or maintaining in the United States of a correspondent account or payable- through account by any domestic financial institution or domestic financial agency for or on behalf of a foreign banking institution, if such correspondent account or payable-through account involves any such jurisdiction or institution, or if any such transaction may be conducted through such correspondent account or payable-through account.*

The special measures, 311 of the PATRIOT Act, have been applied to three states entities(Nauru, Ukraine and Myanmar), eight financial institutions(Myanmar Mayflower Bank, Asia Wealth Bank, Commercial Bank of Syria, Infobank, First Merchant Bank OSH Ltd, VEF Banka, Multibanka, and Banco Delta Asia SARL), and its subsidiary entities located within these eight jurisdiction (Nauru, Ukraine, Myanmar, Syria, Belarus, Turkish Cypriot, Latvia, Macao). After Issuance of Finding and Proposed rule to eleven states and financial entities, Six Final Rule were issued against Myanmar, Myanmar Mayflower Bank, Asia Wealth Bank, Commercial Bank of Syria, VEF Banka, Banco Delta Asia SARL and Two of notice of finding and proposed rule against Ukraine and VEF Banka were rescinded after investigating their respective banks.

In all the cases with the exception of one involved imposing one or more of the information-gathering and record-keeping requirements of the special measures described in section 5318A(b) (1) through (4), Special measure 5 of 5318A(b)(5), which prohibits certain financial institutions (including FCMs and IBs) from establishing, maintaining, administering or managing correspondent or payable-through accounts in the United States for, or on behalf of, entity designated as a primary money laundering concern was issued.

	Finding**	Notice of Proposed Rulemaking	Final Rule	Rescinded
Asia Wealth Bank		<u>11/25/03</u>	<u>4/12/04</u>	
Banco Delta Asia	<u>9/15/05</u>	<u>9/15/05</u>	<u>3/14/07</u>	
Belmetalnergo (Includes Infobank)		<u>9/30/04*</u>	---	
Myanmar		<u>11/25/03</u>	<u>4/12/04</u>	
Commercial Bank of Syria(Includes Syrian LebaneseCommercial Bank)		<u>5/18/04</u>	<u>3/09/06</u>	
First Merchant Bank OSH Ltd.		<u>8/24/04*</u>	---	
First Merchant Finance Ltd.		<u>8/24/04*</u>	---	
First Merchant International Inc.		<u>8/24/04*</u>	---	
First Merchant Trust Ltd.		<u>8/24/04*</u>	---	
FMB Finance Ltd.		<u>8/24/04*</u>	---	
Infobank (Includes Belmetalnergo)		<u>8/24/04*</u>	---	
Multibanka		<u>4/21/05</u>	---	<u>7/12/06</u>
Myanmar Mayflower Bank		<u>11/25/03</u>	<u>4/12/04</u>	
Nauru	<u>12/26/02</u>	<u>4/17/03</u>	---	
Ukraine	<u>12/26/02</u>		---	<u>4/17/03</u>
VEF Banka		<u>4/21/05</u>	<u>7/12/06</u>	
* 9/30/04 notice extended the comment period** For any institutions/jurisdictions without a link in this column, FinCEN issued the finding in the same notice as the proposed rulemaking in the adjacent column.				

(* Chart- I)²¹⁾

21) FinCEN, Rulemaking Listed in Alphabetical Order,
http://www.fincen.gov/reg_section311.html#alphabetical

2. Myanmar Case

2.1 Allegations

2.1-1 Myanmar

In 2001, Myanmar was designated as one of the Non Cooperative Countries and Territories(hereinafter NCCT) for its lack of basic anti-money laundering provisions and weak oversight of the banking sector. According to the Financial Action Task Force(hereinafter FATF)²²⁾, Myanmar lacked a basic set of anti-money laundering provisions. It had not yet criminalized money laundering for crimes other than drug trafficking. There were no anti-money laundering provisions for its financial institutions, nor were there any legal requirement to maintain records and to report suspicious or unusual transactions. There were also significant obstacles to international co-operation by judicial authorities. In addition, no measures were taken to guard against the holding of management functions and control, or acquisition of a significant investment in financial institutions by criminals or their confederates.

In April 2002, following the designation by the FATF as NCCT, the Financial Crimes Enforcement Network(hereinafter FinCEN) issued an advisory to U.S. financial institutions to give enhanced scrutiny to all

22) Financial Action Task Force, "Annual Review of Non-Cooperative Countries and Territories 2005-2006", June 23, 2006.

transactions originating in or routed to or through Myanmar, or involving entities organized or domiciled, or persons maintaining accounts, in Myanmar.²³⁾ On November 3rd, 2003, FATF called upon its members to impose additional countermeasures on Myanmar due to its lack of progress in anti-money laundering law. On November 25th, 2003, FinCEN published a notice that would require certain U.S. financial institutions to take the fifth special measure regarding Myanmar. The additional countermeasures against Myanmar prompted it to issue regulations implementing anti-money laundering laws on December 5th, 2003. However, these regulations were ineffective since it didn't set threshold amounts or time limits. Moreover, the regulations did not address the need for mutual assistance law.²⁴⁾ US which regraded Myanmar as a haven for international trafficking²⁵⁾ and money laundering²⁶⁾ for those illicit money, imposed sanction²⁷⁾ on Myanmar with the Burmese Freedom and Democracy Act of 2003 and Executive Order 13310.

FinCEN published a notice of proposed rule making on November 25, 2003,²⁸⁾ that would require certain U.S. financial institutions to take the fifth special measure

23) Federal Register/Vol.69, No.70/Monday, April 12, 2004/ Rules and Regulations

24) Id.

25) US Identified Myanmar as a major illicit drug producing and drug transiting country pursuant to section 706(1) of the Foreign Relations Authorization Act, Presidential Determination No.2003-14, January 31, 2003

26) Under the Foreign Relations Authorization Act 481(e)(7), Myanmar was defined as major money laundering country "whose financial institutions engage in currency transactions including significant amounts of proceeds from international narcotics trafficking".

27) (1)A ban on the exportation or reexportation, directly or indirectly, of financial services to Myanmar; (2) the blocking of property and interest in property of the State Peace and Development Council of Myanmar and three state-owned foreign trade banks that are in the United States or in the possession or control of U.S. persons; and (3) a ban on the importation of Burmese goods into the United States.

28) 68 CFR 66299

regarding Myanmar. After 5 months of investigating into the Myanmar case, FinCEN issued a final report concluding Myanmar as a "primary money laundering concern" on April 12th, 2004. According to the report issued by FinCEN,²⁹⁾

- Myanmar lacked a basic set of anti-money laundering laws and regulations
- Money laundering was not a criminal offense for crimes other than drug trafficking in Myanmar
- The Burmese Central Bank had no anti-money laundering regulations for financial institutions
- Banks licensed by Myanmar were not legally required to obtain or maintain identification information about their customers.
- Banks licensed by Myanmar were not required to maintain transaction records of customer accounts.
- Myanmar did not require financial institutions to report suspicious transactions.
- Myanmar had significant obstacles in international cooperation with judicial authorities.

With these reasons, the FinCEN determined the imposition of the special measures authorized by section 5318a(b)(5) which prohibit covered financial

29) Federal Register, *supra* note 23.

institutions from establishing, maintaining, administering, or managing in the United States any correspondent or payable-through account for, or on behalf of, a Burmese banking institution.³⁰⁾ This prohibition extended to any correspondent or payable through account maintained in the United States for any foreign bank if the account is used by the foreign bank to provide banking services indirectly to a Burmese banking institutions.³¹⁾ However, the report did allow U.S. financial institutions to maintain otherwise prohibited correspondent accounts to the extent they were permitted pursuant to Executive Order 13310 and the Myanmar-related activities of those accounts were for the purpose of conducting transactions that were exempt from, or licensed pursuant to, Executive Order 13310.³²⁾

2.1-2 Asian Wealth Bank(AWB) and May Flower Bank(MFB)

The Secretary designated Mayflower Bank and Asia Wealth Bank, two of the five largest banks, as "primary money laundering concerns" in November 25, 2003. After 5 months investigation, FieCEN issued its final rule making concluding the banks as "primary money laundering concern". According to the Final rule,³³⁾

They were licensed in Myanmar, a jurisdiction with inadequate anti-money laundering control.

Individuals owning and controlling both banks are linked to drug

30) Id.

31) Id.

32) 31 CFR 103.186 (b)(3)

33) Federal Register, supra note 29.

trafficking and money laundering, including using the banks for such purposes.

The individuals who own and control the banks are linked to the United Wa state Army, an organization involved in narcotic trafficking under the Foreign Narcotics Kingpin Designation Act in the case of the Asia Wealth Bank, the owners are linked to organized crime.

With these reasons, the secretary has determined to authorize the imposition of the special measure by section 5318A(b)(5). Thus, this rule making prohibits covered financial institutions from establishing, maintaining, administering, or managing in the United States any correspondent or payable-through account for, or on behalf of, Mayflower or Asia Wealth Bank. This prohibition extends to any correspondent account maintained for any foreign bank if the account is used to provide banking services indirectly to either of these two banks. Most notably, this measure does not allow U.S. financial institutions to maintain indirect correspondent accounts even to conduct transactions that are exempt from Executive Order 13310.

2.2 Effects to Myanmar and AWB and MFB

After designating Myanmar and its two banks as Myanmar's military "primary money laundering concern" under 311 of PATRIOT Act, the Burmese government denounced the US government sanctions against its banking industry, saying any financial sector problems were partly the fault of developed nations that failed to provide aid.³⁴⁾ These financial sanctions

34) "Myanmar's Private Banking Crisis - a Chronology", Irrawaddy, December 06, 2003

led US financial institutions to cut ties with Myanmar's financial institutions directly and indirectly, isolating Myanmar from international financial institutions. As a result, the Burmese had to rely increasingly on Euros, rather than on U.S. dollars, thus increasing the cost of foreign exchange transactions. The high upkeep of these growing costs forced Myanmar to concede and tried to change its AML in hopes of making the US rescind the rule of the US Treasury as a "primary money laundering concern" and to withdraw its sanctions on its financial institutions.

According to the Annual Review of Non-Cooperative Countries and Territories 2005-2006,³⁵⁾ the Government of Myanmar had enacted significant AML reforms since the designating of as a primary money laundering concern on November 25th, 2003.

In December 2003, Myanmar issued implementing rules for the CMLL (Notification 1/2003) and three orders in January 2004 that specify reporting requirements for financial institutions and property record offices (suspicious transactions and transactions exceeding approximately USD 100,000) and assign certain staff to an FIU. Myanmar adopted the Mutual Assistance in Criminal Matters Law (The State Peace and Development Council Law No. 4/2004) on April 28th, 2004. On October 14th, 2004, Myanmar adopted the Mutual Assistance in Criminal Matters Rules (Notification 5/2004), and Notification 30/2004, which added fraud as a money laundering predicate

35) FATF, *supra* note 22.

offence. On the basis of this progress, the FATF withdrew counter-measures in October 2004. The Law Amending the Control of Money Laundering Law No. 8/2004 was adopted on November 2nd, 2004 and prohibited persons from disclosing the fact that a suspicious or unusual report was filed. In 2004, the Central Bank of Myanmar (CBM) also issued five Instructions requiring banks to, inter alia, exercise customer due diligence, report suspicious and threshold transactions, and designate AML compliance officers. In February 2005, the FATF invited Myanmar to submit an implementation plan.

Myanmar had made progress in implementing its AML regime and continues to take an active role in implementing their legal reforms. In August 2005, the CBM issued Instruction No. 2/2005, which specified on-site inspection procedures. Authorities reported that since 2004, all domestic commercial banks had been inspected for AML compliance. Authorities also reported that the FIU received 7 STRs in 2005, for a total of 19, as well as a total of over 16,000 cash transaction reports.

In addition, Myanmar's military government set up an investigative body, under Central Control Board of Ministry of Home Affairs, to determine whether money and property were obtained by illegal means by the Asia Wealth and Myanmar Mayflower banks. It also launched an investigation into these private banks to determine if they had links to drug trafficking

organizations. The investigation took about three months and was carried out under new regulations for controlling money laundering.³⁶⁾

Finally, on April 1st, 2005, the government withdrew the operating licences of Myanmar Mayflower Bank and Asia Wealth Bank, after investigation into the banks was made for the second time by a five-member preliminary investigative body headed by a deputy home affairs minister. Some observers interpreted this as a move against money-laundering, as both banks have drawn US accusations that they are at least partly controlled by known drug traffickers. The Myanmar government permitted depositors to reclaim their funds, but are required to personally contact the banks. So to speak, the funds belonging to people in custody was taken over by the state of Myanmar.³⁷⁾

Despite the closure of Asia Wealth and Myanmar Mayflower Banks on March 31st, 2005, it was found that serious money laundering problems continued to persist. On August 5th, 2005, GOB officials took over Myanmar Universal Bank (MUB) and arrested its Chairman and Executive Officer. U Tin Sein, owner of the Myanmar Universal Bank sealed by the government, was charged under the country's Narcotic Drugs and Psychotropic Substances Law and the Control of Money Laundering law.³⁸⁾

Referring to the Annual Review of Non-Cooperative Countries and Territories 2005-2006,³⁹⁾

36) Irrawaddy, supra note 34.

37) Asia Pacific Media Service Limited, "Myanmar Payback Time" abstracted from Jane's Defence Weekly, April 15, 2005.
<http://www.asiapacificms.com/articles/myanmar_payback/>

38) "Myanmar private bank owner charged under money laundering laws", Xinhua, April 02, 2007.

- Three banks were shut down in 2005 and their licenses revoked.
- The major shareholder of one bank was convicted of drug trafficking and also convicted under the CMLL on May 15th, 2006. Assets of the banks and individuals had also been seized.
- A number of AML on-site bank inspections and follow-up had also taken place.

The FATF, pleased with Myanmar's progress and willingness to demonstrate adequate AML implementation, agreed to conduct an on-site inspection of its banks. The Myanmar government continued its efforts to implement an effective AML regime. Moreover, in June 2005, Myanmar submitted an application to join the Asia-Pacific Group on Money Laundering, which is affiliated with the FATF. The APG deferred the issue of Myanmar's admission until its next plenary in January 2006.

On March 9th, 2006, as a member of APG, Myanmar committed itself to implementing the international standards for anti-money laundering and combating the financing of terrorism (AML/CFT). Myanmar committed to participate in the APG's Mutual Evaluation Program and was required to undergo a Mutual Evaluation to assess Myanmar's compliance with the international AML/CFT standards.⁴⁰⁾

39) FATF, *supra* note 22.

40) <<http://www.apgml.org/about/newsDetail.aspx?newsID=17>>

Moreover, Myanmar decided to focus their attention in tackling the boundary-less transnational crime with other fellow ASEAN members such as Thailand and Indonesia on issues such as money laundering.⁴¹⁾

On October, 2006, the Financial Action Task Force, a Paris-based intergovernmental group to fight money laundering and terrorist funding, had finally removed Myanmar from its blacklist of non-cooperative countries whose systems support money laundering activities, after a fact-finding trip by an FATF delegation in late September.

3. Banco Delta Asia Case

3.1 allegations

In 2005, American law enforcement agencies, code-named Royal Charm and Smoking Dragon, found hard evidence that support the suspicions that Chinese criminal gangs had smuggled counterfeit American currency, cigarettes and drugs made in North Korea into the United States.

It also uncovered a money trail that led to the former Portuguese colony of Macao ,where United States investigators concluded that criminals linked to North Korea were laundering their earnings.⁴²⁾ The results of these

41) "General News Service: Myanmar to cooperate with Indonesia in fighting money laundering", Xinhua ,Sep 12, 2006.

42) David Lague and Donald Greenlees, "The Money Trail That Linked North Korea to Macao", The New York Times, April 11, 2007

investigations, prompted United States officials to impose financial sanctions against Banco Delta Asia, a small, family-owned bank in Macao.

Banco Delta Asia located in the Macao Special Administrative Region in China which has been identified as "jurisdiction of primary concern."⁴³⁾ by International Narcotics Strategy Control Report (INCSR)⁴⁴⁾. It was also notified as the "major money laundering concern" under the 311 of the PATRIOT Act by the FinCEN on September 20th, 2005.⁴⁵⁾ As a result, FinCEN proposed a rule imposing special measures against Banco Delta Asia.⁴⁶⁾ After eighteen months of investigation, FinCEN determined that there existed reasonable grounds for designating Banco Delta Asia as a financial institution of "primary money laundering concern".

According to the final report issued by FinCEN,⁴⁷⁾Banco Delta Asia:

- Provided financial services for more than 20 years to multiple North Korean entities tied to illicit activities, offering, in exchange for a fee, financial access to the banking system with little oversight or control and surreptitious multi-million dollar cash deposits and withdrawals without conducting due diligence to verify the source of unusually large

43) "major money laundering countries whose financial institutions involving significant amounts of proceeds from international narcotics-trafficking."
<www.state.gov/g/inl/rls/nrcrpt/2005/vol2/html/42388.htm>

44) INCSR reported, in March 2005, that Macao's lack of adequate controls and regulatory oversight of the banking and gaming industries has led to an environment that can be exploited by money launderers.

45) Federal Register/Vol. 70, No. 181/Tuesday, September 20, 2005/Notices

46) Id.

47) Federal Register/Vol. 72, No. 52/Monday, March 19, 2007/Rules and Regulations,

cash deposits, served North Korean clients connected to entities involved with trade in narcotics, counterfeit U.S. currency and counterfeit cigarettes, including front companies suspected of laundering millions of dollars in cash through BDA

- Serviced business accounts knowing the account holders were a front for North Korean banks that had formed the accounts as a cover to disguise the North Korean connection, with BDA helping to obscure the connection to the North Korean banks and acting as if the accounts were business accounts, rather than what they actually were, conduits for North Korean banks to link into the international financial system
- Had its legitimate business activities significantly outweighed by its involvement with money laundering and other financial crimes with respect to general institutional practices
- Failed to obtain and keep adequate information about identity and customer business activities
- Failed to retain and control documents relating to its largest bulk cash
- Failed to take reasonable measures to identify suspicious activity and bulk cash transactions inconsistent with the stated business of its clients
- Failed to follow its own policies, such as screening for counterfeit
- Failed to rate the risk of its clients and monitor high-risk clients
- Failed to use sufficient information technology when manual systems inadequate

- Failed to audit the adequacy of its compliance department
- Failed to regularly update BDA anti-money-laundering policies with new information and best practices

As a result, the U.S. imposed the fifth special measure(31 U.S.C. 5318A(b)(5)) against Banco Delta Asia which authorizes the prohibition of, or imposition of conditions upon, the opening or maintaining of correspondent or payable-through accounts by any domestic financial institution or domestic financial institution for, or on behalf of, a foreign financial institution found to be of primary money laundering concern.

3.2 Effects to BDA

By the Article 85(1) of the Financial System Act of Macao, new delegates were appointed and intervened in the management of BDA.⁴⁸⁾ The Administrative Committee had full authority to run the bank and was accountable only to the Macao government. Moreover, all former head of the bank's nine departments had been terminated and the Administrative

48) 1. perform an inventory of the assets and liabilities of the Bank and a report of the respective valuation criteria as at 17 September 2005, and provide a description of major changes in the assets and liabilities of the Bank between 17 September 2005 and close of business 20 September 2005, inclusive;
 2. perform an investigation into the operation of the Bank in relation to the allegation contained in the FinCEN report covering the period 01 January 2002 to 17 September 2005("the relevant period")
 3. review internal control system including but not limited to anti0money laundering; and
 4. assess the corporate governance standards of BDA

Committee had appointed a team of individuals from outside the Bank to run each of these departments.

The probing into the BDA's activities and the firing of former executives caused depositors to make a "run" on the bank in Macao and within six days following the notice, depositors withdrew exceeding 34% of the Bank's total deposits.⁴⁹⁾ According to report of E&Y, compilation of BDA's adjusted net assets totalled MOP 318 million as of September 17th, 2005, but during the period of the bank "run" which lasted for three days until September 20th, 2005, customers deposits had decreased by MOP 325 million. On the other hand the net amount due from banks had decreased MOP 126 million, and a loan of MOP 507 million had been obtained from the Macao Government to maintain the liquidity of the bank.⁵⁰⁾ In addition all of Banco Delta Asia's U.S. correspondent banks have notified the BDA of the termination of their correspondent accounts with the bank. More importantly, the report cause a crisis in confidence from the bank's depositors. In addition, since the beginning of February 2006, the bank has been advised that two Japanese banks, Bank of Tokyo-Mitsubishi UGJ and Mizuho Corporate Bank, and three South Korean banks, Korea Exchange Bank, Shinhan Bank, and the National Federation of Fisheries Cooperatives have suspended all transaction with it as a result of FinCEN's notice.⁵¹⁾ The bank

49) Collier Shannon Scott, Comments to William J. Fox, Director of Financial Crimes Enforcement Network, October 17, 2005

50) Banco Delta Asia S.A.R.L. Report to The administrative Committee, 16 December 2005.

51) Collier Shannon Scott, Comments to William D. Langford, Associate Director, Regulatory Policy and Programs Division, Financial Crimes Enforcement Network, February 15, 2006.

had now lost correspondent banking relationships with U.S., European, and Asian bank.⁵²⁾

Since then the Bank had terminated all accounts of and businesses and would no longer provide financial services of any kind to North Korean entities and non-North Korean entities that do business with North Korean enterprises.⁵³⁾ On November 15th, 2005, the new management of BDA confirmed that all North Korean related accounts had been closed and that all of the funds in these accounts were being held in suspended accounts, at the discretion of the Macao Monetary Authority.

Also BDA tried to find and solve problems in its banking system. The Macao government retained Ernst&Young LLP to lead an investigation into matters relating to BDA prior to its involvement with North Korean business, and requested the assistance of Ernst&Young to produce a report because the government was concerned with BDA's systemic flaws.

It found that there have been many loopholes in Bank's AML but found no evidence that linked the bank with distributing of counterfeit currency or had any involvement in money laundering according to Banco Delta Asia S.A.R.L. Report to the Administrative Committee,⁵⁴⁾

52) Id.

53) Collier Shannon Scott, *supra* note 49.

54) Banco Delta Asia S.A.R.L. Report to The administrative Committee, *supra* note 50.

- The bank acknowledged that high value deposit of bank notes received from NK entities were subjected to a lower standard of check than would be available if all notes were otherwise sent .
- In addition, the bank's AML and KYC procedures did not fully comply with the AMCM's Anti-Money laundering Guideline For Authorized Credit Institutions. While the bank failed to fully satisfy KYC standards, there was a lack of sufficient contemporaneous KYC data available over files on North Korean Entity customers. Moreover, there were no systematic approach to seeking and securing such data and no policy or procedure, either policy manuals.
- Concerned over transactions with North Korean banks, the bank was on notice that the AMCM considered the BDA's business with North Korean banks as risky. Even after the issuance of the AMCM's report, the bank continued to accept large quantities of physical bank notes and bullion from North Korean parties without having adequate knowledge of the underlying commercial nature of the transactions. Not only transactions with North Korean banks, but also transactions with non-Korean bank customers lack tangible evidence showing that adequate KYC due diligence had been performed.
- Moreover, the BDA had outdated written policy relating to AML and KYC with no evidence of internal review by relevant

management on a regular basis, and lacked review of AML procedures by the internal audit department. In addition, the role and responsibilities of the Compliance Department were not well defined as well as delays in reporting suspicious transactions to proper authorities. There were weaknesses in the KYC process such as the fact that it was not standardized nor consistently applied cross all the banks and its various departments. In addition, these regulations were not updated for existing bank customer nor any policy dictating what should be done if KYC procedures cannot be completed adequately.

In order to address all these deficiencies, the BDA worked with Deloitte & Touche Forensic Services Limited to implement AML policies, complied with international standards, upgraded its information technology systems, and hired a temporary compliance officer until they could search for a permanent compliance officer.⁵⁵⁾ Deloitte provided a high level framework for international standard AML policies and procedures which were implemented by BDA. Under this three-phase program which was finished in 2006, BDA now had the ability to identify and assess risks according to geography, client type, product, channels of distribution, and other relevant factors and international standard AML.⁵⁶⁾

55) Heller Ehrman llp, Comments to Mr.Jamal El-hindi, Associate Director for Regulatory policy and programs, FieCEN,, February 15, 2007.

56) Collier Shannon Scott, supra note 51.

However, according to the final report of the Treasury Department, there still existed serious concerns regarding the bank's potential to be used, wittingly or unwittingly, for illicit purposes. According to the result of the investigation, there were multiple North Korean related accounts that the bank did not identify to the accounting firm. Thus concluded that, even with the development of AML in BDA, the totality of the information presented above cast significant doubt upon the commitment of the bank to effectively resolve the ongoing money laundering vulnerabilities .

3.3 Effects to Macao

In order to address situation of the BDA, the Chief Executive of Macao issued an Executive order to appoint delegates to intervene in the management of BDA pursuant to Article 85(1) of the Financial System Act of Macao on September 17th, 2005 . The government of Macao had appointed a three-person administrative committee to take over management of Banco Delta Asia.⁵⁷⁾ According to Article 91 of the Act, the delegates shall submit to the Chief Executive, through the Monetary Authority of Macao, an inventory of the assets and liabilities of the bank and a report of the respective evaluation criteria within 45 days of their appointment. The Chief Executive of Macao had extended the term of the Administrative Committee until the end of September 2006, Executive Decree No.80/2006.

57) Collier Shannon Scott, *supra* note 49.

On November 15th, 2005, the Macao Monetary Authority ordered to terminate all North Korean related accounts and withhold all the funds in suspended accounts for the new Administrative Committee.⁵⁸⁾ The funds which amounts to 25 million dollars remained in the suspended account pending further directions from the Monetary Authority of Macao.⁵⁹⁾

In addition, the Macao Legislature had passed new AML legislation titled "Prevention and Repression of Money Laundering.", Macao SAR law No.2/2006 and CFT legislation titled "Prevention and Repression of the Crime on Terrorism.", Macao SAR Law No.3/2006 and was published in April 2006 in the government's official gazette.

The administrative branch of the Macao government not only passed new legislation, but also took steps to implement and enforce the new AML and CFT laws. The Macao Judicial Police, the Macao Monetary Authority, and the Macao Finance Department, all of which implemented the AML and CFT laws, and representatives of each three entities has formed a Coordination Unit to establish an intra-governmental Financial Intelligence Unit, which were responsible for the enforcement of the AML and CFT legislation.

3.4 Effects to North Korea

58) HellerEhrman LLP, Comments to Brian L. Ferril,esq., Chief Counsel, Financial Crimes Enforcement Network,, December 2, 2005.

59) Id.

On September 20th, 2005, the US Department of Treasury designated Banco Delta Asia as a "primary money laundering concern." The US condemned North Korea saying that North Korean governmental entities and officials laundered the proceeds of narcotics trafficking, counterfeit activities, and other illegal activities through a network of front companies that used financial institutions in Macao for their operations by allotting a sub-section of the background part. It was the first report from the Department of Treasury designating a financial institution for a "primary money laundering concern" due to its transactions with a specific state which had done illicit activities.

After the notice from the U.S Department of Treasury, North Korean entities as well as non-Korean entities that do business with North Korea had all their accounts terminated at BDA.⁶⁰⁾ The bank's lawyer wrote that 50 entities had been closed, including 20 North Korean banks, 11 North Korean trading companies, 9 North Korean citizens, 8 Macao based companies that conducted business with North Korean entities and 2 Macao residents.⁶¹⁾ In addition, on November 15th, 2005, all North Korean related accounts had been closed and that all funds were held in suspended accounts, at the discretion of the Macao Monetary Authority. Moreover, senior officials from the U.S. Treasury Department visited China, Hong Kong, Macao, Singapore, South Korea and Vietnam to convince other banks to cut ties with North Korea. In what U.S officials described as "outreach

60) Collier Shannon Scott, *supra* note 49.

61) David Lague and Donald Greenleess, *supra* note 42.

effort" in remarks delivered in congressional testimony, they warned that it was almost impossible to distinguish between the North's legitimate and illegitimate dealings and urged banks to consider the risks of conducting any business with North Korea.⁶²⁾

Thus, Not only did North Korea lose access to this particular financial institution, other financial institutions began severing its ties with North Korea, not wanting to risk entanglement in North Korean illicit activities and possible exclusion from U.S. financial markets.⁶³⁾The Chinese were miffed that the U.S. had thrown a wrench into the negotiations, but fearing that their banks could also be targeted, they quietly froze a number of North Korean accounts at the Bank of China's Macao branch.⁶⁴⁾ Other countries like Vietnam and Mongolia began to restrict North Korea-linked transactions.⁶⁵⁾ Some two dozen financial institutions across the globe had voluntarily cut back or terminated their business with North Korea.⁶⁶⁾As a consequence of both these direct and indirect effects, North Korea has encountered increasing difficulty executing international financial transaction.⁶⁷⁾

These developments struck North Korea severely, the affect of which was not limited to illegal money or transactions related with North Korea, but

62) Id.

63) Reference of Marcus Noland, an authority on the North Korean economy at the washington based Peterson Institute of International Economics, in David Lague and Donald Greenlees, *supra* note 42.

64) Jay Solomon and Neil King Jr, "How U.S. Used a Bank to Punish North Korea ; Nuclear Talks Are Said to Proceed, as Macao Frees Frozen Accounts", Wall Street Journal, April 12, 2007

65) Id.

66) Stuart Levey, Speech of the Treasury's undersecretary for terrorism and financial intelligence in Washington, Sept. 8, 2006.

67) David Lague and Donald Greenlees, *supra* note 42.

also to a great extent their legal money and those transactions. Foreigners engaged in business in North Korea reported increasing difficulties in executing financial transactions due to the reluctance of foreign financial institutions to deal with North Korean counter parties. Moreover, the declining value of North Korean Won in the black market suggest that the supply of foreign exchange derived from both these licit as well as illicit activities had been drying up.⁶⁸⁾ In the process, access to hard currency became unavailable. Foreign aid groups tied to the United Nations faced difficulties bringing foreign currency in and out of the country.⁶⁹⁾

A few legitimate businesses were also put in the crossfire of the ordeal. For instance⁷⁰⁾, Daedong Credit Bank, a joint venture between North Korea's state-owned Daesong Bank and a Hong Kong-based investment company, said about \$7 million of its funds were frozen in BDA. Of that figure, \$2.6 million were funds owed to its client, British American Tobacco PLC, which ran a small manufacturing facility in Pyongyang in a joint-venture with a North Korean trading firm. In February 2006, Mongolian intelligence officials detained Daedong couriers seeking to deposit \$1 million and 20 million yen in cash at Ulan Bator's Golomt Bank. Daedong said its couriers were carrying cash because North Korea did not have any computerized systems to make money transfers. The money was later cleared as genuine, but the damage had already been done. As you can see enormous economic effects

68) Marcus Noland, "How North Korea Funds Its Regime", Testimony before the Subcommittee on Federal Financial Management, Government Information, and International Security, Committee on Homeland Security and Governmental Affairs United States Senate, Peterson Institute, April 25, 2006

69) Jay Solomon and Neil King Jr, *supra* note 64.

70) *Id.*

were brought directly and indirectly by just the notices of the proposed rule, even before the final ruling.

There are anecdotes which shows how North Korea felt about the BDA rulings from the U.S Treasury, when negotiators met again in Beijing two months later on September 19th, 2005. North Korea 's envoy, Kim Kye Gwan, lashed out during a private plenary session accusing the U.S. of heaping more sanctions on his country and called the BDA action "intolerable," as noted by one U.S. official who was present.

"At first we thought it was one of those typical, blustery North Korean speeches that often go away like a summer shower," he says. "But this one just stayed. They never stopped talking about it."⁷¹⁾

Two days after Thanksgiving, Christopher Hill, the U.S State Department negotiator sat down with Mr. Kim in Beijing. Anxious that North Korea might still be waffling, Mr. Hill warned that if the North Koreans didn't return to the talks ready to make a deal, the U.S. was prepared to increase the financial pressure. "We have the capacity to go after your activities all over the world," he said. "If you want to go open an account on the moon, we can go after that." An account from one U.S. official present at the session, said the response from Mr. Kim was just "Gulp."⁷²⁾

71) Jay Solomon and Neil King Jr, *supra* note 64.

72) *Id.*

The reason why they reacted differently from other sanctions which has been imposed by U.S. is that the North Korean leadership placed so many of their foreign exchange eggs in the BDA basket and the sanctions on the BDA prompted the closure of these accounts have had an unusually effective impact.⁷³⁾ Prior to September of 2005, North Korea was funneling all sorts of money through the BDA on its way to other banks and other accounts without restriction. Thus it was not just the amount of funds tied up that mattered, it was the disruption of their system for transferring foreign exchange for meeting critical needs of the regime.⁷⁴⁾

With these reasons, It was the resolution of BDA accounts of NK that made North Korea absent and attend the six party talk, as you can recognize by seeing the chronology of North Korean behaviors.

After the U.S declared Banco Delta Asia as "primary money laundering concern" by helping North Korea with its illicit activities, North Korea walked out of the nuclear talks in autumn of 2005. It tested a long-range ballistic missile in July of 2006 and then a crude nuclear bomb in October of 2006. After North Korea conducted these tests, the U.N Security Council condemned North Korean testing, further isolating North Korea. However, Christopher Hill reached out to the North Korean counterpart in an effort to restore dialogue and in January 2007, talks of negotiation amongst six country party resumed early this year. On February 13th, an

73) Reference of Brad Babson, Formal World Bank expert on East Asia, in David Lague and Donald Greenlees, *supra* note 42.

74) *Id.*

agreement was announced for a six-party framework for nuclear disarmament of North Korea. The United States agreed to resolve BDA dispute within 30 days, while North Korea agreed that it would begin shutting down its Yongbyon reactor after the resolution.

In the end, the U.S Treasury issued a final ruling against the bank on March 14th, but hinted it would be willing to let North Korea have its money back. On April 10th, it issued a statement saying it would not oppose Macao's returning of more than \$12 million in frozen funds that the United States had considered the fruit of illicit activities.⁷⁵⁾ However, the North Korean regime leaders apparently had not receive all of the funds, and failed to begin dismantling its nuclear reactor as promised. The holders of the frozen accounts were free to withdraw or transfer the money, but there were problems moving the assets, because financial institutions feared that supplying financial service to North Korea would possibly lead to being designated as a "primary money laundering concern" by the U.S Treasury for receiving illicit funds. So, the transfer itself got bogged down as banks in China were afraid of getting involved, and no other financial institutions were willing to supply accounts to North Korea. Although this isolation from international financial transaction did not extend to gold, a main source of North Korean foreign currency revenue, US officials urged the banks not to buy it from North Korea. The chief executive of London Bullion Market Association, Steward Murray said that "the fact that they're on the list does

75) Kevin G. Hall, "U.S. challenged on action against key bank", McClatchy Newspapers, Apr. 16, 2007.

not mean they can deliver to the London market, when we have sanctions, none of the facilities will accept delivery from a company of a country that is subject to these sanctions."⁷⁶⁾ In the same context, market experts also said that the big banks that are major buyer of gold were not likely to flout the spirit of the US treasury order against Banco Delta Asia, through which North Korea exported gold prior to the ban.⁷⁷⁾

4. Commercial Bank of Syria

4.1 Allegations

On May 11th, 2004, President Bush signed an Executive Order implementing sanctions on Syria pursuant to the Syria Accountability and Lebanese Sovereignty Restoration Act of 2003 ("the Act"). With the implementation of these sanctions, the President had demonstrated the U.S. resolved to address the Syrian government's support for terrorist groups, its continued military presence in Lebanon, its pursuit of weapons of mass destruction, and its actions to undermine U.S. and international efforts with respect to the stabilization and reconstruction of Iraq.⁷⁸⁾

Pursuant to the International Emergency Economic Powers Act (IEEPA), the President had authorized the Secretary of the Treasury, in consultation with

76) Jason Lee, "World as gold", The christian Science monitor, January 22, 2007, <<http://www.scmmonitor.com/2007/0122/p04s01-woap.html>>

77) Id.

78) White House, "Fact Sheet: Implementing the Syria Accountability and Lebanese Sovereignty Restoration Act of 2003", May 11, 2004.

the Secretary of State, to freeze, within the jurisdiction of the United States, assets that belong to certain Syrian individuals and government entities.⁷⁹⁾

On May 18th, 2004, FinCEN also issued a notice of proposed rule for additional sanction, designating Commercial Bank of Syria as a "primary money laundering concern" and proposed U.S. financial institutions to sever correspondent accounts with the Commercial Bank of Syria based on money laundering concerns.

According to the Zarate, responsible for terrorist financing and financial crimes at the U.S. Treasury, a U.S. team had audited the Commercial Bank of Syria in an attempt to trace the transfer of funds.⁸⁰⁾ The investigation found that the regime of President Bashar Assad used the state-owned Commercial Bank of Syria to relay hundreds of millions of dollars to Saddam Hussein loyalists in Iraq and the money has been deployed to finance the insurgency against the U.S.-led coalition primarily in Iraq's Sunni Triangle.⁸¹⁾ The Commercial Bank of Syria also held more than \$1 billion in Saddam's accounts on the eve of the U.S.-led war in Iraq in March 2003, which mostly stemmed from Iraqi arms and oil smuggling as well as illegal commissions obtained from Iraqi oil sales overseen by the United Nations.⁸²⁾

79) Id.

80) "Next Stop Syria?", World Tribune, Nov 24, 2004.

81) Id.

82) Id.

After 22 months of investigation, FinCEN issued a final rule concluding the Commercial Bank of Syria as a "primary money laundering concern". According to the final rule issued by FinCEN,⁸³⁾

■ Commercial Bank of Syria was used by criminals to facilitate or promote money laundering. In particular, it was determined that Commercial Bank of Syria had been used as a conduit for the laundering of proceeds generated from the illicit sale of Iraqi oil and had been used by terrorist or persons associated with a terrorist organizations.

■ Any legitimate business use of Commercial Bank of Syria was significantly out weighted by its use to promote or facilitate money laundering and other financial crimes.

■ Commercial Bank of Syria licensed in Syria, had a jurisdiction with very limited money laundering controls

■ Commercial Bank of Syria was under the control of State Sponsor of Terrorism

As a result, the U.S. imposed the fifth special measure(31 U.S.C. 5318A(b)(5) against Commercial Bank of Syria which authorizes the prohibition of, or imposition of conditions upon, the opening or maintaining of correspondent or payable-through accounts by any domestic financial

83) Federal Register / Vol. 71, No. 50 / Wednesday, March 15, 2006 / Rules and Regulations.

institution or domestic financial institution for, or on behalf of, a foreign financial institution found to be of primary money laundering concern.

4.2 Effects to Syria and Commercial bank of Syria⁸⁴⁾

After the issuance of notice of the proposed rule, Syria appointed Doreid Dergham as a general director of Syria's chief public sector bank, the Commercial Bank of Syria. In September 2004, the Syrian banking giant pushed for larger reforms in preparation for a more competitive banking environment.⁸⁵⁾ However, while pursuing reforms of its banking systems, there were no movements to investigate the money laundering concern in Commercial Bank of Syria. Although some banks in Europe which had strong links to America have refused to conduct any further business with Syrian banks in response to the actual or imagined American pressure,⁸⁶⁾ the sanction, the ban on U.S. ties to the Syrian Commercial bank, was regarded as a symbolic sanction for the Syrian government which can be easily circumvented by switching to other financing sources.⁸⁷⁾

Despite the sanction, Commercial Bank of Syria kept its banking operations running, and propelled its banking system reforms. It launched the nation's first credit card, and began offering electronic bill-paying service,⁸⁸⁾ and it

84) Due to characteristic of Commercial Bank of Syria as a governmental bank, Effects to Commercial Bank of Syria will be discussed in the same section with Effects to Syria.

85) Syria Today, September 2004

86) Syria Today, November 2006

87) Mary Crane, "MIDDLE EAST: U.S.-Syrian relations", Council of Foreign Relations, February 18, 2005.

<http://www.cfr.org/publication/7852/middle_east.html>

also started to provide 'E-Notification' service which enabled subscribers to continuously follow up their accounts through notification messages sent either by SMS or e-mails.⁸⁹⁾ The bank completed the computerization of its system and installed some 500 cash machines throughout the country.⁹⁰⁾ With these reforms, Commercial Bank of Syria earned a net profit of \$90 million in 2004, \$300m in 2005 and it was also on the track of rise in the middle of 2006.⁹¹⁾ In addition, the bank expanded its investment to projects in cement, fertilizer and the future stock market operations using its profits and part of its available funds.⁹²⁾ Thus, the operations of Commercial Bank of Syria was not affected as much by the decision of FinCEN.

However, to prevent the possibility of further sanctions on Commercial Bank of Syria and other financial institutions by the U.S, Syria tried to improve its Anti-Money Laundering Law.

According to the International Narcotics Control Strategy Report - 2006⁹³⁾, after designating CBS as primary laundering concern on May 18, 2004.

■ The SARG passed Decree 33 in May 2005, which strengthens the Commission and lays the foundation for a functioning FIU. Under Decree 33, all banks and non-financial institutions are required to file Suspicious Activity Reports (SARs) with the Commission—which

88) Syria Today, News Highlights, October 2005

89) Syria today, Business and Company News, April 2006

90) Syria report, Business and Company News, May 2006

91) Syria Today, November 2006

92) Syria today, Business and Company News, January 2006

93) The Bureau for International Narcotics and Law Enforcement Affairs, "The International Narcotics Control Strategy Report-2006", March 2006.

is acting as the FIU—for all transactions over \$10,000, as well as all suspicious transactions regardless of the amount. The chairmen of Syrian private banks reported that they employ internationally recognized "know your customer" (KYC) procedures to screen transactions and employ their own investigators to check suspicious accounts. In September 2005, the Commission informed banks that they must use KYC procedures to follow up on their customers every three years and maintain records on closed accounts for five years. Non-bank financial institutions are also to file SARs with the Commission.

- Once a SAR has been filed, the Commission has the authority to conduct an investigation, waive bank secrecy on specific accounts in order to gather additional information, share information with the police and judicial authorities, and direct the police to carry out a criminal investigation. In addition, Decree 33 empowers the Governor of the Central Bank, who is also the chairman of the Commission, to share information and sign Memoranda of Understanding (MOUs) with foreign FIUs. In November 2005, the Prime Minister announced that the Commission had completed an internal reorganization, creating four specialized units.
- Decree 33 provides the Commission with a relatively broad definition of what constitutes a crime of money laundering and specifically lists thirteen crimes that are covered under the AML legislation,

including narcotics offenses, fraud, and the theft of material for weapons of mass destruction.

- While a SAR is under investigation, the Commission can freeze accounts of suspected money launderers for a non-renewable period of up to eighteen days. The law also stipulates the sanctions for convicted money launderers. The Commission circulates among its private and public banks the names of suspected terrorists and terrorist organizations listed on the UNSCR 1267 Sanction Committee consolidated list, and it has taken action to freeze the assets of designated individuals.
- The SARG has begun issuing new regulations to entice people to use the banking sector, including offering high interest Certificates of Deposit and allowing Syrians to access more foreign currency from banks when they are traveling abroad. In addition, the SARG has advertised a deadline of mid-January 2006 by which it hopes to pass a Moneychangers Law to regulate the sector. Once the Moneychangers Law is passed, the Commission will have the authority to monitor the sector under Decree 33.

Now, Syria is one of the fourteen founding members of the Middle East and North Africa Financial Action Task Force (MENAFATF), a FATF-style regional body. In 2006, it was scheduled for a mutual evaluation by its peers in MENAFATF. In addition, Syria hosted a legal team from FATF in

early 2006, which assessed its progress in enforcing AML/CFT statutes. In 2005, Syria hosted a team from the Egmont Group regarding the creation of its FIU. Syria has stated its intention to join the Egmont Group in the near future. Syria has been a party to the 1988 UN Drug Convention. In April 2005, it became a party to the International Convention on the Suppression of the Financing of Terrorism. It had signed, but not yet ratified, the UN Convention against Transnational Organized Crime.

In the meantime, the Commercial Bank of Syria struggled to improve its internal Anti-Money Laundering policy. The bank set up a committee assigned with the task of monitoring banking operations, that the committee hold periodical meetings and reports to the Anti-Money Laundering Commission at the Central Bank of Syria.⁹⁴⁾ There is an officer at each of CBS branches who is responsible for operations of their respective branch, and reports any misconduct they observes to the management, as well.⁹⁵⁾ In addition, every client is asked to complete a "Know Your Customer" form from each amount exceeding SP 500,000 they wants to deposit. In addition, CBS circulates to all branches the lists of names of persons considered suspects.⁹⁶⁾

Furthermore, to confront the expected financial disaster which would bring more disconnections with European financial institutions in case of expanded sanction, even to other financial institutions in Syria, the pound was pegged

94) "Syria rejects US accusations on money laundering", 2006 Mena Report, May 09, 2006
<<http://www.menareport.com/en/business/197812/&searchWords=commercial%20bank%20of%20syria>>

95) Id.

96) Id.

to a basket of foreign currencies instead of the US dollar and all foreign exchange operations of the state started to be done in euros instead of dollars since early of 2006.⁹⁷⁾

IV. Possibilities and Limitations of PATRIOT Act

Wolosky. L. and Heifetz. S described the efforts to find the terrorist financing amongst the billions of dollars that flow through global financial markets is more difficult than searching for the proverbial needle in a hay sack and instead is more akin to searching for an indistinguishable needle amongst a stack of needles.⁹⁸⁾

Like this description, tracking down the terrorist assets in this complex and rapid financial transactions is a hard task. However, the U.S. has struggled to develop new weapons to confront the increasing risk of terrorism. The PATRIOT Act which was enacted after the 9.11 incident has made great progress in this difficult task.

1. Making International Anti-Money Laundering Regime - Rule making effects

97) Syria report, November 18, 2006.

98) Wolosky. L. and Heifetz. S. "Financial Aspect of the War on Terror; Regulating Terrorism", Law and Policy in International Business (2002), 34: 3.

In the international financial community where money can be moved in a matter of seconds, attracting other states to participate in the International Anti-Money Laundering regime is crucial for suppressing terrorist finance. As the 2002 National Money Laundering Strategy noted, raising the obligation for U.S. financial institutions will do little good if money launderers or terrorists can escape detection merely by moving funds to countries with weak anti-money laundering regimes.⁹⁹⁾ Money laundering is intrinsically global. If one country or jurisdiction tightens its regulation on money laundering and the financing of terrorism, these activities will quickly shift to a less regulated environment.¹⁰⁰⁾

However, it is apparent that states have often hesitated to equip themselves with restrictive financial legislation because the law can become an obstacle to the free flow of capital, capital which is indispensable to the economy.¹⁰¹⁾ The reality remains true today that in the fight against financing terrorism, it is difficult to persuade states that cannot afford to lose vital income.¹⁰²⁾ Usually, those states, which cannot generate the revenue from non-financial field, without enough natural resources have lax regulations on its financial services to attract the foreign currencies. Due to economic benefits which it could get by maintaining lax financial system, the states would not try to raise its AML standard even with the pressure from

99) Remarks by Micheal A.Dawson, supra note 18.

100) Aninat, Hardy, Johnston, "Comabting Money laundering and the Financing of Terrorism", Finance and development (September 2002), p.44.

101) Jean-Marc Sorel, "Some questions about the definition of Terrorism and the Fight against its financing", EJIL(2003), Vol.14, No.2, p.377.

102) Id.

the international community. Many of these states are small island developing states, like Nauru which was designated as a primary money laundering concern by U.S. Treasury. Nauru has registered more than 450 bank shells¹⁰³⁾, and its offshore banking quickly became a 'laundry' for investors avoiding taxes, drug and other traffickers.¹⁰⁴⁾ In 1998 alone, Nauru was said to have laundered, with substantial kickbacks, \$70 billion of Russian mafioso funds.¹⁰⁵⁾

Due to these holes in the International AML regime, according to the Expert report (directed by Michael Chandler, President of the Group in charge of the application of the sanctions of the United Nations) addressed to the Security Council at the beginning of September 2002, terrorist organizations will have succeeded in transferring most of their funds toward countries where the legislation is more flexible, in Africa, in Asia, and in the Middle-East.¹⁰⁶⁾

103) Nauru specializes in something called a shell bank, which exists only on paper. There are no teller windows, no A.T.M.'s. Indeed, much of a shell bank's activity takes place not on Nauru (or even in the shack) but in "correspondent accounts" in other countries. A correspondent account is just like a checking account -- except it's for an entire bank. Since most banks are required by the country they are registered in to keep a record of every major transaction that goes in and out of such accounts, money can be traced. (Most banks are also required to report suspicious patterns of activity and to know the identity of their customers.) But Nauru permits its shell banks to operate without such encumbrances. While specific clumps of money may enter a Nauruan correspondent account at a real brick-and-mortar bank, the person charged with managing those transactions sees only an unidentified flow of funds passing through. And once the funds have passed on through, they become untraceable. see Jack Hitt, The Billion-Dollar Shack, New York Times Magazine, December 10, 2000.

104) Helen Hughes, "From Riches to Rags: What Are Nauru's Options and How Can Australia Help?", Issue Analysis, No. 50, August 18, 2004.
<<http://www.cis.org.au/IssueAnalysis/ia50/IA50.pdf>>

105) Id.

106)'Al-Qaeda has necessary resources to finance other terrorist attacks',
<www.un.org/french/newscentre>

There have been many movements to make strong international AML regime to fight against terrorism. The International Convention for the suppression of the Financing of Terrorism of 1999 tried to deal with terrorism financing, and the international organization(FATF) had established forty recommendations in 1990, and eight special recommendations on October 31st, 2001 to fight against the laundering of capital. However, various international standards which have been written to guide governments in adopting anti-money laundering policies¹⁰⁷⁾ have had limited effects on states which did not comply with the international standard of AML due to its soft law standard, therefore making it simple for terrorists or terrorist organizations to gain access to their funds and carry out their activities.

Thus, there needed to be a more effective means which could strongly enforces those states by causing damage for not cooperating with AML regime in order to combat financing terrorism effectively.

The PATRIOT Act with its overreaching powers to put measures against 'primary money laundering concern' achieved this role more than any other efforts from the international community.

Through the PATRIOT Act, by just regulating its own financial institutions within its jurisdiction and not to transact with other financial institutions

107) Bruce Zagaris and Scott Ehlers, "Drug Trafficking & Money Laundering", Foreign Policy in Focus, Volume 6, Number 18, May 2001,
<<http://www.fpif.org/briefs/vol6/v6n18launder.html>>

which play a part in helping to launder money, U.S can push other financial institutions and even other states to change its law and policies. It's kind of power making International law by attracting the international cooperation through regulating its own financial institutions. All of this was made possible due to two main factors, one being that the financial system is globalized, entangled through the complex net between other various financial institutions located all over the world and the strong power of the U.S financial institutions.

From the examples of these three cases of which the PARTIOT Act was applied, not only the banks itself which was designated as "primary money laundering concern", but also the state where these financial institutions are located, changed its rules to strengthen their AML. Designating one financial institution is a kind of warning to other financial institutions in its jurisdiction that unless they change their rules and regulate their financial institutions to follow the international standard AML, the state as a whole or other financial institutions in its jurisdiction would be designated as a "primary money laundering concern" and isolated from international financial society. So it forces the state to change its legislations to prevent further sanction on financial institutions in its jurisdiction.

However, the banks isolate themselves not only from being listed as a "primary money laundering concern" by the Treasury of U.S., but also because they have not implemented AML requirements. Therefore since many different forms of identification are unfamiliar to U.S. financial

institutions, the banks may be reluctant to open certain accounts.¹⁰⁸⁾ In addition, there are continuing issues with remote account openings since there are currently no public databases containing information to verify the identification of foreign individuals as there are for U.S. individuals.¹⁰⁹⁾ Therefore, in order to maintain relationships with U.S. financial institutions, potential foreign account holders will have to work closely with the institutions to ensure continued relationships.¹¹⁰⁾ So to prevent those results, financial institutions voluntarily obey the AML which is equally imposed on U.S. financial institutions.

Thus, those states which lack strong AML are strongly encouraged by the PATRIOT Act to improve the AML, not to lose contact with the international financial community which would cost more than gain benefits by maintaining a non transparent financial system. It can be verified by the fact that three states, Syria, Macao, and Myanmar, which had a lower standard of AML, started to cooperate and follow AML endeavors of the international community after the PATRIOT Act was applied to the state and its financial institutions.

Myanmar, just after the notification of Treasury which designated Myanmar and its two financial institutions as primary money laundering concern on November 25, 2005, issued implementing rules for the CMLL in December 2003 and three orders in January 2004 that specify reporting requirements

108) John J. Byrne, "Banks and the USA PATRIOT Act"
<<http://usinfo.state.gov/journals/ites/0904/ijee/byrne.htm>>

109) Id.

110) Id.

for financial institutions and property record offices and assign certain staff to an FIU.¹¹¹⁾ Myanmar has made progress in implementing its AML regime and continued to take active measures to implement their legal reforms and took procedures to investigate and punish the two financial institutions which were designated as a primary money laundering concern.¹¹²⁾

After designating BDA as a primary money laundering concern on September 15, 2005, the Macao Legislature passed CFT legislation titled "Prevention and Repression of the Crime of Terrorism." Macao SAR Law No.3/2006, on March 30th, 2006. The law was published in the Macao government's official gazette on April 10th, 2006 and became effective the next day on April 11th, 2006. Not only had Macao taken steps in adopting the law, but also took measures to implement and enforce the new AML and CFT laws. The Macao Judicial Police, the Macao Monetary Authority, and the Macao Finance Department each promulgated rules to implement the AML and CFT laws. In addition, representatives of each of these three entities had formed a Coordination Unit to establish an intra-governmental Financial Intelligence Unit, which was responsible for the enforcement of the AML and CFT legislation.

After listing the Commercial Bank of Syria as a primary money laundering concern on May 18th, 2005, Syria passed Decree 33 in May 2005, which strengthened the Commission and laid the foundation to improve its AML/CFT regulations. Decree 33 empowered the governor of the Central

111) FATF, *supra* note 22.

112) *Id.*

Bank, who is also the chairman of the Commission, to share information and sign a Memoranda of Understanding (MOUs) with foreign FIUs. It also strengthened the SAR, KYC and provided the Commission with a relatively broad definition of what constitutes a crime of money laundering.

Other states labeled as "primary money laundering concern" such as Nauru, Ukraine, Belarus, Turkish Cyprus, Latvia have also improved their AML requirements. However, insufficiencies in their AML provisions compared with international standards and weak implementation of AML have made the financial institution or the state itself still remained as a concern for primary money laundering with the exception of Ukraine which was revoked from the primary money laundering concern.

The ability of the U.S to maintain current sanctions and impose special measures on new financial entity in the jurisdiction with lower standards of AML has the power to pressure those states continually to improve their AML and warn other states not restricted by the PATRIOT Act to participate in the international AML regime.

1.1 Conflict with Political motivations

Since Sept. 11th, 2001, there has been a growing awareness that weak rule of law is a security threat – whether it is a failed state providing fertile ground for terrorist havens; porous borders or weak regulatory schemes making it easier for malefactors to move themselves or dangerous

items about; or weak financial frameworks permitting the movement of illicit funds or funds used to facilitate illicit ends.¹¹³⁾ And it has become increasingly apparent that, for such reasons, weak rule of law anywhere on the globe can mean aggravated threats for everyone else, including the United States.¹¹⁴⁾ In this case, financial bureaucrats insisting on sound accounting practices for the global financial system, and insisting that the global financial system serve only licit activities, “ferreting out” suspicious transactions, have ended up “lighting a fire” under North Korea and its confederates, threatening North Korea’s already anemic financial flows.¹¹⁵⁾

However, occasionally there have been cases which rule of law was nullified for the political considerations. For example, US Congress passed the Iran-Libya Sanctions Act (ILSA) seeking to prevent European companies from investing in the oil sector in Iran and Libya. The extraterritorial scope of these measures irritated key US allies, but Presidents Clinton and Bush have waived key provisions of each bill to avoid imposing sanctions against allied industrial nations. As a result, these US laws only blocked activities for US firms.¹¹⁶⁾

The Banco Delta Asia (BDA) issue is being discussed on a separate track from the Six-Party Talks, managed by experts from the Treasury Department. In December and January, the Treasury had two rounds of

113) Id.

114) Id.

115) Id.

116) Gary Clyde Hufbauer, Jeffrey J. Schott, Barbara Oegg, "Using Sanctions to Fight Terrorism", Peterson Institute, November 2001.

useful discussions with D.P.R.K. authorities, where the North Koreans provided information about BDA account holders.¹¹⁷⁾

According to the rule of law from the U.S., dirty money from North Korea should not be released freely without being punished, however the U.S. authorized the release for political motivation. The U.S. agreed that the money would be deposited in a North Korean Foreign Trade Bank account within the Bank of China, under the terms that Pyongyang pledged to spend it on humanitarian and educational purpose.¹¹⁸⁾ However, the Bank of China and all other banks refused to accept the money for the reason that it was dirty. What is indicative of this case was that the U.S. was solving this problem not in a legal manner, but in political one. "It's obviously a significant turnabout in policy,"complained David Asher, a former top State Department official who headed efforts to combat illicit activities by North Korea's dictatorship. "The U.S. government has a responsibility to enforce its law irrespective of what is expedient in a diplomatic context."¹¹⁹⁾

Asher advocated that efforts to curtail North Korea's link to criminal activity, and to ensure that China joins the enforcement effort, should not be suspended for the sake of expediency in the disarmament talks in Beijing.¹²⁰⁾ Asher insisted that the movement against Banco Delta Asia was the direct consequence of law enforcement efforts and was not designed as

117) Christopher R. Hill, "North Korea and the Current Status of Six-Party Agreement", Statement Before the House Foreign Affairs Committee, Assistant Secretary for East Asian and Pacific Affairs, February 28, 2007.

118) "U.S. announces to release frozen fund of DPRK for humanitarian use", Xinhua, March 18, 2007.

119) Kevin G. Hall, *supra* note 75.

120) Donald Greenlees and David Lague, "How a U.S. inquiry held up the NK peace talk", International Heritage Tribune, April 11, 2007

political leverage in talks that were taking place simultaneously with North Korea on nuclear disarmament.¹²¹⁾ Financial institutions that obey the rules and regulations of its states, help them legislate strict domestic AML laws that would prevent its financial institutions from transacting with designated financial institutions or state with dirty money. It is especially important to raise the risk of being covered by domestic AML in case that financial institutions refuse to cut the transaction with a designated financial institution by means of covering and disguising those transactions. However, even with legislation, some states will not enforce their laws, if the US who strongly initiated the rules shows the precedent of giving up the application of the rule of law.

If the sanctions against BDA were lifted explicitly to facilitate the six party talk agreement, then it would greatly decrease the credibility and the legitimacy of the PATRIOT Act Section 311. In the meantime, it would give other states and other financial institutions, which have been alerted as primary money laundering concern, ways to evade the investigation and sanctions of PATRIOT Act.

1.2 Using Non-bank channels and underground economy

Formal banking system is now to an extent being controlled and monitored by broadening its scope of the AML toward former non-cooperative states.

¹²¹⁾ Id.

However, informal financial banking system which is hard to track and control can still be used by terrorists to move their money and provide funding for the terrorism, even with the strong international AML regime.

Due to the lack of formal banking services, informal value transfer systems called hawalas, trade-based money laundering, and cash couriers are widespread in developing countries in the Middle East and South Asia.¹²²⁾

Hawalas transfer money from one country to another without actually moving it¹²³⁾, and leaves no paper trail, which means it is hard to track where the money is going in order to combat the financing terrorism since the transactions are based on trust. Even though some countries have adopted laws that require hawalas to formally register and keep records, which is one of the nine Special Recommendations of the FATF, the policy will only work to the extent that hawaladars are willing to do so.¹²⁴⁾ However, it is hard to expect that hawala bankers will voluntarily give up secrecy of the hawala system which have been deeply rooted in the Islamic community. Moreover, due to its secrecy which makes identification of hawaladars difficult, enforcing hawalas to register is almost impossible.

122) In many parts of the developing world, financial systems are repressed: remittances are heavily taxed; foreign exchange transactions are restricted; and artificial interest ceilings lead to shortages so that banks have to ration the limited credit to investors. see, Canadian centre for intelligence and security studies, "Terrorism Financing and Financial system vulnerability : Issues and Challenges", ITAC, Volume 2006-3, p.10.

123) 8 Person A gives the money to a broker (Hawaladar) in country X, who charges her a relatively low fee together with a more favorable exchange rate than what is offered by the bank. The broker then contacts another broker in country Y by phone, fax or email, who gives the money to person B based on a prearranged code word or number. To settle accounts with each other, the broker in country X can either reduce the debt owed by her to the broker in country Y, or else, expect a remittance from the latter. see Id, p.7~8.

124) Id, p.10.

Thus, some have argued that hawalas should be eliminated.¹²⁵⁾ However, forcing many states in the Middle East and South Asia, which hawalas and other informal value transferring system are widespread, to adopt stronger AML has only had the opposite effect of creating a larger market for informal value transferring system and a startup for an underground economy. For example, Commercial Bank of Syria was subject to sanctions on allegations of money laundering, Dergham, the representative of CBS, said sanctions in fact forced dealings underground.¹²⁶⁾ That theme was continued by Cliff Knuckey, a former head of Britain's Scotland Yard Anti-Money Laundering Unit, saying that "the US has created a whole new underground banking system," he said.¹²⁷⁾

Thus, establishing an international AML regime will inadvertently push these informal financial system to go into even more underground, and make suspicious activity harder to detect, as people respond to the new conditions that they face and try to conceal their activities further, or resort to other illegal means.¹²⁸⁾

1.3 Low cost of terrorist attacks

In most cases, cost of terrorism is not really huge money compared with the money which is circulating through the international financial system. In

125) Financial Action Task Force, Report on Money-laundering Typologies (2001-2002)
<<http://www.fatf-gafi.org/dataoecd/29/36/34038090.pdf>>

126) Syria Today, November 2006

127) Id.

128) Canadian centre for intelligence and security studies, supra note 122, p.10.

the 9/11 Commission hearings from the US, it was estimated that the entire preparation of the attacks on the World Trade Center (including the training of commercial pilots, travel expenses, etc.) cost no more than \$500,000¹²⁹⁾ which was less than 'day-to-day' guerrilla warfare, such as using suicide bombers.¹³⁰⁾ In addition, it said that the October 12th, 2002 nightclub bombing in Bali costed under \$35,000, and the bombing of the U.S.S. Cole on October 12th, 2000 under \$50,000.

To make things complicated, the whole money for the terrorist operation would have been split into several transactions. All of the cash transactions were quite routine and in no way would have triggered any suspicion.¹³¹⁾ The law can require all the reporting in the world, but it's very easy to move around cash the way the terrorists did without generating any concern.¹³²⁾

Meanwhile, not only International Anti-Money Laundering Regime would be unable to detect those small transactions to support terrorism, but also decrease the investigating ability by handing over so many useless facts to investigators. Strict reporting sanctions may exacerbate the over-reporting problems that regulators have battled through the 1980s and 1990s in U.S. and thereby make the system less effective.¹³³⁾ These concerns are summed up in a comment from Brad Jasen, the deputy director of technology policy

129) J.M. Winer, "Globalization, terrorist Finance and Global conflict - Time for a White List?" in M. Pieth (ed.) *Financing Terrorism* (Dordrecht, Boston, London : Kluwer Academic Publishers, (2002) 5-40, p.5.

130) David Gold, "Is the war on Terror "Worth it"?", Security policy Working Group 2006, p.1.

131) Eric J.Gouvin, *supra* note, p. 975.

132) *Id.*

133) Eric J.Gouvin, *supra* note 4, p.973.

for the Free Congress Foundation, a conservative think tank in Washington; "The effect of expanding these requirement is to make the haystack bigger. It's not more finely tuning law enforcement tools. It's basically throwing more paperwork at investigators without benefits."¹³⁴⁾

1.4 Difficulties in identifying source of funding

As already explained before, there are different means of financing terrorism other than through the process of laundering money. The money used to finance terrorism is not only dirty money, but also legitimate money which can not be regulated without proper evidences, earned through business¹³⁵⁾, or charitable organization, personal donations. The FATF experts have identified legal sources in the form of: "collection of membership dues and/or subscriptions; sale of publications; speaking tours, cultural and social events; door-to-door solicitation within the community; appeals to wealthy members of the community; and donations of a portion of their personal earnings."¹³⁶⁾

It is also an alarming fact that a significant portion of terrorist funding seems to be coming from charities.¹³⁷⁾ Rudner (2006) reports that "the largest single source of revenue is the diversion to militant organizations of

134) Jeremy Quittner, "Gauging the New Law's consumer Impact", AM. Banker, April 23, 2002, p.11.

135) An important source of funds for the terrorist is the apparently legitimate business run by the network- travel agencies, road construction companies, and Internet firms.

136) Financial Action Task Force, *supra* note 125,

137) "The iceberg beneath the charity - Charities as the source of terrorist finance", *Economist*, Mar 15, 2003, p.67.

the charitable contributions(zakat) which Islam enjoins the faithful to donate...”.¹³⁸⁾Thousands of Islamic banks around the world allocate funds to zakat, in accordance with the sharia (Islamic law) without being subject to any supervision, and these transactions go unrecorded and cannot be identified.¹³⁹⁾ There are so many charities around the world, but no one can exactly know the real intention of transferring of money by the charity before it is used. Moreover, the places that their funding is most necessary are international hot spots, where it's hard to tell the rebels from the victims from the terrorist.¹⁴⁰⁾

2.Suppressing state sponsoring terrorism and its illicit activities- collective Sanction effects

The cooperation from states changing their domestic laws for AML, money laundering and concerned illicit activities, which were one of core source of financing terrorism and state sponsoring terrorism, would make things easier to detect, prevent and punish more than before. However, the most crucial thing which changed the behavior of uncontrolled states was the role of financial institutions expanding from a unilateral sanction of the US to a more collective sanction by accepting strict AML and cutting transactions with those states.

138) Martin Rudner, “Using Financial Intelligence Against the Funding of Terrorism”, International Journal of Intelligence and Counterintelligence, Vol.19, No.1, Spring 2006, p. 42

139) Simona Sapienza, “The Financing of Islamic Terrorism”
<<http://www.zone-h.org/files/82/FIT.doc>>

140) Eric J.Gouvin, supra note 4, p. 977.

There have been many unilateral and multilateral sanctions proposed by US to control states sponsoring terrorism, such as North Korea, Syria and other sponsoring states. However, unilateral US sanctions have not prevented those states from assisting terrorism. Between 1960 and 1970 the success rate of unilateral US sanctions dropped from 62 percent to a mere 17 percent. Low success rates for unilateral sanctions continued in the 1980s and 1990s.¹⁴¹⁾ In contrast, the success rate of all US sanctions cases where the United States was part of a sanctions coalition remained in the 25 percent range over the period from the 1970s to 1990s.¹⁴²⁾ However, there have been only two terrorism-related cases, convincing Sudan to fully cooperate to fight against terrorism and forcing Libya to extradite the suspects for the Pan-Am flight bombing, where the United States succeeded in garnering multilateral support for economic sanctions.¹⁴³⁾

Due to difficulties in obtaining supports from other states, the US Congress sought to extend the reach of unilateral US measures, such as the Iran-Libya Sanctions Act (ILSA) in 1996, an amendment to the Foreign Assistance Act of 1961, Iran Non-Proliferation Act of 2000, by imposing secondary sanctions on firms located in third countries, but failed.¹⁴⁴⁾ However, the PATRIOT Act, with its broad scope and power, could reach this goal by attracting voluntary cooperations from the financial institutions.

141) Gary Clyde Hufbauer, Jeffrey J. Schott, Barbara Oegg, *supra* note 116.

142) *Id.*

143) *Id.*

144) *Id.*

The effects of North Korea proved this in the BDA case. Although the BDA of Macao was the subject of primary money laundering concern of the PATRIOT Act, the fact that North Korea had their dirty money in the BDA made it much harder for the state to transact with other financial institutions all over the world. Only at the first promulgation of the Department of Treasury, notices, designating BDA as primary money laundering concern, helped dealt specifically with North Korea. There was no mention of North Korea's dirty money in its second proposed rule, in its last rules or in its regulations. The regulations were only subjecting its financial institutions to cut ties with BDA, not with North Korea. However, the effects were severing transactions to North Korea as well. For the virtue of financial globalization; complex and interconnected international financial community, the effects to one state or financial institution led to an effect on other states, and institutions. The Treasury of the US did not need to publicly put other regulations on North Korea. The sanction of 311 PATRIOT Act urged financial institutions not to directly or indirectly transact with banks designated with laundering dirty money. When one considers the size of the US financial market, it makes more sense for other financial institutions to adhere to the US in order to maintain transaction with the biggest financial market and strongest financial power. The consequence of continuing to transact with these designated banks could mean being sentenced financial death, as in the case with Commonwealth Bank, Myanmar Mayflower Bank, BDA and other designated

banks. Thus, those wishing to maintain strong connections with the US, would take measures to be cautious and prevent themselves from transacting with dirty money. As the biggest financial power in the international financial community, it was easier for the US to find cooperation from financial institutions which decided their policy upon their economic interest. In contrast, it was more difficult to attract cooperation from states that not only base their decision on economic interest, but also on other interests as well. This led financial sanction to North Korea to take collective effects, although it was unilaterally proposed by the US.

Although the situation with North Korea was resolved due to a political agreement, it became an obstacle to give the state back their illicit funds through a financial transaction. Although the agreement would return the funds back to North Korea, the states in the six party talks failed to find a financial institution that was willing to transact the funds back to North Korea, even after three months prior to the agreement. The Bank of China, which was first considered to open an account to the money, denied to do so as well as the banks in any other states. As long as the funds were considered dirty money, no financial institutions wanted to bear the money of North Korea. In order to evade the effects of a collective sanction by the PATRIOT Act, the only thing North Korea was able to do was take the label of dirty money off by stopping its illicit activities and sponsoring terrorism. Although North Korea was added on the list as one of the countries sponsoring terrorism after the bombing of a South Korean airline

in November 1987 and providing refuge to international terrorists,¹⁴⁵⁾ it was only until the financial sanction was put into place that the world witnessed the changing behavior of North Korea to cooperate after the BDA designations. This sanction was more effective than any other comprehensive sanctions that were ever placed before the state.

2.1 Economic calculation : NK - soft target, Syria - Hard Target

Financial institutions decide their policy based upon their economic interest. The PATRIOT Act became effective because of the voluntary cooperation from the international financial institutions. However, the Patriot Act also has its limitations. Since financial institutions follow their own interest, if benefits outweigh the cost of transacting with these designated financial institutions, they will continue to maintain relations with these entities through means of disguising and covering those transactions.

This limitation can be seen through effects of the PATRIOT Act to Syria and the Commercial Bank of Syria. Syria has long been considered as a state that sponsors terrorism, since its inception in December of 1979 and has been subjected to strict export controls and other economic restrictions. According to sources from the State Department, while there is no evidence of direct Syrian involvement in or support for terrorist actions since 1986, Syria remains on the list due to its continuing supports to Hezbollah and

145) Id.

Hamas, among other Palestinian terrorist groups.¹⁴⁶⁾ Thus, along with the Syria Accountability and Lebanese Sovereignty Restoration Act of 2003 ("the Act"), US decided to impose additional sanctions, under Section 311 of the USA PATRIOT Act. Although there were some banks in Europe that have shut or curtailed their business dealings with Syrian banks in response to the actual or imagined American pressure,¹⁴⁷⁾ the Syrian government and their financial institutions easily circumvented the situation by switching to other financing sources.¹⁴⁸⁾ In addition, despite the sanction, the Bank of Syria differed from other banks such as BDA, AWB, and MFB in that it had managed its banking operation normally, and even broadened its banking services.

The case with Syria was that unlike North Korea, Syria had more economic power than North Korea with rich resources such as oil at their disposal. Therefore other financial institutions were more willing to maintain its relationship with the state despite the risk of displeasing the US. Also, other financial institutions dealing with Syria can find more alternatives to maintain its transactions without being discovered by the US than financial institutions transacting with NK can. Since Syria is more incorporated with the international financial community, financial institutions can disguise its transactions with the state more easily. Moreover, informal value transferring systems such as the hawalas are widespread and are

146) Id.

147) Syria Today, November 2006

148) Mary Crane, *supra* note 87.

commonly used instead of formal financial transaction. In addition, funds for charities which are hard to identify their intention can be used for financing terrorism even with the sanction. When comparing the effects of the PATRIOT Act on North Korea, the state was considered a soft target¹⁴⁹⁾ in financial terms, whereas with states like Syria, the measures from the PATRIOT Act have proven ineffective and therefore was considered a hard target.

The failed trials of the United States to apply similar pressure on Iran in recent years have proven futile. The size of Iranian oil exports and the country's deeper integration into the international financial system has made it much more difficult to isolate.¹⁵⁰⁾ "It is not so easy with Iran, but it has shown great effect on North Korea," said Benita Ferrero-Waldner, the European commissioner for external relations, during a visit to Beijing on Wednesday.¹⁵¹⁾

2.2 Increasing Terrorist organizations and Terrorists, decreasing sponsoring states

Historically, most major acts of terrorism against American citizens and other targets abroad were supported and, in some cases, instigated by state sponsors.¹⁵²⁾ Accordingly, US policy in the 1970s and 1980s focused on

149) David Lague and Donald Greenlees, "Squeeze on Banco Delta Asia hit North Korea where it hurt", Herald Tribune, January 18, 2007.

<<http://www.iht.com/articles/2007/01/18/news/north.php>>

150) Id.

151) Id.

state sponsors and the groups they supported.¹⁵³⁾ However, in the last decade, as the State Department has indicated in its annual reports, signs point to declining state sponsorship of terrorist activities and a rising threat posed by independent terrorist networks such as Osama bin Laden's al Qaeda network.¹⁵⁴⁾ Economical and technological development has helped organizations, and even individuals to equip themselves with the ability to attack one state. It is a new kind of war being fought between individuals or terrorist organizations against the states, rather than the traditional wars between the states.

Although the PATRIOT Act can be an effective means to control the state sponsoring terrorism as it showed its power to change the behaviors of North Korea, it is still limited by its inability to designate and sanction all the numerous individuals and terrorist organizations. Furthermore, even if it can be controlled the history of economic sanctions in the past decade records no instance of success against terrorist groups, such as Hezbollah, Hamas, Abu Nidal, or for that matter, al Qaeda.¹⁵⁵⁾ Thus the effects of the sanction from the PATRIOT Act would be limited only to the states, rather than towards suspected organizations and individuals.

Instead of controlling those minor entities by sanctioning through the PATRIOT Act, the US passed that responsibility to the respective states anticipating them to detect and punish those suspected entities by enforcing

152) Gary Clyde Hufbauer, Jeffrey J. Schott, Barbara Oegg, *supra* note 116.

153) *Id.*

154) *Id.*

155) *Id.*

their AML rules. Through this process, the international anti-money laundering regime effect of the PATRIOT Act would be applied to terrorist organization and terrorists. However, there still exist pitfalls of financial system which can be used and manipulated by a terrorist or terrorist organization even with a higher standard AML, as already explained.

V.Implications and Recommendations

Title III of the PATRIOT Act paved the way to win the war on the financing of terrorism by establishing the International Anti-money Laundering regime. General AML rules of the PATRIOT Act were adopted by many other states. In addition, the PATRIOT Act made the states which had not been cooperative adopt the norms of AML regime by aiming those states and its financial institutions with its smart bomb, SEC.311 of PATRIOT Act. As a result, the holes which had been used by the terrorists and their organizations to move their money are getting smaller. Moreover, this smart bomb has helped sanctioned states, which earn its revenue from illicit activities and sponsor terrorism with its dirty money, by alienating them from international financial community. The sanction effect of the bomb is so enormous that even states which had not been controlled by any

international pressure felt like changing their behavior by being more cooperative with the international regime.

However, there still exist limitations to combat the financing of terrorism, as mentioned before. The terrorists and their organization have been using innovative technology to their advantage more efficiently than the state to evade the rule of law. In addition, they will find other ways to finance terrorism, if they suspect that the state have started to detect how they are channeling their funds. Although no state can fully assure that it will completely track down and eradicate the money used for terrorism, it should continue to improve its initiative of eliminating the source for terrorism.

Combating the financing of terrorism may not be perfect, but it can be better. In order to make the international AML regime more effective, the U.S. should continue to update new strategies to combat the terrorists and their terrorist organization, develop counter-AML strategies, help states to effectively implement AML by educating its human resources, and to provide formal financial systems to lessen the possibility of using informal financial services. In addition, to make its sanctioning effect stronger to control state sponsoring terrorism, the U.S. needs to draw cooperation from other states. Although the PATRIOT Act has helped achieved collective effects through voluntary cooperation from various financial institutions, there is still a fragile balance from financial institutions depending on the outcome of their economic interest. Thus, the collective effect should be backed up by the states. Moreover, it would be better to use a multinational

framework such as United Nations, because the effects of the PATRIOT Act on other states are so huge that they could be regarded as pursuing cultural and economic imperialism accompanying the progressive colonization of the global commons that exist outside of corporate control¹⁵⁶⁾ and encroaching the inherent sovereignty of other states.

Furthermore, the U.S. should not compromise the rule of law for political motivations which can be abused by other states. The September 11th attack was a clear reminder that the weak rule of law was the main threat to the security.

The terrorist can be brought to justice by using the information abstracted from money flow. In doing so, the lives of innocent people can be saved by deteriorating terrorist operational capabilities and their organizational abilities, such as recruiting and training terrorists, building terrorist camp, buying lethal weapons and etc.

In contrast to swift international reactions to concerns over money laundering, South Korea had not established legal and institutional measures for anti-money laundering. Finally, after the September 11th attack, South Korea participated in the International Anti-Money Laundering regime by passing the 「범죄수익은닉의규제및처벌등에관한법률안」 and 「특정금융거래정보의보고및이용등에관한법률안」 in Congress in early September, 2001 and established the Financial Investigation Unit(FIU) in late November, 2001. Although South Korea can be regarded as a safe zone from terrorist attacks, the possibility

156) Jude McCulloch and Sharon Pickering, "Suppressing the financing of Terrorism : Proliferating State crime, Eroding Censure and Extending Neo-Colonialism", BRIT.J.CRIMINOL, (2005) 45, p.482.

of a terrorist attack occurring has increased due to the rapid growing number of immigrants from South-East Asia, the Middle East and the ongoing threats from North Korea. In addition, illicit activities of NK, one of main source of NK's foreign currency revenue, are maintaining deep business relationship with international organized crime organizations who are working in and around the ROK. Establishing strong AML laws in South Korea would prevent possible terrorist suspects from gaining financial support and make it hard for North Korea to maintain these illicit activity networks with international organized groups using South Korea as a place for money laundering and other illicit activities.

However, according to the survey, conducted in 2002, about 28 out of 40 recommendations of FATF, current anti-money laundering legislations in South Korea are insufficient to fully comply with International anti-money laundering standards satisfying only 12 recommendations.¹⁵⁷⁾ These deficiencies in AML legislations were mainly originated from weakness in Suspicious Activity Report System and Know Your Customer provisions.¹⁵⁸⁾ Recently, South Korea has struggled to be a member of the FATF and was invited as an observer to the FATF council from 18th FATF council, 2006, but still there remain shortcomings in AML legislations.¹⁵⁹⁾

In this globalized world, the instability of one state would not be restricted in the state, but be proliferated to other states as well. By supplementing

157) 김홍범, "한국 자금세탁방지제도의 검토", March 12, 2002.

158) Id.

159) 김창균, "조직범죄의 재정적 규제", November 24, 2006.

these deficiencies in AML legislations which exist in South Korea, it should not allow itself to be a hole in International AML regime abused by terrorists. It should be an active cooperator, and even further a prime mover in the region in order to strengthen AML regime not only for other states suffering from terrorism, but also for its own interests.

【Bibliography】

Books and Articles

Aninat, Hardy, Johnston, "Combating Money laundering and the Financing of Terrorism",
Finance and development (September 2002), p.44.

Ayers, A, "The financial Action Task Force : The war on Terrorism will not be fought on
the battlefield", New York school Journal of Human Right, (2002), pp.449~459.

Canadian centre for intelligence and security studies, "Terrorism Financing and Financial
system vulnerability : Issues and Challenges", ITAC, Volume 2006-3, p.10.

Center for Defence Information, "Treasury Acts Against North Korea's Banker as Nuclear
Talks Look Forward", March 30, 2007.

Donald Greenlees and David Lague, "How a U.S. inquiry held up the NK peace talk",
International Heritage Tribune, April 11, 2007.

Eric J.Gouvin, "Bringing out the big guns::The USA PATRIOT Act, Money laundering, and the
War on Terrorism", Baylor law review, vol. 55:3, (2003), p. 970.

Gary Clyde Hufbauer, Jeffrey J. Schott, Barbara Oegg, "Using Sanctions to Fight Terrorism",
Peterson Institute, November 2001.

Jay Solomon and Neil King Jr, "How U.S. Used a Bank to Punish North Korea ; Nuclear
Talks Are Said to Proceed, as Macao Frees Frozen Accounts", Wall Street Journal, April
12, 2007.

Jean-Marc Sorel, "Some questions about the definition of Terrorism and the Fight against its
financing", EJIL(2003), Vol.14, No.2, p.377.

Jeremy Quittner, "Gauging the New Law's consumer Impact", AM. Banker, April 23, 2002,
p.11.

J.M. Winer, "Globalization, terrorist Finance and Global conflict - Time for a White List?" in

- M. Pieth (ed.) Financing Terrorism (Dordrecht, Boston, London : Kluwer Academic Publishers, 2002) 5-40, p.5.
- Jude McCulloch and Sharon Pickering, "Suppressing the financing of Terrorism : Proliferating State crime, Eroding Censure and Extending Neo-Colonialism", BRIT.J.CRIMINOL, (2005) 45, p.482.
- Martin Rudner, "Using Financial Intelligence Against the Funding of Terrorism", International Journal of Intelligence and Counterintelligence, Vol.19, No.1, (Spring 2006), p. 42.
- Kevin G. Hall, "U.S. challenged on action against key bank", McClatchy Newspapers, Apr. 16, 2007.
- Wolosky. L. and Heifetz. S. "Financial Aspect of the War on Terror; Regulating Terrorism", Law and Policy in International Business (2002), 34: 3
- "Myanmar's Private Banking Crisis - a Chronology", Irrawaddy, December 06, 2003.
- "Next Stop Syria?", World Tribune, Nov 24, 2004.
- "General News Service: Myanmar to cooperate with Indonesia in fighting money laundering", Xinhua, Sep 12, 2006.
- "The iceberg beneath the charity - Charities as the source of terrorist finance", Economist, Mar 15, 2003, p.67.
- "U.S. announces to release frozen fund of DPRK for humanitarian use", Xinhua, March 18, 2007.
- 김홍범, "한국 자금세탁방지제도의 검토", March 12, 2002.
- 김창균, "조직범죄의 재정적 규제", November 24, 2006.

Web Pages

- Asia Pacific Media Service Limited, "Myanmar Payback Time" abstracted from Jane's Defence Weekly, April 15, 2005.
- <http://www.asiapacificms.com/articles/myanmar_payback/>

Bruce Zagaris and Scott Ehlers, "Drug Trafficking & Money Laundering", Foreign Policy in Focus, Volume 6, Number 18, May 2001,

<<http://www.fnif.org/briefs/vol6/v6n18launder.html>>

David Gold, "Is the war on Terror "Worth it"?", Security policy Working Group, p.1.

<<http://www.proteusfund.org/snwg/ndfs/Is%20The%20War%20On%20Terror%20Worth%20It.pdf>>

David Lague and Donald Greenlees, "Squeeze on Banco Delta Asia hit North Korea where it hurt", Herald Tribune, January 18, 2007.

<<http://www.ihf.com/articles/2007/01/18/news/north.php>>

David Lague and Donald Greenlees, "The Money Trail That Linked North Korea to Macao", The New York Times, April 11, 2007

<<http://www.state.gov/g/inl/rls/nrcrnt/2005/vol2/html/42388.htm>>

Mary Crane, "MIDDLE EAST: U.S.-Syrian relations", Council of Foreign Relations, February 18, 2005.

<http://www.cfr.org/publication/7852/middle_east.html>

Simona Sapienza, "The Financing of Islamic Terrorism"

<<http://www.zone-h.org/files/82/FIT.doc>>

Helen Hughes, "From Riches to Rags: What Are Nauru's Options and How Can Australia Help?", Issue Analysis, No. 50, August 18, 2004.

<<http://www.cis.org.au/IssueAnalysis/ia50/IA50.pdf>>

John J. Byrne, "Banks and the USA PATRIOT Act"

<<http://usinfo.state.gov/journals/ites/0904/iee/bvrne.htm>>

FieCEN, Rulemaking Listed in Alphabetical Order,

<http://www.fincen.gov/reg_section311.html#alphabetical>

"Myanmar private bank owner charged under money laundering laws", Xinhua, April 02, 2007.

<<http://www.angml.org/about/newsDetail.aspx?newsID=17>>

"Syria rejects US accusations on money laundering", 2006 Mena Report, May 09, 2006

<<http://www.menareport.com/en/business/197812/&searchWords=commercial%20bank%20of%20syria>>

Syria Today

<<http://www.syria-today.com/pkg05/index.php?page=search&ex=2&dir=search&lang=1&StartSearch=1& Keywords=commercial+ bank+ of+ syria>>

Reports, Statements, Comments, Interviews

Banco Delta Asia S.A.R.L. Report to The administrative Committee, 16 December 2005

Collier Shannon Scott, Comments to William J. Fox, Director of Financial Crimes Enforcement Network, October 17, 2005

Collier Shannon Scott, Comments to William D. Langford, Associate Director, Regulatory Policy and Programs Division, Financial Crimes Enforcement Network, February 15, 2006.

Executive Order No. 13224, 66 C.F.R. 186 (Sept. 25, 2001).

Federal Register/Vol. 69, No. 70/Monday, April 12, 2004/ Rules and Regulations.

Federal Register / Vol. 71, No. 50 / Wednesday, March 15, 2006 / Rules and Regulations.R

Federal Register/Vol. 70, No. 181/Tuesday, September 20, 2005/Notices.

Federal Register/Vol. 72, No. 52/Monday, March 19, 2007/Rules and Regulations.

Financial Action Task Force, Annual Review of Non-Cooperative Countries and Territories 2005-2006, June 23, 2006

Financial Action Task Force, Report on Money laundering Typologies 2001-2002.

Heller Ehrman LLP, Comments to Mr. Jamal El-hindi, Associate Director for Regulatory policy and programs, FieCEN,, February 15, 2007.

Heller Ehrman LLP, Comments to Brian L. Ferril, esq., Chief Counsel, Financial Crimes Enforcement Network,, December 2, 2005

Marcus Noland, "How North Korea Funds Its Regime", Testimony before the Subcommittee

on Federal Financial Management, Government Information, and International Security, Committee on Homeland Security and Governmental Affairs United States Senate, Peterson Institute, April 25, 2006

Micheal A.Dawson, Critical Infrastructure Protection and Compliance Policy, Department of the Treasury, July 16, 2003.

NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, "THE 9-11 COMMISSION REPORT", p.382.

Stuart Levey, Speech of the Treasury's undersecretary for terrorism and financial intelligence in Washington, Sept. 8, 2006.

The Bureau for International Narcotics and Law Enforcement Affairs, "The International Narcotics Control Strategy Report-2006", March 2006.

White House,"Fact Sheet: Implementing the Syria Accountability and Lebanese Sovereignty Restoration Act of 2003", May 11, 2004.

【국문초록】

강 성 용

9·11 테러 이후, 부시 행정부는 실패한 대테러 전략을 보완하기 위해 새로운 형태의 대테러전(테러자금차단)을 시작할 필요가 있었다. 이러한 대테러자금차단전에서 이기기 위해서, 미국은 테러자금 조달에 있어서 필수적인 요소인 돈세탁을 규제하기 위하여 국제 사회에 강력한 반돈세탁 체제를 확립하기 위해서 선도적인 역할을 하였는데, 그러한 정책들 중 하나가 바로 애국법(PATRIOT act)이다. 특히, 애국법 3장(2001 국제돈세탁 약화 및 반테러자금법)은 테러리스트들에 의해 미국 국내 금융 기관들이 돈세탁을 위해 사용되어지는 것을 막기 위해 강력한 반돈세탁 조항들을 삽입하였고, 재무부 장관에게 비협조적인 외국 국가들이나 금융 기관들에게 정교한 스마트 폭탄으로 여겨질 수도 있는 특별 조치를 취할 수 있는 권한을 주었다.

이 논문에서는, 위 애국법 3장을 분석하고, 주요 돈세탁 우려지에 대해 특별 조치가 취해진 세 가지 사례(미얀마와 미얀마 금융기관, 방코델타아시아, 시리아상업은행)를 분석함으로서, 애국법 311조가 외국 국가와 금융 기관들에게 행사되어지는 과정과 그 영향력을 연구하였다.

이러한 연구는 애국법이 국제 반돈세탁 체제를 구축하고, 테러지원국과 그 국가들의 불법행위를 억제함으로서 성공적인 대테러자금차단의 가능성을 향상시켰다는 것을 보여주었다.

하지만, 비록 국제 반돈세탁 제도가 완전히 정착될지라도, 여전히 극복해야할 장애가

존재하고 새로운 난관들이 생겨날 것이다. 게다가 테러지원 국가들을 압박하기 위한 애국법의 제재는 모든 경우가 아니라 일정 조건이 충족되어질 때에 효과를 발휘하고, 그 효과에 있어서도 한계가 존재한다.

대테러자금차단에 있어서 미국의 애국법은 성공적인 대테러자금차단을 위한 새로운 가능성들을 제시하였고, 비록 여전히 존재하기는 하지만 테러자금차단을 위한 한계를 과거에 비해서 줄임으로서 많은 성과를 거두었다. 비록 그 누구도 테러가 완벽하게 사라질 것이라고 확신하지는 못하지만, 계속하여 그 가능성이 향상되는 한, 미국은 테러와의 전쟁에서 이기기 위하여 대테러 자금 차단을 위한 선도적인 역할을 하여야 하고, 그 선도적인 역할을 자칫 새로운 형태의 제국주의로 비추어지지 않도록, 국제기구의 집단체제 안에서 행사되어야 한다.

키워드 : 대테러자금차단, 반돈세탁, 애국법 3장, 애국법 311조