

GROUP 2

COMPONENTS AND LEGAL FRAMEWORK FOR COMBATING MONEY LAUNDERING, CURRENT SITUATION, PROBLEMS AND SOLUTIONS FOR ASSET CONFISCATION SYSTEM

Chairperson	Mr. Meinrado P. Paredes	Philippines
Co- Chairperson	Mr. Wataru Nemoto	Japan
Rapporteur	Mr. Kedar Prasad Poudyal	Nepal
Co- Rapporteur	Mr. Ahmad Zaidi Bin Ibrahim	Malaysia
Co Rapporteur	Mr. Camillus Jacob Sambua	Papua New Guinea
Members	Ms. Nadira Tabassum	Bangladesh
	Mr. Richard Otieno Okore	Kenya
	Mr. Haruo Maruyama	Japan
Advisors	Deputy Director Keiichi Aizawa	UNAFEI
Professor	Chikara Satou	UNAFEI
Professor	Nosaka Akihino	UNAFEI
Visiting Expert	Ms. Susan Lea Smith	United States

I. INTRODUCTION

Rapid globalization and economic development has opened up new opportunities for pursuing more fulfilling lives. On the other hand, it has also created new opportunities for criminal exploitation, challenging the basic rules of our social, economic and political systems. In recent years, crime has become increasingly international in scope, and the financial aspects of crime have become more complex, due to rapid advances in technology and globalization of the financial services industry. Money laundering is an indispensable element of organized crime, narcotics trafficking, terrorist activities or arms trafficking. It is necessary for all the nations to enact the necessary laws and regulations to effectively combat money laundering. One such method is the establishment of an effective confiscation system.¹

Traditionally, nations concentrated only on crimes not on proceeds. Consequently, existing laws are inefficient to trace and confiscate proceeds of crime. Legal provisions for confiscation of the proceeds generated from all types of serious crimes is the main tool to fight against money laundering. Therefore, the focus of anti-money laundering legislation should include a strong confiscation provision. This group has identified problems relating to the tracing, freezing and the confiscation of illegal proceeds and suggests that strong legislative and administrative measures must be enacted to create an effective confiscation system. This paper will examine the following issues concerning confiscation:

¹ Article 1(f) of the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, (Vienna Convention), and Article 2(g) of the UN Convention Against Transnational Organized Crime define confiscation as the permanent deprivation of property by order of a court or other competent authority.

117TH INTERNATIONAL SEMINAR
REPORTS OF THE COURSE

- (i) The current situation in participating countries as well as other countries;
- (ii) Identification of common problems;
- (iii) Identification of possible solutions.

Prior to discussing these issues, however, it is first necessary to examine the current international standards concerning the creation of an effective confiscation system.

II. INTERNATIONAL STANDARDS

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

The scope of the Vienna Convention was to promote co-operation among the parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances. To comply with their obligations under the Convention, the parties must take such legislative and administrative measures which criminalizes all forms of narcotics trafficking, drug-related money laundering and provides for the confiscation of property derived from such drug-related crimes.

Article V of the Vienna Convention details the obligations of the parties to seek confiscation of drug trafficking and money laundering proceeds, as well as the instrumentalities used to commit such offenses. It mandates each signatory country to enact laws with domestic and international confiscation application. Article V requires parties to the convention to enact domestic confiscation legislations enabling the party in question to locate, freeze, and confiscate all kinds of property derived from, or used in, drug trafficking or drug money laundering. It also requires each party to provide assistance to another

country by identifying, tracing, seizing, freezing, or confiscating any property or proceeds which were derived from, or used in, drug trafficking or drug money laundering and which may be located in their country. Furthermore, Article V provides that bank secrecy laws must not serve as a barrier to domestic and international asset confiscation investigations.

B. The Forty Recommendations of the Financial Action Task Force (FATF)

The FATF is an international working group whose purpose is the development and promotion of policies to combat money laundering. These policies aim to prevent such proceeds from being utilized in future criminal activities and from affecting legitimate economic activities. The FATF requires each country to take necessary measures to criminalize money laundering for all serious crimes. The determination of what constitutes serious crimes and what will be designated as money laundering predicate offences is left to each country to decide.

In Recommendation 7, the FATF identified and recommended confiscation as one such measure to combat money laundering. It recommended that countries should adopt measures similar to those set forth in the Vienna Convention to enable their competent authorities to confiscate property actually laundered or traceable thereto, instrumentalities used in, or intended for use in the commission of any money laundering offence, or property of corresponding value, without prejudicing the rights of bona fide third parties. Such measures to confiscate should include the authority to:

- (i) Identify, trace and evaluate property which is subject to

- confiscation;
- (ii) Carry out provisional measures, such as freezing and seizing, to prevent any dealing, transfer or disposal of such property; and
 - (iii) Take any appropriate investigative measure.

C. 2000 United Nations Convention Against Transnational Organized Crime

The purpose of this Convention is to promote international co-operation to prevent and combat transnational organized crime more effectively. Article 12 of the Convention explicitly deals with the seizure and confiscation of proceeds of crime. It restates the requirements contained in Article V of the Vienna Convention but extends seizure and confiscation to other serious crimes.

III. REVIEW OF CURRENT SITUATION IN COUNTRIES

From the countries' reports and discussion, it was determined that Bangladesh, Cambodia, Costa Rica, Kenya, Malaysia, Nepal, Oman, Pakistan, Sri Lanka and Tanzania have enacted laws to confiscate the proceeds of drug trafficking, and a few have additionally extended their laws to confiscate the proceeds of other crimes such as bribery and other forms of corruption. The penal laws in Papua New Guinea and the Philippines provide for the confiscation of the proceeds of all crimes. However, these laws are inadequate as they do not apply to converted or transferred assets. Additionally, all the above named countries have not criminalized money laundering for all serious crimes.

Canada, Fiji, Germany, Hong Kong, Japan, Portugal, Republic of Korea, South Africa, Thailand and the United States have enacted anti-money laundering legislation which extends to all serious

crimes. These countries have comprehensive confiscation regimes which allow for the confiscation of the proceeds of drug trafficking and other serious crimes as well as the confiscation of instrumentalities used to facilitate the crime.

While all the above listed countries have provisions for criminal confiscation based on conviction, Malaysia, South Africa, Thailand and the United States additionally have civil *in rem*² confiscation procedures.

IV. PROBLEMS RELATING TO THE CONFISCATION OF PROCEEDS

The group identified the following general and specific problems relating to confiscation measures to fight against money laundering. Upon review of the legal provisions of participating countries, it was determined that while all the participating countries have confiscation laws, most countries' laws are insufficient and ineffective in the fight against money laundering.

A. General Problems

1. Lack of Awareness

In many of the countries, there is a general lack of awareness among the general public and particularly among lawmakers, law enforcement officials, and judges concerning the gravity and adverse effect of money laundering.

² Civil *in rem* confiscation proceedings are brought against the property and do not depend upon the conviction of the wrongdoer. The government must prove the basis of the confiscation action by a preponderance of the evidence, after which the burden shifts to the claimant to defend his or her interest in the property.

117TH INTERNATIONAL SEMINAR
REPORTS OF THE COURSE

2. Lack of a Strong Political Will

The increasing concentrations of wealth among criminal groups in a number of jurisdictions is a concern not only because of the impacts on investments, real estate values, legitimate commerce and government integrity, but also because these organizations have the wealth to make large campaign contributions to candidates who may then assist them in their criminal activities. A government elected with the help of such money generally loses the political will to enact strong anti-money laundering and confiscation legislation. Illicit funds and corrupt officials represent a continuing threat to democracy in virtually all regions of the world.

B. Specific Problems

1. Narrow scope of application of confiscation laws

In most of the participating countries, confiscation is only available for the proceeds of narcotics trafficking. In addition, only a few of the participating countries have legislation which criminalizes money laundering for the proceeds of all serious crime and which would extend confiscation to such proceeds. Because of the narrow scope of the countries' confiscation laws, successful confiscation actions have been limited in numbers.

2. Standard of Proof

In many countries, criminal confiscation is the only basis for confiscation. Therefore before any confiscation can occur, a defendant must be charged and convicted of a crime. The burden of proof in criminal cases requires the government to prove its case beyond a reasonable doubt. Because a conviction is necessary before confiscation can be effected in most countries, it is sometimes difficult to achieve. In many of the countries, the rate of conviction is very low. Sometimes, even though a defendant

cannot show any legal source for his assets, the confiscation will fail because the government has insufficient evidence to prove guilt. Additionally, most criminal forfeiture systems contain no means for confiscating the illegal assets of a criminal who has absconded or died.

3. Implementation Problems

A Study of the situation of the various countries also shows that despite having some confiscation provisions, their effective implementation has been lacking. In most of the countries, there are no prosecutions for money laundering or confiscation. Most of the implementation problems are related to a country's ability to identify, trace, freeze and confiscate the proceeds of crime both pre-trial and post conviction. The following causes were determined to hinder the implementation of confiscation laws.

(a) *Strong Bank Secrecy Laws*

In countries like the Philippines, there is a strong bank secrecy law which cannot be pierced for law enforcement purposes. Because of this, investigating authorities cannot identify or trace illicit monies for confiscation.

(b) *Lack of Reporting Obligations of Financial Institutions as Regards Suspicious Transactions*

In most of the participating countries, there is no provision mandating financial institutions to report suspicious transactions. Consequently, the investigating authorities do not receive the necessary information which would alert them to the possible existence and location of illegal assets.

(c) *Lack of Financial Intelligence Units*

Criminals are increasingly using sophisticated methods to hide their illegal proceeds. Without the assistance of a financial intelligence unit to analyze suspicious transaction reports and

facilitate financial investigations, most illegal assets cannot be identified and consequently are not confiscated.

(d) *Lack of Procedural Laws*

Additionally, it was determined that in some countries, there is a lack of procedural laws to satisfactorily give effect to confiscation. In many countries, for example, the property laws create an equal property right of the father, mother and sons over the ancestral property. If one member of the family is involved in criminal activity and has used the common property for facilitating his/her criminal activities, naturally, it is unfair to confiscate the entire common property. The property rights of those family members who did not know of the criminal use of the property should not be affected. Because of the difficulty in determining which part of the property should be confiscated, confiscation claims usually fail. Thus, because the procedural law has no means to satisfactorily divide the property, it is impossible to execute a confiscation order.

(e) *Lack of Proper Provisions for International Co-operation*

Even those countries which have confiscation laws often are unable to fully implement the law because there is no provision for international co-operation. In many instances, illegal proceeds have been transferred to another country and without assistance from that country, the proceeds cannot be confiscated. However, if the country in which the assets are located does not have the ability to provide such international assistance, the confiscation action will fail.

V. SOLUTIONS TO IDENTIFIED PROBLEMS

A. Increase Awareness Concerning Money Laundering

Substantive efforts should be made to raise the public awareness concerning the dangers of money laundering to the national security of a country. This can be accomplished through the publication of informative articles in local newspapers, the conducting of seminars for lawmakers, judges, law enforcement officials and private sector persons and ultimately, in the investigation and prosecution of money launderers.

B. Need for a Comprehensive Proceeds of Crime Law

Those countries which only have a limited confiscation system should enact a comprehensive law to confiscate the proceeds of serious crime. It is suggested that developed countries should provide assistance to those countries in the drafting of such new legislation as well as provide financial and technical assistance to create an infrastructure for the effective implementation of the confiscation laws. Furthermore, where countries are unwilling to enact and implement such laws, the international community must exert pressure through the use of countermeasures against such non co-operating countries. An effective confiscation law should include the following provisions.

1. All Serious Crimes to be Included

All countries should include provisions within their law which allow the confiscation of proceeds from serious crimes³. However, it is recognized that each country will determine those crimes to be designated as serious. It is suggested that certain crimes be included in such definition such as, drug trafficking, human and arms trafficking, terrorism, corruption,

117TH INTERNATIONAL SEMINAR
REPORTS OF THE COURSE

fraud and other transnational organized crimes.

2. Provisional Measures

Any confiscation law should provide for the pre-trial freezing or seizure of assets. If any individual or organization or company is suspected of engaging in an illegal transaction with the proceeds of crime, the competent authority must be given the power to demand particulars of the accounts of such persons and if necessary, to freeze and/or seize the identified assets prior to trial.

3. Types of Property to be Confiscated

In some countries, only the proceeds which are located with or in the name of an accused can be confiscated. In other countries, intangible property cannot be confiscated nor can the property generated from the proceeds be confiscated. Difficulties are also experienced concerning the confiscation of instrumentalities, mixed property (illegal property mixed with the legal property) and other property which facilitates the concealment of illegal property. A comprehensive confiscation law should provide for the confiscation of the following types of property:

- (i) All movable, immovable, tangible, intangible, claim rights, and securities;
- (ii) All property that is proved to be proceeds or traceable thereto, even

if it is registered in other's name so long as the owner is not an innocent owner or a bona fide purchaser for value;

- (iii) All instrumentalities including real estate, vehicles, and machinery which have been used or intended to be used in the commission of a crime;
- (iv) Any proceeds which have been mixed with other legal property to the extent of the value of the illegal property;
- (v) Interest and profit generated from the proceeds.

4. In rem Confiscation

In some countries like the United States, there is a provision under which, in certain instances, property can be confiscated even without conviction. This type of confiscation is difficult for many countries to accept. However, as has been stated earlier, in many of the developing countries, the conviction rate is very low thus prohibiting the confiscation of most illegal assets. Consequently, adoption of such in rem confiscation measures is suggested if the legal system of a particular country permits.

5. Legal Presumptions

If a country's domestic legal systems allows, a defendant should be required to prove the lawful origin of the alleged proceeds of serious crime or other property liable to confiscation.⁴

³ The UN Convention Against Transnational Organized Crime in Article 2(1)(a) requires the confiscation of the proceeds of offences covered by the Convention. The offences mentioned are organized crimes, money laundering, corruption, and obstruction of Justice. (See Articles 5, 6, 8 and 23). The Convention also defines serious crime as conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.

⁴ See Vienna Convention, Article V(7) and Convention Against Transnational Organized Crime, Article 12(7).

C. Enhancements for Effective Implementation

Effective implementation is still a problem in most countries. The following measures are suggested to enhance effective implementation.

- (i) Bank secrecy laws must be amended to allow law enforcement agencies to obtain information concerning the location of the proceeds of crime.⁵
- (ii) Financial institutions must be required to report suspicious transactions.⁶
- (iii) A Financial Intelligence Unit should be established to analyze suspicious transaction reports and assist in financial investigations.

D. Disposition of Confiscated Property

In some countries, all or a portion of confiscated assets are segregated to be used to enhance law enforcement capabilities. However, other countries believe that such confiscated assets should be returned to the general treasury. It was concluded that each country should determine the proper use of such property according to their respective laws.

E. International Co-operation

Major drug traffickers and other criminals often hide their illicitly generated proceeds outside the country where they commit their crimes. Thus, one country's confiscation efforts, however effective and comprehensive, may not be enough to take the profit out of transnational crime. For confiscation laws to work effectively, countries must apply and enforce their domestic confiscation measures

consistently and must pursue the confiscation of illegal assets found abroad.

Recognizing the diversity of legal systems among nations, the Vienna Convention⁷ and the Convention Against Transnational Organized Crime provide that a requested country may seek the forfeiture of property at the request of another country in one, or both, of two ways. The requested country may initiate its own forfeiture proceedings against the property in question using the evidence provided by the requesting country. Alternatively, the requested country may give full faith and credit to a forfeiture judgment rendered by the competent authorities of the requesting country.

The sharing of confiscated assets among countries serves to create an incentive for future cooperation and often provides the means for a country to assist in the investigation, tracing, freezing, seizing and confiscation of illegal assets. The means to effect a request for assistance in the freezing, seizure and confiscation of illegal proceeds and asset sharing should be determined through multilateral or bilateral agreements among countries.

VI. CONCLUSION

To combat money laundering, participating countries should have strong substantive and procedural laws against it. Effective asset confiscation is a critical tool of modern law enforcement. Through asset forfeiture, governments can take both the profit out of crime and disrupt criminal activity by forfeiting the property that makes the crimes possible. In this way, law enforcement is not limited to arresting and prosecuting criminal offenders, but can also attack the economic underpinnings of crime and make restitution to victims.

⁵ FATF Recommendation 2.

⁶ See FATF Recommendation 15 and Convention Against Transnational Organized Crime, Article 7.

⁷ See Article V.

117TH INTERNATIONAL SEMINAR
REPORTS OF THE COURSE

However, as criminal activity becomes increasingly transnational, international cooperation has become a law enforcement imperative. Only through such international cooperation, can nations hope to win the fight against transnational organized crime.