

For information

Legislative Council Panel on Security

Sharing of Confiscated Drug Trafficking Proceeds with the United States Government

PURPOSE

Pursuant to a request from the United States Government (USG) for assistance in confiscating the drug proceeds, the Hong Kong Government (HKG) confiscated and realised assets from a drug trafficker and his associates between 1991 and 2008. This paper briefs Members on a proposal to be submitted to the Finance Committee to create a new non-recurrent commitment of HK\$11,912,000, being USG's share of the confiscated assets.

JUSTIFICATION

2. A drug trafficker, LAW Kin Man ("Law") was arrested in Hong Kong in December 1989 for trafficking heroin to the United States (US), and was surrendered to the US in December 1992 pursuant to judicial proceeding. He subsequently pleaded guilty in the US to drug trafficking. Investigation into Law's financial history revealed that he had received more than \$400 million between 1982 and 1989, and there was no apparent legitimate source for the money. Most assets under Law's control in Hong Kong were in the names of his relatives or associates or nominees, or in fictitious names.

3. In June 1992, the USG made a formal request to share in the drug proceeds of Law confiscated in Hong Kong pursuant to the Hong Kong and US Agreement Concerning the Confiscation and Forfeiture of the Proceeds and Instrumentalities of Drug Trafficking ("the Agreement"). The Agreement, in force between 18 January 1991 and 30 June 1997¹, was a

¹ In view of the expiry of "the Agreement", a Hong Kong/US Agreement on Mutual Legal Assistance in Criminal Matters was signed on 15 April 1997, which entered into force on 21 January 2000.

bilateral agreement between the two jurisdictions for combating drug trafficking, and provided for co-operation in the restraint and confiscation or forfeiture of drug trafficking proceeds and instrumentalities. The Agreement was implemented through the Drug Trafficking (Recovery of Proceeds) (Designated Countries and Territories) Order, Chapter 405 sub. leg. A (“DTROPO”).

4. HKG considered the US request in April 1993 and decided, among other things, that the confiscated proceeds be shared with the US on the basis of a 50:50 share of the confiscated proceeds, provided that 20% of the confiscated proceeds should first be withheld by the HKG to cover our costs. (In other words, the actual sharing ratio for Hong Kong and the US is 60:40.) At the same time, the HKG would also share in the assets forfeited in the US on the same basis (i.e. 50:50 after deduction of 20% to cover the USG’s costs). The Legislative Council was informed of the decision in May 1993 (**Annex A**).

5. The USG was informed in May 1993 of the HKG’s decision to share confiscated assets in the Law case, subject to the confiscation of monies ceasing to be open to challenges in courts and the monies to be transferred being appropriated by the Legislative Council. Both sides agreed on the sharing arrangements in June 1993.

6. The Law case involved an enormous range and number of assets (including money in over 300 accounts, company shares and real property), a large number of parties, and resulted in protracted litigation over the years. The asset realisation process had therefore taken a considerable time. The process was finally completed in 2008 with the assets confiscated by the HKG totalling \$185,706,000 (after deduction of receivers fees, legal fees and disbursements and without taking into account interest accruing on the confiscated sum). USG also advised that the assets forfeited in the US came to the value of \$2,025,000.

7. In accordance with the agreed sharing arrangements as outlined in paragraph 4 above, the USG’s share of assets confiscated/forfeited in Hong Kong amounted to \$74,282,000, while Hong Kong’s share in total

The new Hong Kong/US Agreement provides for comprehensive mutual legal assistance in criminal matters, including assistance in the restraint and confiscation of proceeds of crime.

amounted to \$112,234,000. After setting off against Hong Kong's share in the US forfeited proceeds, the US should receive from Hong Kong a net payment of confiscated proceeds of \$73,472,000.

8. The Court is currently holding \$61,560,000 in a deposit account created to hold the confiscated funds, with the rest of the proceeds credited to the General Revenue². It is proposed that the Secretary for Justice gives a direction to the Registrar of the High Court pursuant to section 13(8) of Schedule 2 to DTROPO, to transfer \$61,560,000 to the USG. We shall seek the approval of the Finance Committee to pay the balance of \$11,912,000 to the USG out of the General Revenue. Detailed calculations are at **Annex B**.

BACKGROUND

9. We have all along been cooperating with foreign jurisdictions for the suppression of drug trafficking and combating of money laundering at the international level. In the course of mutual legal assistance, our primary objective is to combat transnational crime. Any financial gain arising from assets confiscated from drug traffickers is nothing more than an additional benefit. Based on the premise of encouraging international cooperation to combat drug trafficking and money laundering, the sharing of confiscated proceeds with the foreign jurisdictions concerned is consistent with the spirit of cooperation and is a reasonable arrangement.

10. A Committee on Asset Sharing (the Committee) was established in 1994 to decide on requests made by overseas jurisdictions pursuant to the DTROPO for sharing of drug proceeds on a case-by-case basis. Since its establishment, the Committee has considered six drug-related cases. To date, Hong Kong has paid confiscated proceeds worth \$44.5 million and \$5.6 million to the US and Australia respectively in relation to these cases, and has received confiscated proceeds worth \$29.6 million from the US.

² Prior to 1995, under DTROPO, proceeds paid into the Court on realisation of confiscated assets were paid into the General Revenue. In order not to inflate both the General Revenue and public expenditure and to shorten the administrative procedures, the DTROPO was amended in 1995 to provide that proceeds obtained on realisation of confiscated assets should be held in a deposit account by the Registrar of the High Court for at least five years before being transferred to the General Revenue. This allows time for a request to share the assets to be made by a foreign jurisdiction, and for a decision to be made on such request.

Details of the cases are summarised at **Annex C**. Among the cases, only a CHAN Ching-wai case required funding approval by the Finance Committee for a commitment of \$16.9 million for paying the USG. The approval was granted on 30 March 1998.

WAY FORWARD

11. We shall submit a proposal to the Finance Committee for its approval to create the non-recurrent commitment for making payment to the USG in early 2011.

Security Bureau
November 2010

LEGISLATIVE COUNCIL BRIEF

**Drug Trafficking (Recovery of Proceeds)
Ordinance (Chapter 405)**

**PROPOSALS ON THE SHARING OF ASSETS
CONFISCATED FROM DRUG TRAFFICKERS**

INTRODUCTION

At the meeting of the Executive Council on 27 April 1993, the Council ADVISED and the Governor ORDERED that the following policy and other proposals should be implemented -

- (a) the request from the United States Government, for a share of the assets confiscated by the Hong Kong Government in the LAW Kin-man case be accepted on the basis of a 50:50 share of the net confiscated assets (i.e. a 40:60 share of the gross assets confiscated in Hong Kong) less 40% of the gross assets confiscated in the United States in their LAW Kin-man case;
- (b) subject to the court ruling upholding the confiscation of LAW Kin-man's assets in Hong Kong, a submission should be made to the Finance Committee of the Legislative Council to appropriate the amount to be given to the United States Government;
- (c) a Committee on Asset Sharing should be established to decide on requests for asset sharing in other cases involving assets valued above HK\$10 million. Requests for a share of assets where the total is HK\$10 million or less should not be entertained; and
- (d) the Drug Trafficking (Recovery of Proceeds) Ordinance should be amended to provide that in future cases, assets confiscated under bilateral drug agreements should be held in a Deposit Account for a period of five years, or until they are shared, whichever is the shorter, before being transferred to the General Revenue.

BACKGROUND AND ARGUMENT

Bilateral Cooperation in the Suppression of Drug Trafficking

2. Hong Kong has concluded eleven bilateral agreements and arrangements with other jurisdictions concerning mutual assistance in the investigation, confiscation and recovery of drug proceeds. The bilateral agreements stipulate that confiscated assets should accrue to the Party in whose territory the assets are located. The agreements also provide for the possibility of sharing such assets. Hong Kong has cooperated with the USA on nine drug cases which have resulted in drug assets amounting to about HK\$300 million being frozen or confiscated in Hong Kong. In the HK-US bilateral agreement, there is a clause stipulating that either Party may transfer the confiscated assets or the proceeds of their sale to the other Party, to the extent permitted by their respective laws upon such terms as may be agreed.

3. The US Government has made a formal request for a 50% share of the assets confiscated by the Hong Kong Government in a particular drug case, involving a drug trafficker known as LAW Kin-man. This is the only request received to date. The US authorities have sought to justify their request by referring to the considerable investigative and litigative resources they have devoted to the case. They have also claimed that their efforts have provided the Hong Kong Government with sufficient grounds to seek the restraint orders against the drug trafficker's assets in Hong Kong.

The Policy on Asset Sharing

4. The main purpose of our bilateral agreements is to provide mutual assistance to suppress drug trafficking and to combat money laundering; financial gain is nothing more than an additional benefit. However, in recognition of the importance of international cooperation in combatting the drug problem, it is appropriate to consider requests to share confiscated assets on a case-by-case basis.

Why Hong Kong Should Share Assets with the USA

5. There are several reasons why Hong Kong should favourably consider the request -

- (a) forfeiture procedures brought by the US Attorney's Office in New York led to the confiscation and realization of the drug trafficker's assets in Hong Kong;

- (b) the Americans are likely to attach higher priority to breaking drug rings involving countries which are willing to share confiscated assets with them; and
- (c) other countries have agreed to share confiscated assets with the USA in similar circumstances.

Ratio of Sharing for the Case in Question

6. We consider that the request of the US authorities for a 50% share should be accepted, provided that all costs incurred by Hong Kong are deducted first. This is to ensure that our costs are recovered and that we retain the larger share, in recognition of the principle that the Party in control of confiscated assets is responsible for their disposal. Our costs are, at this stage, estimated at around 20% of the assets confiscated in this particular case. For simplicity, we propose to deduct 20% from the confiscated assets to cover costs, and share the net assets on an equal basis with the USA. In other words, and subject to the qualification in the next paragraph, the US Government is to be given a 40% share of the gross confiscated assets.

Other Aspects of Asset Sharing

7. As Hong Kong has also contributed significantly to the identification and confiscation of the drug trafficker's assets in the United States, we propose to take account of these in determining the amount of proceeds to be transferred to the US Government. It would be reasonable and equitable for the Hong Kong Government to receive a share in these proceeds on the same basis as the US Government receives a share in the proceeds confiscated in Hong Kong. Accordingly, we propose to pay over 40% of the gross confiscated assets held by us less 40% of the gross confiscated assets held by them.

MECHANISM FOR ASSET SHARING

Appropriation of Funds for Sharing with the USA

8. As the monies realized from the assets confiscated in this case have been credited to the General Revenue, the transfer of an appropriate share to the US authorities will require the approval of the Finance Committee of the Legislative Council. In this regard, the Attorney General's Chambers have advised that any sharing should be conditional upon the confiscation and realization of these monies continuing to remain free from legal challenge. Although the appellate time-limits for the confiscated

assets have expired, a recently-mounted application to set aside two of the three original US court orders is before the Hong Kong courts, although a hearing date has yet to be fixed.

9. Therefore, Finance Committee approval for the transfer of the appropriate amount of money to the US Government will only be sought after the court ruling on the application is delivered and provided it upholds the confiscation of the assets in Hong Kong.

Future Cases

10. Asset confiscation is invariably a time-consuming process, and a considerable administrative effort is involved in processing the court orders and in other confiscation procedures. A major contribution, in terms of legal, accounting and law enforcement agents' staff time, is required on the part of the requested Party in each confiscation. It is therefore appropriate for a threshold value to be set, and for any request from an overseas jurisdiction for asset-sharing involving confiscated assets below the threshold value to be declined.

11. It is proposed to set the threshold at HK\$10 million and to have requests for asset-sharing in cases where confiscated assets amount to more than this amount examined on a case-by-case basis by a Committee on Asset Sharing chaired by the Secretary for Security, or his representative, and attended by the Attorney General, the Commissioner for Narcotics, the Secretary for the Treasury, the Commissioner of Police, the Commissioner of Customs & Excise, and the Commissioner of the Independent Commission Against Corruption, or their representatives.

12. In the light of operational experience so far, it does not appear that there is yet a case where there are grounds for Hong Kong to initiate a request for asset sharing. Should such a case arise, the matter will be considered by the Committee on Asset Sharing.

LEGISLATIVE AMENDMENTS

13. Under s.13(7) of the Drug Trafficking (Recovery of Proceeds) Ordinance, the balance of the proceeds of confiscation, after the settlement of specific payments stipulated in the section, shall be deposited in the General Revenue. The effect of this requirement, if some of the assets are subsequently to be shared, is to -

- (a) unduly inflate both general revenue and public expenditure; and

- (b) lengthen the administrative procedures involved in processing requests for asset-sharing.

14. We therefore propose that, in future cases, confiscated assets will be placed in a Deposit Account for a period of five years, or until they are shared, whichever is the earlier. The confiscated assets, or our share remaining, will then be transferred to the General Revenue. Our share of assets confiscated in and received from other jurisdictions will be transferred directly to the General Revenue. The necessary amendments to the Drug Trafficking (Recovery of Proceeds) Ordinance will be included in an amendment bill which is expected to be submitted in early 1994.

FINANCIAL AND STAFFING IMPLICATIONS

15. The proposed sharing of confiscated assets in the LAW Kin-man case will involve appropriation of funds from General Revenue. This will require the approval of the Finance Committee because all the assets confiscated have already been transferred to General Revenue. However, in future cases, if the legislation is amended as proposed, only Hong Kong's share of the confiscated assets will accrue to the General Revenue Account. The proposals have no staffing implications.

CONSULTATION

16. The Action Committee Against Narcotics has been consulted. It supports the proposals, which will enhance international cooperation in the fight against drugs.

PUBLICITY

17. A press release will be issued on the day the subject is discussed by the Finance Committee.

Narcotics Division
Government Secretariat
7 May 1993

**Sharing of Confiscated Drug Trafficking Proceeds
with the United States Government**

Amount to be transferred from General Revenue

	<u>\$'000</u>	<u>\$'000</u> (USG's share)	<u>\$'000</u> (HKG's share)
(i) <i>Hong Kong confiscated proceeds</i>	185,706		
(a) HKG's share (60%)			111,424
(b) USG's share (40%)		74,282	
(ii) <i>US confiscated proceeds</i>	2,025		
(c) HKG's share (40%)			810
(d) USG's share (60%)		1,215	
(iii) HKG's total share [(a) + (c)]			112,234
(iv) USG's total share [(b) + (d)]		75,497	
(v) Net payment to USG [(b) – (c)]	73,472		
(vi) Amount to be paid from Deposit Account	-	<u>61,560</u>	
(vii) Amount to be paid from General Revenue subject to the approval of the Finance Committee [(v) – (vi)]		<u>11,912</u>	

**List of Asset Sharing Cases Considered by
the Committee on Asset Sharing since 1994**

Date of Meeting	Case Name	Result
31.8.1994	Claude Duboc	US paid over HK\$22.54M to Hong Kong in 2003
6.1.1995	Chan Ching-wai	Hong Kong paid over HK\$16.9M to the US in 1998
5.11.1997	Giorgio Farina	US paid over HK\$7.07M to Hong Kong in 2000
6.4.2001	Gladys Pimental	Hong Kong paid over HK\$27.53M to the US in 2001
6.4.2001	Bruce McCauley	Hong Kong paid over HK\$5.64M to Australia in 2003

Note

Excluding 1 case discussed in 1994 but the Committee decided that no request should be made to the US.