

GROUP 2

CONFISCATION OF DRUGS AND PROCEEDS DERIVED FROM DRUG OFFENCES: A WAY FORWARD FOR EFFECTIVE ENFORCEMENT

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I. INTRODUCTION

A. Overview

Illicit drug trafficking yields significant profits for criminal organizations, and the profits are reinvested in illegal activities conducted by those organizations, including international terrorism. Therefore, a fundamental priority for law enforcement agencies dealing with combating illicit drug activity is to confiscate illegally obtained assets along with the illegal drugs. The confiscation of drugs and assets, however, requires first to successfully identify, seize and trace them. Moreover, those assets are often laundered to hide the true nature, origin and ownership of criminal proceeds. Thus, covering legislative and practical loopholes by sharing strong anti-money laundering policies and confiscation methods throughout the world is an essential issue in combating illicit drug trafficking.

This group shared the current situation, legislation and good practices of each participating country and discussed the possible solutions for the common challenges that we face concerning this issue.

B. International Conventions and Frameworks

As it is broadly recognized among law enforcement agencies worldwide, there are several international conventions addressing combating money-laundering and confiscation of criminal proceeds.

1. United Nations Convention against Transnational Organized Crime 2004 (Palermo Convention)

For instance, the United Nations Convention against Transnational Organized Crime 2004 (hereafter referred to as the “Palermo Convention”) stipulates in its Article 7 that each state party “shall institute a comprehensive domestic regulatory and supervisory regime” for specified business operators and “establish a Financial Intelligence Unit (hereafter referred to as ‘FIU’) to serve as a national center for the collection, analysis and dissemination of information regarding potential money-laundering”. It also urges the states parties in its Article 12 to adopt measures to enable confiscation of proceeds derived from, and property, equipment or other instrumentalities used in criminal offences.

2. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (Vienna Convention)

The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereafter referred to as the “Vienna Convention”) also requires each party in its Article 5 to adopt measures to enable confiscation of proceeds from or instrumentalities used in drug-related crimes as well as narcotic

drugs and psychotropic substances.

3. Financial Action Task Force (FATF)

Since money laundering is a transnational crime, each country is encouraged to work in harmony within the international frameworks such as the Financial Action Task Force (hereafter referred to as the “FATF”) and the Egmont Group¹.

The FATF Recommendation most recently revised in 2012, which is recognized as the international standard for anti-money-laundering measures and which should be adopted by the member states, includes criminalization of money laundering, adoption of measures to enable them to identify, trace, freeze and confiscate criminal proceeds, and possible adoption of non-conviction-based confiscation.

II. DRUGS

A. Identification and Tracing

1. Overview

The discussion found that all participating countries commonly use traditional investigative methods such as informants and random checking as measures to identify drugs. Due to current threats and rapid technological development, some countries have adopted special investigative tools to identify and trace drugs, such as controlled delivery, undercover operations and electronic surveillance (video surveillance and interception of wire, oral, or electronic communications).

Some participating countries have jurisdiction to conduct these special investigations while enforcement agencies in some of the countries conduct controlled delivery, undercover operations and surveillance in practice without written jurisdiction. The group has agreed that the uses of these techniques vary from country to country and is aware of controversy surrounding their use, such as abuse of power and infringement of human rights.

2. Challenges and Countermeasures

Drug law enforcers have to continuously keep pace with criminal modus operandi and current drug trends. Drug traffickers, in an effort to elude law enforcement, will consistently change their methods of concealment and their trafficking behaviour and routes forcing investigators to be reactive rather than proactive². Another challenge identified is that there are inadequacies in trained or specialized personnel coupled with weak financial support to conduct special investigation.

To remedy these challenges, we suggest that the countries faced with these challenges engage in capacity-building for their investigators, such as training in proactive investigation techniques, surveillance, undercover operations where the legislation will permit and to a greater extent consistent refresher training in current drug trends which can be done by engaging international partners and sharing current trends.

To address the issue of inadequate financial resources, we recommend that the responsible agencies/country identify and put measures in place to ensure at the very least that investigators are provided with the basic resources necessary to interdict drug trafficking activities. Some of these basic necessities vary from technological resources, financial support for witnesses and informants to physical resources.

From the discussions it was also recognized that witness protection, and the lack thereof, is an issue in some countries which negatively affects the gathering of information in identifying and tracing drugs. Witnesses are reluctant to assist law enforcement with information as to where drugs are stored and the identities of the criminals involved. This hinders investigators and further exacerbates the issue of conducting proactive investigation.

Concerning this challenge, we recommend that countries adopt Article 24 of the Palermo Convention on

¹ The Egmont group is a united body of 155 Financial Intelligence Units (FIUs). The Egmont provides a platform for the secure exchange of expertise and financial intelligence to combat money laundering and terrorist financing (ML/TF)

² For example, the dark web can be described as one of the most recent emerging threats in the field of drug trafficking.

“Protection of Witnesses”³.

B. Seizing Drugs

1. Overview

Most of the countries need search warrants or written authority to conduct searches, with the exception of Malaysia⁴, Mali⁵ and Sri Lanka⁶. All participants confirmed that enforcement agencies will seize all drugs that they identify. Pre-testing will be carried out on the drugs seized to verify that the substances seized were drugs.

Some of the countries stated that investigation will be done by public prosecutors and the drugs will be handed over to their storage/exhibit/evidence facility. In some countries, enforcement agencies such as police and customs officers will conduct investigation into drug seizures. The drugs then will be sent to a forensic laboratory for analysis to confirm that it is a narcotic drug and that the substance is illegal. After getting a conclusive result, drugs seized will be kept in secure storage by enforcement agencies, public prosecutors’ offices or other competent authorities.

2. Challenges and Countermeasures

From the discussion, we identified one of the challenges as being limited storage areas and lack of financial allocation to keep the drugs during the trial phase, which normally takes years in some countries. This may lead to loss or theft of exhibits in custody.

To effectively counter this challenge, we agreed that early disposal of the larger portion of the drugs seized is recommended by applying to the appropriate or competent body to dispose of the said exhibits before the conclusion of the case. To do this, it is necessary to amend the domestic laws in some countries which are in need of but do not have such provisions. Increased financial allocations to investigative bodies can also be suggested to assist in providing adequate storage areas coupled with sufficient human resources.

C. Disposal or Use of Drugs

1. Overview

All countries stated that drug exhibits will only be disposed of on conclusion of the court case. Committees consisting of public prosecutors or police officers and other stakeholders are established to monitor the disposal of drugs in some jurisdictions. Some of the countries⁷ may need approval from specific authorities such as enforcement agencies, environmental bodies and/or other health officials beforehand.

The common method used to dispose the drugs is burning in incinerators by appointed and competent enforcement agencies. It was noted that the methods of disposal vary by country as in some countries burning is carried out in open spaces and in one country⁸ it is carried out in the presence of the public. For some countries, some drugs are not being destroyed but are used for medical treatment as well as scientific study/research purposes⁹.

2. Challenges and Countermeasures

In some countries there is an issue of lack of trust in members of the police department or competent authorities by the public, fearing that there will be issues of corruption. Because excessive amounts of drugs are seized by law enforcers, from time to time there may be concerns embedded in the minds of civilians that the drugs seized are being infiltrated back into the black market by corrupt officials.

To effectively counter this challenge, it was suggested in the group to have a special vetted agency,

³ “Each State Party shall take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by this Convention and, as appropriate for their relatives and other persons close to them.”

⁴ Dangerous Drugs Act, 1952

⁵ Penal Procedure Code, 2001

⁶ Criminal Procedure Code No. 15, 1979

⁷ Malaysia, Japan, Egypt, Sri Lanka and Mali

⁸ Sri Lanka

⁹ Sri Lanka and Palestine

committee or independent persons participate in the disposal proceeding to mitigate allegations of corruption against law enforcement.

There is no single international standard addressing the disposal of drugs seized by law enforcers. In all countries represented there were varying methods of how and when seized drugs are disposed. For some, the disposal is done in public, for others in incinerators. Some countries expressed that there are concerns regarding disposal raised by environmentalists.

Regarding this challenge, it is suggested that the Single Convention on Narcotic Drugs, 1961 should adopt and declare an internationally accepted method of disposal of drugs seized in an effort to alleviate the varying methods of drug disposal. In treating this issue, it is recommended that stakeholders such as environmentalists, non-governmental organizations (NGOs) and members of the public be engaged through workshops, surveys and research to arrive at an accepted method of disposal.

III. ASSETS

A. Identification of Assets

The group examined the ease or lack thereof of identifying assets in its respective jurisdictions. In any asset tracing investigation there are objectives to be considered: locating the assets, linking them to an unlawful activity with a view to freezing or confiscating them and proving the commission of the relevant offence. Identification of assets is carried out in a similar manner in almost all countries represented. This is done by:

1. Search Procedures

Searching is a very effective method of gathering evidence to trace these assets. Search procedures are conducted in all countries, some with warrants and in some cases without warrants because their legislation does not require such. Searches minimize the opportunity for document destruction and concealment, and they can avoid deliberate or inadvertent failure to produce documents following an agency request. There are, however, notable disadvantages to conducting searches and seizures of documents in tracing assets as sometimes the material gathered is very large and is time consuming to analyse. For example, the vast number of documents gathered during a search takes a considerable amount of time to review.

2. Financial Intelligence Units (FIUs)

It was confirmed from the discussions that all countries have well-established FIUs. In some jurisdictions the names or titles given to this body differ, but the meaning or classification remains the same. FIUs in some countries are tasked to identify assets linked to the predicate offences being investigated. In some countries, they do not have investigative powers and, therefore, will only seek to identify assets when requested by the investigative body, which in most cases is the police or narcotics investigative body. Once assets are identified, then the next step is to trace these assets to verify if they are proceeds that were derived from criminal activities.

3. Information Obtained by Investigation and Interrogation

Assets are identified through interviews and interrogations in some countries. For example, during interviews suspects and their relatives are asked certain questions relative to their addresses and addresses of associates. The information garnered is then used to identify assets which may have been acquired from criminal conduct.

4. Tracing Assets

From all indication the group shares similar methods of asset tracing in that they seek to trace assets through similar channels such as financial institutions, public records and government/non-governmental bodies charged with recording and documenting purchases and acquisitions.

Tracing of assets in drug investigations is conducted by the FIUs in some countries. These units are considered pre-trial bodies or pre-investigative bodies and can undertake investigation into tracing of assets. For other countries, assets are traced by the police under direct or indirect supervision of the prosecution, and the FIUs have no investigative authority. Assets are also traced, upon the request of the FIU, prosecution or police department, across borders using or requesting international cooperation.

In some participating countries there is a structured process or formal committee/body in place to undertake this type of tracing while in others it is done informally or professionally through established networks or stakeholders.

5. Challenges and Countermeasures

As stated above, it was discovered that there are certain limitations on scope in that FIUs in some countries only respond to requests of another investigative body while those in some other countries are not authorized to conduct investigations.

To address the issue of the varying roles of FIUs it was suggested that some countries strengthen or broaden the scope or authority given to FIUs, which will afford their FIUs the power to have a commitment to the investigations process. This will ensure cohesiveness and, to a greater extent, continuity. It is also recommended that the FIUs which do not have investigative authority coordinate and communicate with other investigative bodies.

The issue of third party ownership and unregistered properties/assets was identified as a challenge in all countries; in some instances the assets concerned are registered to a third party individual or company which makes it extremely complicated when tracing ownership of assets. In other instances, the assets identified are unregistered and difficult to trace.

Those countries with concerns about third party ownership and unregistered assets should consider implementing FATF Recommendation 4 (2017) which includes instituting legislative measures to enable their competent authorities to freeze, or seize and confiscate (a) property laundered, (b) proceeds from or instrumentalities used in or intended for use in money laundering predicate offences without prejudicing the rights of *bona fide* third-party owners.

There is a difficulty in identifying and tracing criminal proceeds when the transaction is conducted across international borders due to legislative powers and the slow pace of assistance in international cooperation (Mutual Legal Assistance), whereas a written request is mandatory but takes too much time in processing. Dual criminality is an issue that affects tracing these assets as whenever the offence concerned is not an offence in the participating country then there will be limited or no assistance.

It is recommended that clear guidelines be established addressing international cooperation between countries and that measures be implemented when assets are identified and traced overseas. Countries should have adequate legal basis for providing assistance and where appropriate should have in place treaties, arrangements and other mechanisms to enhance cooperation and expedite assistance which should include addressing the issue of dual criminality. In addition each country should engage in networking mechanisms establishing appropriate focal points when conducting these investigations. This will enhance cooperation between countries and reduce the response time in forwarding trace requests.

It was also pointed out in discussion that criminals tend to avoid using established financial institutions and spend below thresholds that will raise concerns. This is a major problem for some countries as it allows criminals to conduct illicit transactions which often go undetected.

In countering the issue of unreported suspicious transactions, it is recommended that the affected countries adopt FATF Recommendation 21 (2017), which speaks tipping-off and confidentiality.

We also agreed that all countries should engage in capacity-building for law enforcement officers including prosecutors and that they should organize training sessions aimed at enhancing the knowledge base of financial investigators, developing their skills and competencies especially in a technological sense.

B. Measures of Freezing and Confiscation of Assets in Illicit Drug Investigations

1. Freezing of Assets

Evidently all participating countries engage in the practice of freezing assets of suspects believed to be acquired through criminal conduct, whether directly or indirectly. These assets are oftentimes frozen on an application of the investigative body or the prosecuting authority. These applications must be approved by a competent court, and in some cases the applicant must prove that the assets to be frozen are directly or

indirectly the proceeds of criminal conduct or that those assets are directly related to the charged offence. In most countries¹⁰ the assets are frozen throughout the investigation process until the conclusion of the case.

In some cases, a bond is placed on the asset and the suspect/accused is allowed to utilize the asset depending on the type of property; however, the holder cannot dispose, destroy or transfer the asset. In all cases when assets are frozen and involve a third party, the party is duly informed and in certain instances they are given the right to appeal.

2. Confiscation of Assets

Relative to confiscation of assets, the general consensus is that assets are deemed confiscated or forfeited on authority of the court or an equally competent body and are only so confiscated on conclusion of trial or investigation. In countries such as Ukraine and Egypt, two methods of confiscation of assets are practiced. This is, however, dependent on the type of asset and the value. The method used depends on whether the assets were directly used in the commission of the predicate offence or the value of the assets. Some countries practice two methods of confiscation, such as Jamaica and Malaysia, that is, criminal and civil forfeiture.

When confiscating assets, anti-money-laundering measures are one method in the criminal sense. In this procedure, the assets are only liable for confiscation if it is proven that they were direct proceeds of the crime and the accused is convicted of the said offence(s). In civil forfeiture proceedings, the assets can be confiscated regardless of whether or not a conviction is obtained; if the accused is acquitted, civil proceedings are immediately initiated with a view to seizing assets identified and traced, and it is upon the defendant to prove the legitimate source of his/her assets.

Another notable procedure practiced in some countries¹¹ is the principle of “equivalent value” or “value-based confiscation”, which stipulates that once the court determines that the benefit that accrued to the individual/accused was directly or indirectly obtained from illegitimate conduct, it would enforce a financial liability such as an amount, usually in multiples of the profit or benefit derived from the crime which is realizable against the assets of the individual.

All but three represented countries, Mali, Malaysia and Palestine, have clearly established and specific money laundering acts or procedures. For some it is classified as the Money Laundering Act which stands on its own, and for some it is embedded in articles in their Proceeds of Crimes Act. Money laundering procedures are initiated as a result of predicate offences and intentions to deprive criminals of their profits derived from criminal conduct.

In one country¹² there is no link between money laundering investigation and drug crimes, and it is investigated just like any other criminal investigation. In another country¹³ there is a supreme committee consisting of all stakeholders responsible for money laundering policies to gather the efforts and coordinate the parties tasked. This supreme committee is headed by the FIU.

In Japan it is presumed that any property obtained from criminal conduct during the purported time of the commission of any drug offences provided for can be regarded as proceeds of the crime. This is dependent on the affordability of the offender and what can be reasonably assumed as property beyond his scope or any known benefits he has been in receipt of.

Two countries¹⁴ have no distinction between Money Laundering Laws and Proceeds of Crimes Acts but are subjected to predicate offences dictated in law. It is however possible to initiate money laundering investigations in absence of those predicate offences as well as conduct money laundering investigations simultaneously with the criminal or predicate offence(s).

¹⁰ Except Malaysia and Jamaica

¹¹ Except Sri Lanka and Mali

¹² Ukraine

¹³ Palestine

¹⁴ Japan and Ukraine

3. Challenges and Countermeasures

In some countries¹⁵ confiscation is only possible after final verdict, and the verdict must be in favour of the prosecution. Some frozen assets deteriorate during the investigation process, and should the prosecution or competent body fail to prove its case, then the assets may devalue, which can result in the state having to compensate the party or in the reverse where on conclusion of the case the asset is forfeited but has deteriorated and is of no value.

It is recommended that countries institute a special vetted agency or committee with expertise in property management to manage the storage and utilization of high value assets that are frozen by the state. This committee can develop measures to preserve or market the assets during the course of the investigation and where legally possible the state can earn revenue from the asset in its frozen state.

The time for completion of criminal procedures is exhaustive in some instances, and the assets are sometimes stored at a high cost to the state, for example, storage for high value assets. To counter this challenge, it can be recommended that the state institute alternate procedures, such as bonding the owner of the asset, that is, the owner will retain the asset/property and be liable to pay the state the value of the asset at the time of freezing should he fail in his bid to retain the asset on conclusion of the investigation.

The burden of proof rests on the state/prosecution in some countries, and the standard is beyond reasonable doubt, which is oftentimes difficult to prove, especially where a continuous drug crime must be proven. In Malaysia, where non-prosecution is practiced when freezing assets, the standard of proof is on the balance of probability.

It is recommended that countries adopt best practices of other countries, such as simultaneously bringing both cases before the court to eliminate the time wasted waiting for a conviction on the predicate offence. Also, amendment in legislation can be encouraged to make provision for civil proceedings where the burden of proof is shifted from the prosecution to the defendant.

C. Disposal of Assets

1. Forfeited Assets

All participating countries have provisions for disposing assets forfeited to the state or competent body. In most instances the assets are disposed of on the instructions of a court or competent body on the conclusion of the investigation and almost always when there is a conviction. The method of disposal varies depending on the type and value of assets. These variations include but are not limited to:

- a. Auctions for moveable property such as motor vehicles;
- b. Caveats placed on immovable property such as land;
- c. Monetary assets transferred to government institutions;
- d. Assets utilized by investigative bodies or departments that made the case such as (boats, motor vehicles, houses, etc.);
- e. Monetary assets lodged in interest-bearing accounts and its allocation decided by the state; it may also be utilized in drug investigations such as payment for informants.

In some countries¹⁶ a designated body or committee is assigned to assess the assets forfeited and make a decision on the best way to dispose of the asset. This is so when the asset is considered disposable, for example, a fish pond, animals and other perishable assets.

2. Returning Seized Assets

Participants' countries have systems or procedures in place to return assets whenever there is an

¹⁵ Japan, Egypt, Ukraine and Sri Lanka

¹⁶ Malaysia, Ukraine and Jamaica

acquittal in a case or where the prosecution or investigative body has failed to prove beyond a reasonable doubt that the assets were proceeds of criminal conduct such as drug crimes.

3. Challenges and Countermeasures

Some challenges identified were common among all participating countries, especially where the assets frozen deteriorated while in storage and, hence, the disposal is counter beneficial to the state. This is a result of lengthy trial process and administrative proceedings.

Countries can employ an approach whereby assets that devalue quickly are disposed using the “value-based procedure”; the owner can retain the asset but must pay to the state the equivalent value at the time of freezing.

Some forfeited assets are of little or no use to the state. For example, in one country where houses are forfeited to the crown/state, there is difficulty selling them as buyers are concerned about their safety.

It can be recommended that countries either amend legislation or adopt best practices where the drug trafficker is made to compensate the state an assumed value of property believed to be obtained from criminal conduct particularly in cases where there is a difficulty in identifying where the dirty money was integrated back into society as legitimate gain.

There are no clear procedures in some countries addressing how assets are valued. For example, where a committee is responsible for valuing the assets forfeited, there are no clear guidelines on assigning valuation. Therefore, those countries with no clear guidelines in valuing or revaluing high priced assets should consider instituting unambiguous and written guidelines on disposal of those assets.

IV. CONCLUSION AND GENERAL RECOMMENDATIONS

In conclusion, the group reached a consensus that illicit trafficking in narcotic drugs and psychotropic substances and drug-related offences is a global problem that needs global and new solutions. As the different jurisdictions adopt different systems to identify, trace, freeze and confiscate drugs and assets in drug cases, they recognize that the need to strengthen multidisciplinary measures at the international, regional, national, local and community level to prevent drug-related crimes and foster social development and inclusiveness is very much a requirement in all the jurisdictions.

The group reached the following recommendations:

- a. Monitor current trends and drug trafficking routes and share experiences, best practices and lessons learned in order to prevent and counter the misuse of international trade for illicit drug related activities. In addition, note the current initiatives by the UN institutions in preventing and countering the diversion of precursors for illicit use and illicit financial flows stemming from drug trafficking and related crimes.
- b. Strengthen coordinated border management strategies as well as the capacity of border control and law enforcement and prosecutorial agencies, including where appropriate the provision of equipment and technology, along with the necessary training and maintenance support in order to prevent, monitor, and counter trafficking in drugs, trafficking in precursors and other related crimes such as illicit financial flows, smuggling of bulk of cash and money laundering.
- c. Develop and strengthen mechanisms of domestic coordination and timely and efficient information sharing between authorities involved in identifying and countering drug trafficking and related money laundering. Integrate financial investigation more thoroughly into interdiction operations to identify individuals and companies involved in such activities.
- d. Strengthen and utilize existing and relevant regional, sub-regional and international networks for the exchange of operational information to prevent and counter money laundering and illicit financial flows.

- e. Promote effective measures capable of addressing the links between drug crimes and the assets generated from such crimes for successful confiscation procedures.
- f. Improve the availability and quality of statistical information and analysis of illicit drug cultivation, production and manufacturing, trafficking, money laundering and illicit financial flows, including appropriate reflection in reports of the UNODC and the International Narcotics Control Board in order to better measure and evaluate the impact of such crimes and to further enhance the effectiveness of criminal justice responses in that regard.
- g. Enhance the capacity of law enforcement and criminal justice agencies especially in forensic science in the context of drug investigations and issuing guidelines to the investigating authorities regarding harmonizing the implementation of anti-money-laundering laws.