

# Stolen Asset Recovery

A GOOD PRACTICES GUIDE FOR  
NON-CONVICTION BASED ASSET FORFEITURE

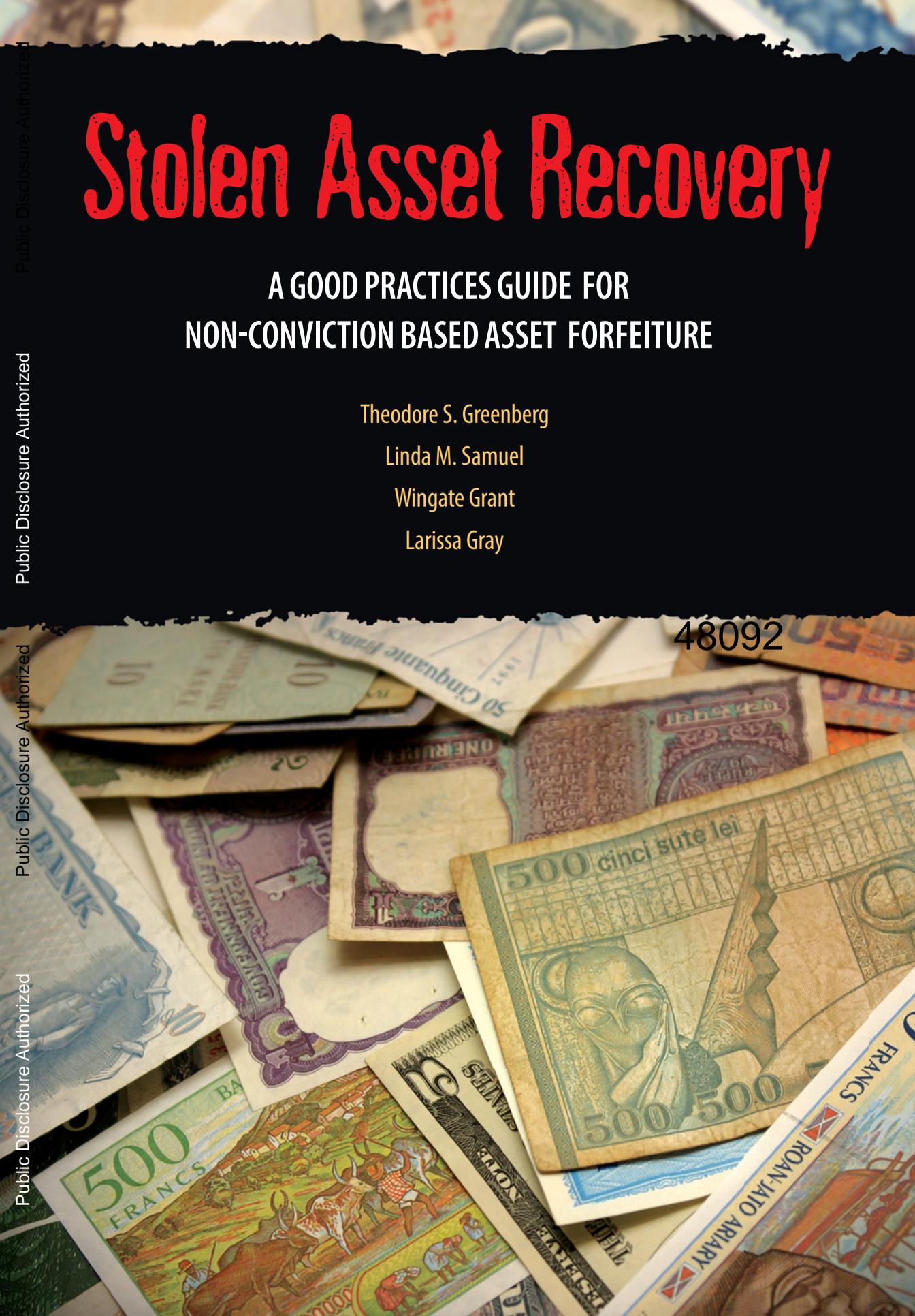
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# **Stolen Asset Recovery**



Stolen Asset Recovery (StAR) Initiative

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A Good Practices Guide for  
Non-Conviction Based Asset Forfeiture

Theodore S. Greenberg  
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**THE WORLD BANK**  
Washington, D.C.

StAR



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1 2 3 4 12 11 10 09

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ISBN: 978-0-8213-7890-8

eISBN: 978-0-8213-7902-8

DOI: 10.1596/978-0-8213-7890-8

### **Library of Congress Cataloging-in-Publication Data**

Stolen asset recovery : a good practices guide for non-conviction based asset forfeiture / Theodore S. Greenberg ... [et al.].

p. cm.

Includes bibliographical references and index.

ISBN 978-0-8213-7890-8 — ISBN 978-0-8213-7902-8 (electronic)

1. Forfeiture. 2. Forfeiture—Criminal provisions. 3. Corruption. I. Greenberg, Theodore S.

K5107.S76 2009

345'.0773—dc22

2009000084

Cover design: Critical Stages

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# Foreword

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The corrupt money associated with bribes received by public officials from developing and transition countries is estimated to be \$20 billion to \$40 billion per year—a figure equivalent to 20–40 percent of flows of official development assistance. The amount of stolen assets is of such a staggering magnitude that it has a devastating impact on development. Stolen assets are difficult, sometimes impossible, to trace if immediate action is not taken. When stolen assets are moved through the international financial system, they move almost instantly from jurisdiction to jurisdiction, their “... provenance fading in a maze of electronic transfers, which shift[...] it, hid[e] it, br[eak] it up into manageable wads which [are]... withdrawn and re-deposited elsewhere obliterating the trail.”<sup>1</sup>

Even a portion of recovered assets can provide funding for social programs and badly needed infrastructure, which has led the President of the World Bank and the Secretary General of the United Nations to make helping countries to recover stolen assets a priority. On September 17, 2007, they, together with the Director of the UN Office of Drugs and Crime, launched the Stolen Asset Recovery (StAR) Initiative.

Non-conviction based (NCB) asset forfeiture is a critical tool for recovering the proceeds and instrumentalities of corruption, particularly in cases where the proceeds are transferred abroad. A procedure that provides for the seizure and forfeiture of stolen assets without the need for a criminal conviction, NCB asset forfeiture can be essential when the wrongdoer is dead, has fled the jurisdiction, or is immune from prosecution. Article 54(1)(c) of the United Nations Convention against Corruption urges countries to consider permitting NCB asset forfeiture of stolen assets when the offender cannot be prosecuted.

With the increased attention to NCB asset forfeiture comes a corresponding need for a practical tool for use by jurisdictions (policy makers, prosecutors, investigators, and judges) contemplating enacting and implementing an NCB asset forfeiture regime. *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* is designed as this practical tool. It is the first of its kind in the area of NCB asset forfeiture and the first knowledge publication under the StAR Initiative.

We hope that the guide is useful and we look forward to providing technical assistance to StAR countries.

**Adrian Fozzard**  
**StAR Coordinator**

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1. Linda Davies, *Nest of Vipers* (New York: Doubleday, 1995), p. 4.



# Acknowledgments

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*Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* would not have been possible without the special collaborative effort of the colleagues named below—from inside and outside the World Bank, from both civil and common law practitioners, and from developed and developing countries—whose expertise in criminal forfeiture and non-conviction based forfeiture breathes life and resonance into the important and complex work of asset forfeiture.

All whose names are mentioned have had a role in writing the guide. The principal writing, design, and editing was done by Theodore S. Greenberg (Senior Financial Sector Specialist, Financial Market Integrity Unit, World Bank, and NCB Asset Forfeiture Guide Team Leader), Linda M. Samuel (Deputy Chief, Asset Forfeiture and Money Laundering Section, United States Department of Justice), Wingate Grant (Assistant United States Attorney, Eastern District of Virginia, and rapporteur for the Vienna and Cancun workshops), and Larissa Gray (Consultant, Financial Market Integrity Unit, World Bank). A special thanks to Linda Samuel for working with the World Bank drafters on a daily basis to develop and execute this project.

The team is especially grateful to Latifah Merican-Cheong, Director, Financial Market Integrity, World Bank, for her guidance on this project; and to Adrian Fozzard (StAR Coordinator), Richard Weber (Chief, Asset Forfeiture and Money Laundering Section, United States Department of Justice), and our colleagues in the StAR Secretariat for their guidance and suggestions. Special thanks also to Paul Allan Schott for editing the final version of the guide, and to Jocelyn Taylor for arranging the logistics of the workshops in Vienna and Cancun.

The guide includes a number of special contributions written by experts in asset forfeiture who have shared their unique perspectives: Yves Aeschlimann (Switzerland), Dr. Mohammad A. A. Al Moqatei (Kuwait), Francis Cassidy (Ireland), Clara Garrido (Colombia), Stephanie Jeavons (United Kingdom), Peeraphan Premabhuti (Thailand), Frederic Raffray (Guernsey), and Roman del Rosario (the Philippines).

The team benefited from the thoughtful and helpful comments during the peer review process, which was chaired by Adrian Fozzard (StAR Coordinator) and Jean Pesme (Lead Financial Sector Specialist, Financial Market Integrity). The peer reviewers were Heike Gramckow (Senior Counsel, Justice Reform, World Bank), Claudio Mascotto (Prosecutor, Geneva, Switzerland), Tim Steele (Senior Governance Specialist,

StAR/UNODC), and Richard Weber (Chief, Asset Forfeiture and Money Laundering Section, United States Department of Justice).

As part of the drafting and consultation process, two Practitioners Workshops were held in Vienna (March 2008) and Cancun (June 2008). The workshops were chaired by Theodore Greenberg (World Bank). Those participating in the workshops were Alejandro Abrego Hinojosa (Mexico), Muhammad Yusufli Adhyaksana (Indonesia), Yves Aeschlimann (Switzerland), Salahuddin Ahmad (Bangladesh), Dr. Mohammad A. A. Al Moqatei (Kuwait), A. F. Hassan Ariff (Bangladesh), Andy Clarke (United Kingdom), Victor Dumas (World Bank), Yara Esquivel (International Centre for Asset Recovery), Adrian Fajardo (Mexico), Clara Garrido (Colombia), Claudy Gassant (Haiti), Alejandro Gomez (Mexico), Dorothee Gottwald (UNODC), Wingate Grant (United States), Larissa Gray (World Bank), Guillermo Hernandez Salmeron (Mexico), Stephanie Jeavons (United Kingdom), Inbal Levi (Israel), Graeme McKerrell (Guernsey), Cahyo Rahadian Muzhar (Indonesia), Nchima Nchito (Zambia), Peeraphan Premabhuti (Thailand), Frederic Raffray (Guernsey), Roman del Rosario (the Philippines), Randi Ryterman (World Bank), Linda Samuel (United States), Killian Strauss (Organization for Security and Co-operation in Europe), Delphine Schantz (UNODC), Brigitte Strobel-Shaw (UNODC), Salim Succar (Haiti), I Ktut Sudiharsa (Indonesia), Arturo Tellez Yurn (Mexico), Min Usihen (Indonesia), and Dr. Robert Wallner (Liechtenstein).

Special thanks to Killian Strauss and the Organization for Security and Co-operation in Europe for hosting the first Practitioners Workshop in Vienna and to Mr. José Luis Santiago Vasconcelos, Deputy Attorney General of Mexico, for hosting the second Practitioners Workshop in Cancun.

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# Abbreviations

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Abbreviations and acronyms are defined in the glossary.

All dollar amounts are in U.S. dollars unless otherwise indicated.

AMCATS	AMLO's Consolidated Asset Tracking System (Thailand)
AML	Anti-Money Laundering
AML/CFT	Anti-Money Laundering and Combating the Financing of Terrorism
AMLA	Anti-Money Laundering Act (Thailand)
AMLB	Anti-Money Laundering Board (Thailand)
AMLO	Anti-Money Laundering Office (Thailand)
ARA	Asset Recovery Agency (United Kingdom)
CICAD	Inter-American Drug Abuse Control Commission
Commonwealth Model Legislation	Commonwealth Model Legislative Provisions on the Civil Recovery of Criminal Assets Including Terrorist Property
CPS	Crown Prosecution Service
DNE	National Anti-Narcotics Agency Special Administration Unit, Dirección Nacional de Estupefacientes (Colombia)
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
EU	European Union
FATF	Financial Action Task Force on Money Laundering
FSRB	FATF Style Regional Bodies
FIU	Financial intelligence unit
FRISCO	Fund for Rehabilitation, Social Investment and Fight against Organized Crime (Colombia)
G-8	Group of Eight countries (Canada, France, Germany, Italy, Japan, Russian Federation, United Kingdom, United States)
GDP	Gross domestic product
IMAC	Federal Act on International Mutual Assistance in Criminal Matters (Switzerland)
KIO	Kuwaiti Investment Office

KYC	Know Your Customer
MLA	Mutual Legal Assistance
MLAT	Mutual Legal Assistance Treaty
NCB	Non-conviction based
NGO	Nongovernmental organization
OAS	Organization of American States
OAS Model Regulations	OAS/CICAD Model Regulations Concerning Laundering Offenses Connected to Illicit Drug Trafficking and Other Serious Offenses
ODA	Official development assistance
OECD	Organisation for Economic Co-operation and Development
PEP	Politically exposed person
R.A.	Republic Act (Philippines)
SAR	Suspicious Activity Reports
SFO	Serious Fraud Office (United Kingdom)
SOCA	Serious Organised Crime Agency (United Kingdom)
StAR	World Bank/UNODC Stolen Asset Recovery Initiative
STR	Suspicious Transaction Report
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNODC	United Nations Office on Drugs and Crime
UNTOC	United Nations Convention against Transnational Organized Crime (2000) or “Palermo Convention”
Vienna Convention	United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)

# Introduction

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## **The theft of public assets is a development problem of the greatest magnitude.**

- The cross-border flow of the global proceeds from criminal activities, corruption, and tax evasion is estimated to be between \$1 trillion and \$1.6 trillion per year.
- The amount of money stolen from developing and transition countries is about \$20 billion to \$40 billion per year—a figure equivalent to 20–40 percent of flows of official development assistance.
- The damage resulting from such thefts includes the degradation and distrust of public institutions, the weakening of the private investment climate, and the corruption of social service delivery mechanisms for basic health and education programs.

**Once stolen funds, whether public or private, have been transferred abroad, they are extremely difficult to recover.** Developing countries face serious obstacles because of the lack of non-conviction based (NCB) asset forfeiture laws, as well as limited legal, investigative, and judicial capacity and inadequate financial resources. Jurisdictions where stolen assets are hidden—often developed countries—may not be able to respond to requests for legal assistance because necessary laws, including NCB asset forfeiture legislation, are not in place. In situations in which death, fugitive status, or immunity of officials impedes a criminal investigation or prosecution, the process of asset recovery can be even more difficult.

**NCB asset forfeiture is a critical tool for recovering the proceeds and instrumentalities of corruption.** It is a legal mechanism that provides for the restraint, seizure, and forfeiture of stolen assets without the need for a criminal conviction; it can be essential to successful asset recovery when the violator is dead, has fled the jurisdiction, is immune from investigation or prosecution, or is essentially too powerful to prosecute. A growing number of jurisdictions have established NCB asset forfeiture regimes and such regimes have been recommended at regional and multilateral levels by a number of organizations. The United Nations Convention against Corruption (UNCAC) urges countries to consider permitting NCB asset forfeiture of stolen assets when the offender cannot be prosecuted.

**This increased attention to NCB asset forfeiture drives a corresponding need for a practical tool for use by jurisdictions contemplating NCB asset forfeiture legisla-**

**tion. *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* is designed as a practical tool to help countries recover stolen assets.** It is the first of its kind in NCB asset forfeiture and the first knowledge publication under the Stolen Asset Recovery (StAR) Initiative, a joint World Bank/UNODC initiative, which, among other things, helps developing countries recover assets stolen by corrupt leaders. The guide identifies 36 Key Concepts—legal, operational, and practical—that an NCB asset forfeiture system should encompass to be effective in recovering stolen assets.

## Methodology

To ensure a practical focus, StAR drew on the expertise and experience of a team of experts who practice criminal forfeiture or NCB asset forfeiture or both on a daily basis. The practitioners were representative of various forfeiture systems and all phases of forfeiture, and included investigating magistrates, prosecutors, law enforcement officers, and asset managers. Civil and common law systems were equally represented.<sup>2</sup> Practitioners from developed and developing countries contributed their legal and practical experiences. Finally, legislative drafters, policy makers, and forfeiture practitioners from jurisdictions considering NCB asset forfeiture were part of the drafting process. These individuals participated in the drafting process in their individual capacities as practitioners, not on behalf of their respective governments.

The 36 Key Concepts represent the agreed-on recommendations of these experts. All agreed that these concepts are critical for designing and building an effective NCB asset forfeiture regime. In some cases, practitioners agreed to a concept despite the absence of that particular concept in his or her respective system. They agreed because the concept was appropriate not just in theory, but based upon the experiences of the jurisdictions that applied it. Their recommendations are based on their shared experiences as practitioners; their agreement is rooted in a common objective of introducing NCB asset forfeiture as a critical tool for recovering the proceeds of corruption.

The Key Concepts were initiated as the agreed outcome of a Practitioners Workshop in March 2008 (Vienna, Austria) and were further developed through follow-up contributions and consultations. A revised version was presented to and agreed upon by an expanded group of practitioners at a Practitioners Workshop in June 2008 (Cancun, Mexico). This was followed by additional contributions and consultations and the final version was agreed to by the expanded group.

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2. Civil law jurisdictions included Colombia, Costa Rica, Haiti, Indonesia, Kuwait, Liechtenstein, Mexico, Switzerland, and Thailand. Common law jurisdictions included Bangladesh, Canada, Israel, the Philippines, the United Kingdom, the United States, and Zambia. Guernsey is considered a common law jurisdiction for these purposes, albeit a part civil law and part common law jurisdiction with a customary law origin.

## How to Use This Guide

The *Good Practices Guide* is designed as a practical tool for policy makers, legislative drafting groups, investigators, and prosecutors, as well as a reference book for training on NCB asset forfeiture. Given the diverse audiences, it is important that readers keep in mind two points. First, the overall purpose of the guide is to assist all countries in the development and implementation of laws supporting the forfeiture of assets without the requirement for a conviction as outlined in UNCAC.<sup>3</sup> Second, the key concepts must be considered in the context of a jurisdiction's existing legal system. The policy maker, for example, must first determine whether the NCB legislation should be a separate statute or integrated into existing laws, such as a penal (criminal) code or anti-money laundering act. In either event, the Key Concepts can be used to draft national legislation enabling or improving NCB asset forfeiture.

Furthermore, it may not be possible for a jurisdiction to incorporate all the Key Concepts into its NCB asset forfeiture legislation. Some concepts may be acceptable in civil law systems but not in common law systems and vice versa. Where a proposed concept may not be appropriate in the context of a jurisdiction's existing legal system, the underlying purpose of the concept should be considered. There may be an alternative approach to reaching the same goal. Just as the practitioners were able to reach an agreement on the 36 Key Concepts, it is hoped that the concepts involved are able to transcend the limits of any particular legal system.

The guide is organized into three major parts:

Part A first provides an overview of the problem of stolen assets and the problem of recovering the assets once they are transferred abroad. Second, it describes how the international community has taken steps to respond to the problem through UNCAC and the StAR Initiative. UNCAC introduced a new framework to facilitate the tracing, freezing, seizing, forfeiture, and return of assets stolen through corrupt practices and hidden in foreign jurisdictions. The StAR Initiative developed an action plan to support the domestication and implementation of asset recovery provisions under UNCAC, to facilitate countries' efforts to recover stolen assets that have been hidden in foreign jurisdictions, and ultimately, to help deter such flows and eliminate safe havens for hiding corruption proceeds. Third and finally, Part A introduces NCB asset forfeiture as one of the critical tools to combat corruption, describing the situations when it

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3. NCB asset forfeiture can and should be applied to a much wider range of offenses, in particular to the offenses established in accordance with the 1988 Vienna Convention and UNTOC. This means that there are recommendations within this guide that are obligations with respect to corruption offenses for countries that have ratified UNCAC and that there are some Key Concepts in which the treatment of corruption offenses may be different from that for other offenses. The authors have tried to highlight these differences.

is useful, how it differs from criminal forfeiture, its usefulness in civil and common law jurisdictions, and the support it has gained internationally.

Part B contains the 36 Key Concepts. The concepts have been grouped together by topic area, including prime imperatives, definitions of assets and offenses subject to NCB asset forfeiture, measures for investigation and preservation of assets, procedural and evidentiary concepts, determining parties and ensuring proper notice, judgment proceedings, organizational considerations and asset management, and international cooperation and asset recovery. The concepts are illustrated through examples from cases and excerpts from different jurisdictions' NCB asset forfeiture legislation.<sup>4</sup>

Part C contains a number of special contributions written by individual practitioners. The contributions focus on the general practice of NCB asset forfeiture and international cooperation in specific jurisdictions, namely Colombia, Guernsey, Ireland, Kuwait, Switzerland, Thailand, and the United Kingdom. In addition, some contributions illustrate a selection of NCB asset forfeiture practices, such as asset management, delegating certain roles to the executive branch, and pursuing forfeiture based on illicit enrichment.

The appendixes contain additional reference tools to assist jurisdictions in implementing an NCB asset forfeiture system. Appendix I is a matrix comparing the features of forfeiture systems across a selection of countries, with specific references to NCB legislation. Appendix II provides a Quick Reference Sheet to the Key Concepts. Appendix III provides information on the StAR Focal Point Contact List. Appendixes IV, V, and VI provide sample forms and checklists that could be used during the investigative and pre-seizure planning stages. Appendix VII provides the online locations for some of the materials referenced in the guide, many of which are also available in the guide's CD-ROM appendix.

The CD-ROM Appendix of Legal Resources, also available online at [www.worldbank.org/star](http://www.worldbank.org/star) or [www.amlcft.org](http://www.amlcft.org), contains the materials referenced in the guide, including the United Nations Convention against Corruption, relevant decisions and recommendations of multilateral organizations (for example, the Commonwealth, the Financial Action Task Force, the Group of Eight Countries, the European Union), case law, sample court forms for investigative applications, sample checklists and forms for asset management and investigations, and sample policy or practice directions. These practical tools are referenced in the guide and are designed to provide assistance to all parties involved in developing and implementing NCB asset forfeiture legislation, whether policy makers, investigators, or prosecutors.

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4. The examples are drawn from civil and common law jurisdictions and various forfeiture models in an effort to demonstrate how the concepts can be adopted by different systems. Despite efforts to ensure a balance, examples are limited in some areas; NCB asset forfeiture is new in many jurisdictions and there are fewer examples to draw on compared with jurisdictions with more-developed NCB asset forfeiture legislation and case experience. The guide is not designed to be used as a comparative analysis of legal traditions or as a description of the pros and cons of the characteristics of forfeiture models. Such a detailed analysis is beyond the scope of this publication.

## **PART A**

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### Understanding the Problem and the International Response



# 1. Theft of Public Assets: A Development Problem of the Greatest Magnitude

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The theft of public assets is a development problem of the greatest magnitude. The exact value of state assets that have been stolen from developing countries is impossible to determine with any precision. Between \$1 trillion and \$1.6 trillion is lost each year to various illegal activities.<sup>5</sup> Corrupt public officials in developing and transition countries loot as much as \$40 billion each year, concealing these funds overseas where they are extremely difficult to recover. This figure is equivalent to the annual GDP of the world's 12 poorest countries, where 240 million people live.

The true cost of corruption far exceeds the value of assets stolen by the leaders of countries. It leads to the degradation and distrust of public institutions, especially those involved in public financial management and financial sector governance; the weakening if not destruction of the private investment climate; and the corruption of social service delivery mechanisms, such as those for basic health and education programs, with a particularly adverse impact on the poor.<sup>6</sup>

Once the stolen funds have been transferred abroad, recovery is extraordinarily difficult. On the one hand, developing countries face serious obstacles as a result of limited legal, investigative, and judicial capacity; inadequate financial resources; and a lack of political will. This weakens countries' abilities to successfully conduct their own investigations and prosecutions, and to trace, freeze, forfeit, and return the proceeds of corruption. Furthermore, those same obstacles reduce their capacity to submit adequate international requests to the foreign jurisdictions where the stolen assets are located, whereas a sufficient request could enable the foreign jurisdictions to initiate proceedings to restrain the assets or enforce a foreign freezing or forfeiture order. On the other hand, jurisdictions where stolen assets are hidden—often developed countries—may not be responsive to requests for legal assistance. Many countries can freeze assets, but not return them. In other cases, the evidentiary and procedural standards required by

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5. UNODC and The World Bank, "Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan" (World Bank, Washington, DC, 2007,) p. 10, citing Raymond Baker, *Capitalism's Achilles Heel: Dirty Money and How to Renew the Free-Market System* (Hoboken, NJ: John Wiley & Sons, Inc., 2005). For the text of the StAR Initiative report, see CD-ROM appendix A.

6. StAR Initiative report, p. 8.

the laws of the foreign jurisdiction are high and therefore difficult or impossible for the requesting jurisdiction to meet. Where death, the fugitive status, or immunity of officials engaged in stealing assets impedes a criminal investigation and prosecution, the asset recovery process is made even more difficult or impossible. Asset recovery can only work in the presence of time-sensitive mutual collaboration between developed and developing countries and between victim (requesting jurisdiction) and foreign areas where the stolen assets are located (requested jurisdiction).

## 2. Global Consensus on the Need for Concerted Action

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### The United Nations Convention against Corruption

Acknowledging the serious problem of grand corruption and the need for improved mechanisms to combat its devastating impact, the international community introduced a new framework to facilitate the tracing, freezing, seizing, forfeiture, and return of assets stolen through corrupt practices and hidden in foreign jurisdictions. The United Nations Convention against Corruption<sup>7</sup> (UNCAC), which entered into force in 2005, introduced this innovative framework in a chapter dedicated to asset recovery.

The return of assets is identified as a fundamental principle of UNCAC, and States Parties are required to afford one another the widest measure of cooperation and assistance in this regard.<sup>8</sup> To enable implementation of this principle, UNCAC outlines mechanisms for the recovery of illicitly acquired assets and international cooperation regarding the tracing, freezing, seizing, forfeiture, and return of looted assets, including

- adequate procedures to ensure that financial institutions pay particular attention to suspicious activity involving the private banking accounts of prominent public officials and their family members and close associates;<sup>9</sup>
- procedures that permit a State Party to participate as a private litigant in the courts of another State Party, allowing the state to recover corruption proceeds as a plaintiff in its own action, as a claimant in a forfeiture proceeding, or as a victim for purposes of court ordered restitution;<sup>10</sup>
- domestic legislation that enables a state to recognize a foreign forfeiture order and to freeze and forfeit assets derived from corruption in a foreign state through its own investigations;<sup>11</sup> and
- measures to allow NCB asset forfeiture, particularly in cases of death, flight, or other cases.<sup>12</sup>

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7. The text of UNCAC, along with a list of countries that have signed or ratified it, is available at <http://www.unodc.org/unodc/en/treaties/CAC/index.html>. See also CD-ROM appendix B.

8. UNCAC, Article 51.

9. UNCAC, Article 52.

10. UNCAC, Article 53.

11. UNCAC, Article 54.

12. UNCAC, Article 54, para. 1(c).

Furthermore, UNCAC outlines a framework for international cooperation<sup>13</sup> and for the disposition of property forfeited by one State Party at the request of another, depending on how closely the assets were linked to the requesting State Party.<sup>14</sup> UNCAC speaks specifically of the embezzlement of public funds and the laundering of embezzled public funds and obligates a requested State Party to return confiscated property to the requesting State Party.<sup>15</sup> In addition to promoting a complementary scheme of domestic laws to achieve the goal of return of embezzled public funds, UNCAC requests, where no special rule is applicable, priority consideration to returning confiscated property to prior legitimate owners or compensating the victims of the crime.<sup>16</sup> Apart from the rules set forth by this framework, requested States Parties may deduct reasonable expenses incurred in investigations, prosecutions, or judicial proceedings leading to the return or disposition of confiscated property.<sup>17</sup> States may further give consideration to concluding agreements or mutually acceptable arrangements, on a case-by-case basis, for the final disposal of confiscated property.<sup>18</sup>

## The Stolen Asset Recovery (StAR) Initiative

To help address the staggering problem of the theft of public assets from developing countries, the World Bank in partnership with the United Nations Office on Drugs and Crime (UNODC) launched the Stolen Asset Recovery (StAR) Initiative in September 2007. In announcing the plan, Secretary General of the United Nations Ban Ki-moon, World Bank President Robert B. Zoellick, and Executive Director of the UNODC Antonio Maria Costa indicated that a truly international effort is needed to ensure looted assets are returned to their rightful owners.<sup>19</sup>

“This Initiative will foster much needed cooperation between developed and developing countries and between the public and private sectors to ensure that looted assets are returned to their rightful owners.”

~ Ban Ki-moon, Secretary  
General of the United Nations,  
September 17, 2007

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13 . UNCAC, Article 55.

14. UNCAC, Article 57.

15. UNCAC, Article 57, para. 3(a).

16. UNCAC, Article 57, para. 3(c). The UNTOC also includes provisions for return to a requesting State Party for return to prior legitimate owners and compensating victims (UNTOC, Article 14, para. 2).

17. UNCAC, Article 57, para. 4.

18. UNCAC, Article 57, para. 5. Other multilateral conventions have advocated such sharing agreements: see UNTOC, Article 14, para. 3(b), and Vienna Convention, Article 5, para. 5(b)(ii).

19. The Group of 20 Countries declared their support of the StAR Initiative in the Declaration of the Summit on Financial Markets and the World Economy (Washington, DC, November 15, 2008). StAR's efforts were also noted in the Outcome Document of the United Nations Follow-up International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus (Doha, Qatar, December 2, 2008, para. 20). The G-8 finance ministers also welcomed the StAR Initiative in Potsdam, Germany, on May 19, 2007.

The StAR Initiative urges countries to ratify UNCAC and applies the framework established in UNCAC to support the domestication and implementation of UNCAC. StAR is focused on international asset recovery, lowering the barriers to asset recovery in the major financial centers, building the technical capacity to facilitate asset recovery by victim states, and ultimately, helping to deter such flows and eliminate safe havens for corruption.

The StAR Initiative will help

- generate and disseminate knowledge on asset recovery and advocate for the implementation of measures that reduce barriers to asset recovery;
- support national efforts to build institutional capacity for asset recovery, such as effective forfeiture regimes or the capacity to respond to and file international mutual legal assistance requests; and
- monitor the recovered funds if requested by national authorities.

The development benefit of recovering stolen assets is enormous, assuming the funds are well spent. Even a portion of the assets could provide much-needed funding for social programs or badly needed infrastructure. Every \$100 million could fund full immunizations for 4 million children or provide water connections for 250,000 households.<sup>20</sup>

Beyond the benefits of restitution, a StAR program that is effective in assisting countries in reducing barriers and recovering stolen assets will help build institutional capacity and provide a powerful deterrent effect and ultimately help to eliminate safe havens for corruption.

“There should be no safe haven for people who steal from the poor.” “Helping developing countries recover the stolen money will be key to fund social programs and put corrupt leaders on notice that they will not escape the law.”

~ Robert B. Zoellick, President of the World Bank, September 17, 2007

“Corruption hurts us all. ... [F]ighting it is a shared responsibility.”

~ Antonio Maria Costa, Executive Director of UNODC, January 28, 2008

20. StAR Initiative report 2007, p. 11.



# 3. Non-Conviction Based Forfeiture as a Tool for Asset Recovery

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## Distinguishing between Criminal Forfeiture and NCB Asset Forfeiture

There are generally two types of forfeiture used internationally to recover the proceeds and instrumentalities<sup>21</sup> of crime: NCB asset forfeiture and criminal forfeiture. They share the same objective, namely the forfeiture by the state of the proceeds and instrumentalities of crime. Both share common, two-fold rationales. First, those who commit unlawful activity should not be allowed to profit from their crimes. Proceeds should be forfeited and used to compensate the victim, whether it is the state or an individual. Second, unlawful activity should be deterred. Removing the economic gain from crime discourages the criminal conduct in the first instance. Forfeiture of instrumentalities ensures that such assets will not be used for further criminal purposes; it likewise serves as a deterrent.

Where criminal and NCB asset forfeiture differ is in the procedure used to forfeit assets. The main distinction between the two is that criminal forfeiture requires a criminal trial and conviction, whereas NCB asset forfeiture does not. In addition, there are a number of procedural differences that generally characterize the two systems (see box 1 for a comparison).

Criminal forfeiture is an *in personam* order, an action against the person (for example, *State v. John Smith*). It requires a criminal trial and conviction, and is often part of the sentencing process. Some jurisdictions apply a lower standard of proof (that is, the balance of probabilities) for the forfeiture process than for the criminal portion of the process. (For a description of standards of proof, see Key Concept 14.) Nonetheless, the requirement of a criminal conviction means that the government must first establish guilt “beyond a reasonable doubt” or such that the judge is “intimately convinced” (intimate conviction). Criminal forfeiture systems can be object-based, which means that the prosecuting authority must prove that the assets in question are proceeds or instrumentalities of the crime. Alternatively, they can be value-based regimes, which allow for the forfeiture of the value of the offender’s benefit from the crime, without proving the connection between the crime and the specific object of property.

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21. “Instrumentalities” are the assets used to facilitate crime, such as a car or boat used to transport narcotics. See Key Concept 6.

<b>BOX 1</b>		<b>Differences between Criminal and NCB Asset Forfeiture</b>	
<b>Criminal forfeiture</b> Against the person ( <i>in personam</i> ): part of the criminal charge against a person.	<b>Action</b>	<b>Non-conviction based forfeiture</b> Against the thing ( <i>in rem</i> ): judicial action filed by a government against the thing.	
Imposed as part of sentence in criminal case.	<b>When does it take place?</b>	Filed before, during, or after criminal conviction, or even if there is no criminal charge against a person.	
Criminal conviction required. Must establish criminal activity “beyond a reasonable doubt” or “intimate conviction.”	<b>Proving unlawful conduct</b>	Criminal conviction not required. Must establish the unlawful conduct on a “balance of probabilities” standard of proof (standard may vary).	
Object-based or value-based.	<b>Link between proceeds and unlawful conduct</b>	Object-based.	
Forfeit defendant’s interest in the property.	<b>Forfeiture</b>	Forfeit the thing itself, subject to innocent owners.	
Varies (criminal or civil)	<b>Jurisdiction</b>	Varies (criminal or civil l)	

NCB asset forfeiture, also referred to as “civil forfeiture,” “*in rem* forfeiture,” or “objective forfeiture” in some jurisdictions, is an action against the asset itself (for example, *State v. \$100,000*) and not against an individual.<sup>22</sup> It is a separate action from any criminal proceeding and requires proof that the property is tainted (that is, the property is the proceeds or an instrumentality of crime). Generally, the criminal conduct must be established on a balance of probabilities standard of proof. This eases the burden on the government and means that it may be possible to obtain forfeiture when there is insufficient evidence to support a criminal conviction. Because the action is not against an individual defendant, but against the property, the owner of the property is a third party having the right to defend the property.

NCB asset forfeiture is useful in a variety of contexts, particularly when criminal forfeiture is not possible or available (see box 2 for case examples), as in the following examples:

- The violator is a fugitive. A criminal conviction is not possible if the accused is a fugitive.

22. There are some countries with variations on what is essentially an *in rem* proceeding. In the Philippines, the system is not purely *in rem* because the government can obtain a personal judgment against an individual, not against the property, if the property is unavailable.

- The violator is dead or dies before conviction. Death brings an end to criminal proceedings.
- The violator is immune from criminal prosecution.
- The violator is so powerful that a criminal investigation or prosecution is unrealistic or impossible.
- The violator is unknown and assets are found (for example, assets found in the hands of a courier who is not involved in the commission of the criminal offense). If the asset is derived from crime, an owner or violator may be unwilling to defend civil recovery proceedings for fear that this would lead to a criminal prosecution. This uncertainty makes a criminal prosecution of a violator very difficult, if not impossible.
- The relevant property is held by a third party who has not been charged with a criminal offense but is aware—or is willfully blind to the fact—that the property is tainted. While criminal forfeiture may not reach the property held by bona fide third parties, NCB asset forfeiture can forfeit the property from a third party without a bona fide defense.
- There is insufficient evidence to proceed with criminal prosecution.

In such scenarios, NCB asset forfeiture is possible because it is an *in rem* action against the property, not the person, or a criminal conviction is not required, or both. NCB asset forfeiture can also be useful in the following situations:

- The violator has been acquitted of the underlying criminal offense as a result of lack of admissible evidence or a failure of meeting the burden of proof. This applies in jurisdictions in which NCB asset forfeiture is established on a standard of proof that is lower than the criminal conviction standard. While there may be insufficient evidence for a criminal conviction beyond a reasonable doubt, there still could be sufficient evidence to show the assets are derived from illegal activity on a balance of probabilities.
- The forfeiture is uncontested. In jurisdictions in which NCB asset forfeiture is conducted as a civil proceeding, default judgment procedures are used to forfeit the assets, resulting in time and cost savings.

NCB asset forfeiture can be particularly effective in divesting the politically corrupt of the fruits of their crimes and restoring those funds to the citizens of the victimized state. While NCB asset forfeiture should never be a substitute for criminal prosecution, in many instances (particularly in the context of official corruption), NCB asset forfeiture may be the only tool available to recover the proceeds of those crimes and to exact some measure of justice. The influence of corrupt officials and other practical realities may prevent criminal investigations entirely, or until after the official has died or absconded. It is not uncommon for a corrupt official who robs a country to also attempt to obtain immunity from prosecution. Because an NCB asset forfeiture regime is not dependent on a criminal conviction, it can proceed regardless of death, flight, or any immunity the corrupt official might enjoy.

**BOX 2**      **NCB Asset Forfeiture Scenarios**

**Flight from jurisdiction**

Two foreign students selling counterfeit designer jewelry and high-value designer handbags on an Internet auction site were arrested for offenses related to counterfeiting and money laundering. They were released on bail and failed to report for trial. They were believed to have returned to their home country.

The case was referred to the Asset Recovery Agency (ARA; United Kingdom) and investigations revealed that money had been received into various bank accounts from online payment companies and cash payments. The ARA was granted a freezing order and eventually obtained an order for £60,000 (approximately \$83,500).

**Proceeds within the jurisdiction; crime committed in foreign jurisdiction**

A human trafficker was convicted in a French court, sentenced to eight years imprisonment, fined 500,000 (approximately \$658,000), and his French apartment was confiscated. Unfortunately, the French authorities did not have jurisdiction to reach his United Kingdom assets to satisfy the fine, leaving him with access, upon release, to substantial assets purchased with the proceeds of illegal activities. The ARA was successful in obtaining a property freezing order and eventually forfeited £750,000 (approximately \$1,044,000) after establishing that the large and numerous cash deposits in bank accounts were the proceeds of human trafficking.

**Insufficient evidence for a criminal prosecution**

In 2004, Hertfordshire police executed search warrants and found traces of cocaine, but found insufficient evidence to secure a conviction. The case was referred to the ARA, which successfully obtained a property freezing order on assets worth £1.5 million (approximately \$2,088,000). In obtaining the order, the ARA contended the subject's assets were derived from a wide range of unlawful conduct, including drug trafficking, money laundering, and mortgage fraud, and that properties held in the name of a family member and a corporation were funded by the subject. The subject had set up several companies with associates who had drug convictions, financial statements had not been filed for the majority of these companies, and it was impossible for the subject to have funded his property and businesses with any legitimate resources available to him.

NCB asset forfeiture is also not confined to the national context. In today's global economy, criminals can move assets around the world in a matter of seconds at the push of a button. International boundaries are no longer the ally of the corrupt politician if the state in which the corruption occurred and the state in which the criminal proceeds are located have enacted laws to permit cooperation in seizing and forfeiting assets—based on both criminal and NCB asset forfeiture.

## NCB Asset Forfeiture in Civil and Common Law Jurisdictions

An NCB asset forfeiture regime can be established in both civil and common law jurisdictions. The starting point is Article 54(1)(c) of UNCAC, which requires all States Parties to consider forfeiting the proceeds of crime without a conviction. UNCAC does not focus in

<b>BOX 3      NCB Asset Forfeiture in Civil and Common Law Jurisdictions</b>		
<b>Civil law</b>		<b>Common law</b>
<b>Similarities</b>		
Action against the property or asset ( <i>in rem</i> )		
Conviction not required		
Requires proof of unlawful conduct		
<b>Differences</b>		
Beyond a reasonable doubt or intimately convinced	<b>Standard of proof required for forfeiture</b>	Balance of probabilities or preponderance of the evidence
Criminal	Court of jurisdiction	Civil
Limited	Prosecutorial discretion	Broad

*Note: Forfeiture models vary from jurisdiction to jurisdiction, therefore exceptions may apply.*

a single legal tradition or suggest that fundamental differences can impede implementation. Instead, it proposes NCB asset forfeiture as a tool for all jurisdictions to consider in the fight against corruption, a tool that transcends the differences between systems.

Although it enjoys lengthier experience in selected common law jurisdictions, such as the United States, South Africa, and Ireland, a growing number of civil law jurisdictions have enacted legislation. Among these civil law jurisdictions are Albania, Colombia, the Province of Quebec (Canada), Liechtenstein, Slovenia, Switzerland, and Thailand. Within the common or civil law traditions, the forfeiture models have varied among the jurisdictions that have adopted them.

Although there are fundamental differences in common and civil law systems (see box 3), there are significant areas of agreement. In some cases, civil law jurisdictions have incorporated common law principles into their systems, and vice versa. For example, the Province of Quebec, a civil law jurisdiction within Canada, employs the balance of probabilities standard of proof in civil cases, rather than the singular standard that characterizes other civil law jurisdictions. In other cases, jurisdictions have found solutions to enable international cooperation. For example, courts in Switzerland have confirmed that Switzerland can provide criminal judiciary cooperation to the United States in an NCB asset forfeiture case despite the absence of an intention to pursue criminal proceedings.<sup>23</sup> This type of practical cooperation is also important for international cooperation required under UNCAC.

23. *A. Company v. Federal Office of Justice*, ATF 132 II 178 (Switzerland). For the text of the decision, see CD-ROM appendix H.

As indicated in the introduction, this guide is designed to be useful in both civil and common law jurisdictions. It draws on experiences from both traditions, and, where available, it illustrates the key concepts using examples. It identifies the similarities and differences and offers possible solutions to problems. In some cases, there may not be a proposed solution. Instead, the issue is highlighted so that jurisdictions are aware of the issues and can consider possible solutions based on the context of their own systems.

## Historical Perspective and International Support for NCB Asset Forfeiture

The concept of NCB asset forfeiture dates back many years and is premised on the notion that if a “thing” offends the law, it may be forfeited to the state. The concept of *in rem* jurisdiction, literally “against the thing,” became common in admiralty law so that the vessel, not the captain, crew, or owner, could be sued if the vessel committed a wrong.

While the United States has had NCB laws since 1776, its laws were amended more than 30 years ago to attack the scourge of drug trafficking to reach two categories of property: proceeds of crime and property that facilitates the commission of designated crimes.

In recent years, a number of multilateral treaties have been concluded that provide obligations for states to cooperate with one another on forfeiture, asset sharing, legal assistance, and compensation of victims. Several United Nations conventions and multilateral treaties contain provisions with regard to forfeiture:

- United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988; Vienna Convention)<sup>24</sup>
- United Nations Convention against Transnational Organized Crime (2000; UNTOC)<sup>25</sup>
- United Nations Convention against Corruption (2004; UNCAC)
- Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005)
- Council of Europe, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990; Strasbourg Convention)
- Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997)

Among these, UNCAC is the only instrument containing a specific provision on non-conviction based forfeiture, and it provides some ground-breaking obligations for

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24. UNCAC, Article 5, requires countries to adopt measures to enable confiscation of proceeds and instrumentalities from drug-related offenses.

25. UNCAC, Articles 12 and 13, require countries to adopt measures to enable confiscation of proceeds and instrumentalities from offenses related to corruption and money laundering.

states to provide international cooperation in criminal matters and financial and technical assistance to each other.

Article 54(1)(c) of UNCAC: Consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.

In Article 54 on international cooperation for purposes of forfeiture, States Parties are obliged to enable domestic authorities to recognize and act on “an order of confiscation issued by a court of another State Party”<sup>26</sup> and “to permit its competent authorities, where they have jurisdiction, to order the confiscation of such property of foreign origin.”<sup>27</sup> This is broadly worded and can encompass monetary forfeiture judgments and NCB orders.<sup>28</sup> Similarly, Article 43 requires States Parties to consider assisting each other in investigations of and proceedings in civil and administrative matters related to corruption. This article includes NCB asset forfeiture proceedings and addresses the problem encountered in the past, whereby states could provide legal assistance and cooperation in criminal matters, but not in civil cases.<sup>29</sup> With respect to a related area, whereby a state may initiate civil litigation to recover assets, Article 53 allows a State Party to participate as a private litigant in the courts of another state to recover corruption proceeds as a plaintiff in its own action, as a claimant in a forfeiture proceeding, or as a victim for purposes of court-ordered restitution.

A number of other multilateral and intergovernmental organizations have recommended NCB asset forfeiture in their decisions and working groups (see box 4).

Like all legislation, both criminal and NCB asset forfeiture laws have not been without legal challenge. Courts have been called upon to interpret NCB laws. Even courts in jurisdictions without NCB asset forfeiture have considered it in the context of mutual legal assistance.<sup>30</sup> The constitutionality of the laws has been challenged in a

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26. UNCAC, Article 54 (1)(a).

27. UNCAC, Article 54 (1)(b).

28. The interpretive notes for the official records (travaux préparatoires) of the negotiation of the UNCAC state that the reference to an order of confiscation in Article 54(1)(a) may be interpreted broadly, as including monetary confiscation judgments, but should not be read as *requiring* enforcement of an order issued by a court that does not have criminal jurisdiction (United Nations A/58/422/Add.1, para. 57).

29. United Nations, Legislative Guide for the Implementation of the United Nations Convention against Corruption (New York: United Nations, 2006), para. 522.

30. *In re S-L* (Restraint Order: External Confiscation Order), [1996] QB 272 (Court of Appeal of England); *In the Matter of the Representation of Batalla-Esquivel*, [2001] JLR 160 (Royal Court of Jersey); *In the Matter of Poyiadjis*, Unreported 17th February 2005 (High Court of Justice of the Isle of Man) (courts in respective jurisdictions without NCB laws permitting enforcement of a foreign *in rem* restraint order under what were perceived to be “criminal legislative powers”). See also “Enforcement of Restraint Orders Based on Foreign Non-Conviction Based Forfeiture Orders before the Introduction of NCB Asset Forfeiture Legislation in England and Wales and the Crown Dependencies” in part C.

**BOX 4**      **Multilateral Support for NCB Asset Forfeiture**

**United Nations:** UNCAC, Article 54(1)(c)

Also through UN Working Groups:

- Open-Ended Intergovernmental Working Group on Asset Recovery, established by the Conference of States Parties to UNCAC
- Open-Ended Intergovernmental Expert Working Group on Countering Money-Laundering and Promoting Judicial Cooperation, established by the Commission on Narcotic Drugs in March 2008

**Financial Action Task Force:** The Forty Recommendations, Recommendation 3, para. 3<sup>a</sup>

**Commonwealth Secretariat:** Commonwealth Model Legislative Provisions on the Civil Recovery of Assets Including Terrorist Property<sup>b</sup>; Report of the Commonwealth Working Group on Asset Repatriation 2005, Recommendation 21

**European Union:** Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, Article 3, para. 4<sup>c</sup>; Proceeds of organized crime: Ensuring that “crime does not pay,” Communication from the Commission to the European Parliament and the Council (Brussels, 20 November 2008, COM(2008) 766)<sup>d</sup>

**G-8 Countries:** G-8 Best Practice Principles on Tracing, Freezing and Confiscation of Assets, para. 26<sup>e</sup>

a. “Countries may consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction. . . .” For the full text of the FATF Forty Recommendations, see CD-ROM appendix C.

b. For the full text of “Commonwealth Model Legislative Provisions on the Civil Recovery of Criminal Assets Including Terrorist Property,” see CD-ROM appendix D.

c. For the full text of Council Framework Decision 2007/212/JHA, see CD-ROM appendix F.

d. For the full text of the communication, see CD-ROM appendix F.

e. For the full text of the G-8 Best Practice Principles, see CD-ROM appendix E.

number of jurisdictions, including Colombia,<sup>31</sup> South Africa,<sup>32</sup> Thailand,<sup>33</sup> Ireland,<sup>34</sup> and the Province of Ontario in Canada.<sup>35</sup> As early as 1986, the European Commission

31. Constitutional Court, Sentence C-1065-03, Judge Dr. Alfredo Beltrán Sierra (Law 793 of 2002 upheld as constitutional on a number of issues raised, including property rights, fair trial, presumption of innocence, reversal of the burden of proof, and retrospectivity). For the text of the decision, see CD-ROM appendix H.

32. *NDPP v. Mohamed No and Ors*, [2003] ZACC 4 (Constitutional Court of South Africa) (ex parte statutory preservation provisions not in violation of due process and fair trial provisions); *National Director of Prosecutions v. Prophet*, [2006] ZACC 17 (Constitutional Court of South Africa) (law upheld as constitutional further to a number of constitutional issues raised, including violation of rights to dignity, privacy, fair trial, silence, to be presumed innocent until proven guilty, and the right not to be arbitrarily deprived of property). For the text of the *NDPP v. Mohamed No and Ors* decision, see CD-ROM appendix H.

33. *Charles Mescal and Mrs. Tayoy*, Case Nos. 40-41/2546 (October 16, 2003) (retrospective application of NCB asset forfeiture provisions under Anti-Money Laundering Act not in violation of the Constitution). For full text of the decision, see CD-ROM appendix H.

34. *Murphy v. GM, PB, PC Ltd., and GH*, O’Higgins J., June 4, 1999 (Supreme Court of Ireland) (law upheld as constitutional on a number of issues including violations of rights to a fair trial, against self-incrimination, and property). For text of decision, see CD-ROM appendix H. See also “Targeting the Proceeds of Crime: An Irish Perspective” in part C.

35. *Attorney General of Ontario v. Chatterjee*, [2007] ONCA 406 (Ontario Court of Appeal). (Provincial NCB asset forfeiture law upheld as constitutional on issues related to the presumption of inno-

of Human Rights declared NCB asset forfeiture to be consistent with the presumption of innocence and fundamental property rights.<sup>36</sup> The commission has stated that any recovery of assets must, however, be open to challenge in court as well as be reasonable and proportionate.<sup>37</sup> Likewise, a number of jurisdictions and the European Court of Human Rights have considered whether NCB asset forfeiture provisions comply with the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).<sup>38</sup>

The guide identifies and describes many of these cases. Not only are the cases helpful in identifying some of the potential legal challenges a jurisdiction may face, but they provide the reasoned response of a judge, usually those seated at the highest courts. Some of the common arguments, as well as the Key Concept that addresses the issue, are outlined in box 5.

<b>BOX 5      Legal Issues in NCB Asset Forfeiture</b>	
<b>Legal issue</b>	<b>Key Concept</b>
Civil-criminal classification of law (criminal classification would lead to additional protections and criminal burden of proof)	14
Double punishment	2
Retrospective application of NCB asset forfeiture laws	8
Reversal of the onus of proof violates presumption of innocence (for example, presumptions)	14
Right against self-incrimination vis-à-vis the criminal case	2
Interference with property rights	6, box 18
Proportionality of forfeiture to the gravity of the offense	15
Entitlement of claimant to legal expenses	22

cence and the classification of the law as related to civil and property law [provincial jurisdiction] as opposed to criminal law [federal jurisdiction]. Appeal was heard by the Supreme Court of Canada on November 12, 2008, and the Court reserved judgment.)

36. European Human Rights Commission, No. 12386/1986.

37. European Commission, “Green Paper: The Presumption of Innocence” (European Commission, COM(2006) 174 final, Brussels), [http://eurlex.europa.eu/LexUriServ/site/en/com/2006/com2006\\_0174en01.pdf](http://eurlex.europa.eu/LexUriServ/site/en/com/2006/com2006_0174en01.pdf), citing *Welch v. United Kingdom* No. 17440/90 (9 February 1995), *Philips v. United Kingdom* No. 41087/98, (5 July 2001) (any recovery of assets must be open to challenge in court, reasonable and proportionate).

38. *Dassa Foundation v. Liechtenstein*, Eur.Ct.H.R., Application no. 696/05 (July 10, 2007) (retrospective NCB legislation not offending Convention); *Walsh v. Director of the Assets Recovery Agency*, [2005] NICA 6 (Court of Appeal in Northern Ireland). (NCB asset forfeiture proceedings held to be civil proceedings which did not engage article 6(2) of the Convention). For the text of the decisions, see CD-ROM appendix H.

## Appropriate Laws to Introduce Forfeiture

In establishing a forfeiture system,<sup>39</sup> jurisdictions need to consider whether NCB asset forfeiture laws can be incorporated into existing laws (for example, Criminal Code of Switzerland,<sup>40</sup> Anti-Money Laundering Act of Thailand, or Anti-Money Laundering Act of the Philippines) or whether a separate statute is warranted (for example, Proceeds of Crime Act in the United Kingdom, or Law 793 of 2002 in Colombia). See box 6 for examples of laws incorporating NCB asset forfeiture provisions. Jurisdictions will also need to consider the extent to which existing procedures can be referenced and incorporated and to what extent they need to create new procedures (see Key Concept 4).

<b>BOX 6</b>		<b>Jurisdictions with NCB Asset Forfeiture and Relevant Legislation</b>
Albania	Law 9284 of 30 September 2004 on Preventing and Striking at Organized Crime	
Antigua and Barbuda	Money Laundering (Prevention) Act 1996	
Australia	Proceeds of Crime Act 2002	
Canadian Provinces	Alberta: Victims Restitution and Compensation Payment Act, S.A. 2001, c. V-2.5 2001 British Columbia: Civil Forfeiture Act, S.B.C. 2005, c. 29 Manitoba: Criminal Property Forfeiture Act, C.C.S.M. 2004, c. C306 Ontario: Civil Remedies Act, 2001, S.O. 2001, c. 28 Quebec: An Act respecting the forfeiture, administration, and appropriation of proceeds and instruments of unlawful activity, R.S.Q. c. C-52.2 Saskatchewan: Seizure of Criminal Property Act, S.S. 2005, c. S-46.001	
Colombia	Law 793 of 2002 (27 December) on the Extinction of the Right of Property Law 785 of 2002 (27 December) on the Administration of Frozen Assets	

39. In addition to criminal and NCB asset forfeiture, some countries' forfeiture regimes, including that of the United States, also employ a concept referred to as "administrative forfeiture." It is a non-judicial mechanism for addressing uncontested NCB asset forfeitures in which a non-judicial official issues a declaration of forfeiture when (1) proper notice has been given to all interested parties, and (2) no one seeks to contest the forfeiture. Some jurisdictions apply the process for only low-value assets; for instance, in the United States, vehicles of any value and bank accounts below \$500,000 may be forfeited administratively, but real estate, regardless of value, must always be forfeited judicially. Due process rights are protected and there are benefits (for example, cost savings, relief to an overburdened judicial system); however, there are also drawbacks, particularly in jurisdictions in which there is a high level of corruption or the asset forfeiture regime is in the early phases of development. In these situations, it is preferable that all forfeiture decisions be subject to court approval. Not only does judicial scrutiny implement necessary checks and balances, but it builds support for the various levels of enforcement (for example, police, prosecution) and helps to develop a body of case experience.

40. Criminal Code (Switzerland), Articles 70–72. For the text of the provisions, see box 40 in "Good Practices in Non-Conviction Based Forfeiture: A Swiss Perspective" in part C.

**BOX 6**

**Jurisdictions with NCB Asset Forfeiture and Relevant Legislation  
(continued)**

Fiji	Proceeds of Crime Act 1997, as amended
Guernsey	The Forfeiture of Money, etc in Civil Proceedings (Bailiwick of Guernsey) Law 2007
Ireland	Proceeds of Crime Act, 1996 (No. 30/1996), as amended in 2005 (No. 1/2005) Criminal Assets Bureau Act, 1996, as amended
Isle of Man	Proceeds of Crime Act 2008
Israel	Prohibition on Money Laundering Law, 5760–2000
Jersey	Civil Asset Recovery (International Co-operation) Law 2007 Proceeds of Crime (Cash Seizure) Law 2008 (provides for the enforcement of foreign NCB asset forfeiture orders)
Liechtenstein	Code of Criminal Procedure (StPO) of 18 October 1988, Sections 97a, 98, 98a, 253a, 353, 354, 356, 356a, 357 Criminal Code, Sections 20, 20a, 20b, 20c, 64, 165, 165a
The Philippines	Anti-Money Laundering Act of 2001 (Republic Act No. 9160, as amended by Republic Act No. 9194), Section 12 Rules of Procedure in Cases of Civil Forfeiture, Asset Preservation, and Freezing of Monetary Instruments, Property, or Proceeds Representing, Involving, or Relating to an Unlawful Activity or Money Laundering Offense under Republic Act No. 9160, as amended (A.M. No. 05-11-04-SC 2005-11-14)
Slovenia	Criminal Procedure Act (8/2006 of 26 January 2006), Article 498a
Switzerland	Criminal Code, Articles 70–72
Thailand	Anti-Money Laundering Act of B.E. 2542
South Africa	Prevention of Organised Crime Act 121 of 1998, as amended, Sections 37–62
United States	18 United States Code, Sections 981, 983, 984, 985 (NCB asset forfeiture)
United Kingdom	Proceeds of Crime Act 2002 (c. 29), Sections 240–316, 341–416 Serious Crime Act 2007 (c. 27), Sections 74–85 Serious Organised Crime and Police Act 2005 (c. 15), Sections 97–101, 245A–D, 255A–F

## Asset Recovery

NCB asset forfeiture does not predetermine nor preclude any specific disposal or use of the confiscated assets. Forfeited assets are disposed of by the forfeiting jurisdiction as determined by legislation. However, international treaties can establish various degrees of obligations for such legislation on the final disposal of assets, depending on the type of underlying offense (see box 7).

### BOX 7

#### Asset Recovery in United Nations Conventions

##### UNCAC

##### Article 57

3. ... the requested State Party shall:
  - (a) In the case of embezzlement of public funds or of laundering of embezzled public funds ... return the confiscated property to the requesting State Party;
  - (b) In the case of proceeds of any other offence covered by this Convention, ... return the confiscated property to the requesting State Party, when the requesting State Party reasonably establishes its prior ownership of such confiscated property to the requested State Party or when the requested State Party recognizes damage to the requesting State Party as a basis for returning the confiscated property;
  - (c) In all other cases, give priority consideration to returning confiscated property to the requesting State Party, returning such property to its prior legitimate owners or compensating the victims of the crime.
4. Where appropriate, unless States Parties decide otherwise, requested States Parties may deduct reasonable expenses incurred in investigations, prosecutions or judicial proceedings leading to the return or disposition of confiscated property pursuant to this article.
5. Where appropriate, States Parties may also give special consideration to concluding agreements or mutually acceptable arrangements, on a case-by-case basis, for the final disposal of confiscated property.

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##### UNTOC

##### Article 14

1. Proceeds of crime or property confiscated by a State Party ... shall be disposed of by that State Party in accordance with its domestic law and administrative procedures.
2. When acting on the request made by another State Party ... States Parties shall, to the extent permitted by domestic law and if so requested, give priority consideration to returning the confiscated proceeds of crime or property to the requesting State Party so that it can give compensation to the victims of the crime or return such proceeds of crime or property to their legitimate owners.
3. When acting on the request made by another State Party ... a State Party may give special consideration to concluding agreements or arrangements on:
  - (a) Contributing the value of such proceeds of crime or property or funds derived from the sale of such proceeds of crime or property or a part thereof to the account designated in accordance with article 30, paragraph 2 (c), of this Convention [account for technical assistance] and to intergovernmental bodies specializing in the fight against organized crime;

**BOX 7**

**Asset Recovery in United Nations Conventions (continued)**

- (b) Sharing with other States Parties, on a regular or case-by-case basis, such proceeds of crime or property, or funds derived from the sale of such proceeds of crime or property, in accordance with its domestic law or administrative procedures.

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**Vienna Convention**

**Article 5**

- (a) Proceeds or property confiscated by a Party ... shall be disposed of by that Party according to its domestic law and administrative procedures.
- (b) When acting on the request of another Party ..., a Party may give special consideration to concluding agreements on:
  - (ii) Contributing the value of such proceeds and property, or funds derived from the sale of such proceeds or property, or a substantial part thereof, to intergovernmental bodies specializing in the fight against illicit traffic in and abuse of narcotic drugs and psychotropic substances;
  - (iii) Sharing with other Parties, on a regular or case-by-case basis, such proceeds of property, or funds derived from the sale of such proceeds or property, in accordance with its domestic law, administrative procedures or bilateral or multilateral agreements entered into for this purpose.



## **PART B**

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# Key Concepts in Non-Conviction Based Asset Forfeiture



# Prime Imperatives

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## **Key Concept 1.**

**Non-conviction based (NCB) asset forfeiture should never be a substitute for criminal prosecution.**

Dispensing with a criminal prosecution in favor of NCB asset forfeiture undermines the effectiveness of criminal law and the confidence of people in law enforcement. Therefore, while NCB asset forfeiture can be an effective tool to recover assets connected to crime, it should not be used as an alternative to criminal prosecution when a jurisdiction has the ability to prosecute the violator. In other words, criminals should not be allowed to avoid prosecution by pointing to the NCB asset forfeiture regime as the mechanism for seeking redress for crimes that have been committed. Forgoing a criminal prosecution, when available, in return for NCB asset forfeiture has the appearance of a violator buying his or her way out of prosecution. The reduction of crime is, in general, best secured by criminal prosecutions, convictions, and forfeiture. Thus, criminal prosecutions should be pursued whenever possible to avoid the risk that prosecutors, courts, and the public would view disgorgement of assets as a sufficient sanction when criminal laws have been violated.

However, NCB asset forfeiture should be complementary to criminal prosecutions and convictions. It may precede a criminal indictment or parallel criminal proceedings (see Key Concept 2). In addition, the NCB asset forfeiture option should be preserved in all cases so that it can be instigated if criminal prosecution becomes unavailable<sup>41</sup> or is unsuccessful;<sup>42</sup> this principle should be affirmatively stated in the law (see, also, Key Concept 3). It will still be necessary to prove that the assets are tainted (that is, that they are either the proceeds of crime or the instrumentalities used to commit the crime).

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41. For example, the defendant has died, fled the jurisdiction, or is immune from prosecution, or the offense is statute-barred. For further reference, see “Non-Conviction Based Asset Forfeiture as a Tool for Asset Recovery” in part A.

42. For example, the defendant is acquitted or there is insufficient evidence to secure a criminal conviction. For further reference, see “Non-Conviction Based Asset Forfeiture as a Tool for Asset Recovery” in part A.

## **Key Concept 2.**

The relationship between an NCB asset forfeiture case and any criminal proceedings, including a pending investigation, should be defined.

Because NCB asset forfeiture is triggered by criminal conduct, there may be instances in which the criminal investigation and prosecution collide or proceed in parallel with the NCB asset forfeiture action. Most of these situations can be anticipated, and legislation should provide a resolution once the jurisdiction decides the point at which NCB proceedings will be permitted to proceed. Jurisdictions will need to decide whether NCB proceedings will be permitted only when criminal prosecution and forfeiture proceedings are not possible, or whether NCB asset forfeiture action and criminal prosecution can proceed simultaneously.

The simultaneous approach is the preferred method. However, both need not proceed at the same time. For example, the NCB asset forfeiture statute may allow either the government or the asset owner—usually the accused in the criminal matter—to seek a stay or adjournment of the NCB asset forfeiture case until the investigation or criminal case is resolved.<sup>43</sup> Or the statute might permit the forfeiture case to proceed alongside the criminal case but provide that compelled information from the asset owner cannot be used against him or her in the criminal prosecution.<sup>44</sup> Absent some protections, there is a risk that an accused asset owner may be precluded from challenging the NCB asset forfeiture action for fear of incriminating himself, or would use discovery in the NCB asset forfeiture case to obtain information that would then be used to prejudice the criminal prosecution.<sup>45</sup>

In narcotics cases in Thailand, there is discretion to proceed with NCB asset forfeiture simultaneously with criminal prosecution.<sup>46</sup> In addition, if there is an acquittal in the Criminal Court, the Office of the Narcotics Control Board and Royal Thai Police hand over all seized

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43. On a practical note, if a conviction follows criminal proceedings, the funds will form part of the forfeited assets and the conviction will be valuable evidence in the NCB asset forfeiture proceeding. In effect, this allows several opportunities for law enforcement to recover the proceeds of crime.

44. In the Proceeds of Crime Act 2002 (United Kingdom), Section 357 outlines the procedures for compelled disclosure. A person giving evidence pursuant to a disclosure order is protected by the rule against self-incrimination. The evidence obtained from a disclosure order cannot be used in criminal proceedings, except for rebuttal evidence or by the co-accused: Proceeds of Crime Act 2002 (United Kingdom), Section 360; *Saunders v. United Kingdom*, [1996] 23 EHRR 313 (statutorily compelled disclosures in a fraud investigation were not admissible in criminal proceedings). For cash seizures in the United Kingdom, the NCB case is usually adjourned until after the criminal proceedings.

45. For example, by allowing the accused to obtain information about government witnesses before the time otherwise permitted may result in those witnesses being intimidated by the suspect. The concept of limited discovery may be introduced to address this issue. Such risks may be limited or do not exist in civil law jurisdictions.

46. Anti-Money Laundering Act 1999, Section 58: “Where the asset involved in the commission of an offense is subject to another legal process which has not yet commenced or is pending or if it would be more effective to proceed under this Act, then the Government shall proceed as provided in this Act.”

or restrained assets to the Anti-Money Laundering Office (AMLO) for institution of NCB asset forfeiture proceedings and furnish AMLO with evidence and cooperation to achieve the NCB asset forfeiture. Other jurisdictions also provide for information sharing between agencies in NCB legislation.<sup>47</sup> Such information sharing is critical to the country's own international investigations and compliance with international commitments.<sup>48</sup>

Both a criminal prosecution and an NCB asset forfeiture action can proceed without violating protections against double jeopardy because NCB asset forfeiture is neither a “punishment” nor a criminal proceeding. In *United States v. Ursery*, the United States Supreme Court stated, “Our cases reviewing civil forfeitures under the Double Jeopardy Clause adhere to a remarkably consistent theme. . . . *In rem* NCB asset forfeiture is a remedial civil sanction, distinct from potentially punitive *in personam* civil penalties such as fines, and does not constitute a punishment under the Double Jeopardy Clause.”<sup>49</sup> Courts in other jurisdictions have reached the same conclusion, or have confirmed that NCB asset forfeiture is not a punishment or a criminal proceeding.<sup>50</sup> In *Walsh v. Director of the Assets Recovery Agency*, the Northern Ireland Court of Appeal stated, “The primary purpose is to recover proceeds of crime; it is not to punish the appellant in the sense normally entailed in a criminal sanction.”<sup>51</sup>

### **Key Concept 3.**

NCB asset forfeiture should be available when criminal prosecution is unavailable or unsuccessful.

#### **Criminal Prosecution Unavailable**

NCB asset forfeiture should clearly be prescribed for instances in which the property owner is unavailable for prosecution. Unavailability can be due to the fact that the violator is dead, has fled the jurisdiction, or enjoys immunity from prosecution. To allow

47. Proceeds of Crime Act 2002 (United Kingdom), Section 436; Prevention of Organised Crime Act (Am) 1998 (South Africa), Section 71; Civil Remedies Act (Ontario, Canada), Section 19.

48. See FATF, The Forty Recommendations (CD-ROM appendix C), recommendations 35–40 on international cooperation and mutual legal assistance.

49. *United States v. Ursery*, 518 U.S. 267, 278 (1996).

50. *The Scottish Ministers v. Doig*, [2006] CSOH 176 (Scotland); *Walsh v. Director of the Assets Recovery Agency*, [2005] NICA 6 (Northern Ireland Court of Appeal). The compensatory nature of NCB asset forfeiture has been affirmed in the context of whether NCB asset forfeiture could ever be so punitive as to offend the provision of the United States Constitution that prohibits the imposition of excessive fines. In *United States v. Alexander*, 32 F.3d 1231, 1236 (8th Cir. 1994), the court held “Forfeiture of proceeds cannot be considered punishment, and thus, subject to the excessive fines clause, as it simply parts the owner from the fruits of the criminal activity.” It is also considered a “measure,” not a “punishment” in Switzerland. (See “Good Practices in Non-Conviction Based Asset Forfeiture: A Swiss Perspective” in part C.)

51. *Walsh v. Director of the Assets Recovery Agency*, [2005] NICA 6 (Northern Ireland Court of Appeal) at para. 39.

a person who can avoid prosecution to retain his or her illegally acquired assets (or pass the assets on to heirs in the event of death) provides an enormous incentive to any would-be criminal. Even if NCB asset forfeiture actions are viewed as compensatory in one jurisdiction and punitive in another, the inability to prosecute should not affect another legal action to recover proceeds and instrumentalities of crime.

Some jurisdictions have differing time triggers for NCB asset forfeiture actions against assets of a decedent. For instance, various options include allowing forfeiture to proceed against a dead accused if death occurs after (1) the investigation has commenced, (2) charges have been laid, or (3) a conviction is announced. Some jurisdictions impose similar restrictions for using NCB asset forfeiture against assets of a fugitive, based on when the fugitive absconded. The point is not to limit law enforcement, but rather, allow it to proceed *in rem* regardless of when the violator died or fled the jurisdiction.<sup>52</sup>

Similarly, assets acquired illegally should not be protected by any personal immunity from prosecution that an official may enjoy. When an official is afforded immunity because of that person's official or diplomatic status, a criminal action against that individual is generally not permitted (absent a waiver by the jurisdiction or its parliament). This cloak of immunity should not protect a corrupt official's assets from NCB asset forfeiture proceedings or investigations (see box 8 for Peruvian reforms to address immunities). Thus, provisions should be considered that preclude persons who claim immunity from criminal prosecution from providing evidence in an NCB asset forfeiture action unless there are appropriate sanctions. Such a provision could preclude the person who has

**BOX 8**

**Peru's Legislative Reforms to Address Immunities**

In 2000, televised videos showed Vladimiro Montesinos, chief of Peru's intelligence service under President Fujimori, bribing an elected congressman. Subsequent investigations revealed Montesinos' vast network of illegal activities. In recovering the proceeds of corruption, the Government of Peru introduced Law 27.379 to address the immunities enshrined in Article 99 of the Constitution, which exempted a broad range of senior public officials from criminal prosecution by directing that they could only be accused and tried by a Congressional Commission.<sup>a</sup>

Law 27.379 authorized the Attorney General to initiate preliminary inquiries against these officials. Furthermore, the Attorney General could use the preliminary measures provided in the law after obtaining authorization from a Supreme Court judge.

a. Article 99 of the Constitution of Peru states that only the Permanent Commission in Congress can accuse and try the President, members of Congress, state ministers, Judges of the Constitutional Court and Supreme Court, members of the Judicial Council, chief prosecutors, the Ombudsman, and the Comptroller for crimes committed while in office and until five years after leaving office.

52. In the Philippines, NCB asset forfeiture action is *sui generis*. The Anti-Money Laundering Act requires the owner of property subject to forfeiture to be impleaded as a party; nonetheless, the proceedings may be maintained in his or her absence.

refused to provide evidence in a criminal proceeding from introducing evidence in the NCB asset forfeiture action or could instruct the trier of fact either to draw an adverse inference based on the lack of evidence or to deem certain facts as proven.<sup>53</sup> A provision in the NCB asset forfeiture legislation should expressly state that there is no immunity for assets and, where necessary, jurisdictions should be prepared to issue diplomatic notes stipulating that any residual immunity is waived with respect to assets.

### **Criminal Prosecution Unsuccessful**

NCB asset forfeiture should also be available for situations in which criminal prosecution has been unsuccessful, for example, a defendant has been acquitted<sup>54</sup> or the defendant cannot be prosecuted because there is insufficient evidence to secure a criminal conviction beyond a reasonable doubt or by intimate conviction.<sup>55</sup> Acquittals can occur for any number of reasons: evidence gathered in an unlawful search may be declared inadmissible; a witness may recant; a trial judge may misdirect the jury; a juror may be intimidated into voting not guilty. The lack of sufficient evidence can occur for similar reasons and is often the unfortunate reality of cases involving corruption and organized crime. However, in NCB asset forfeiture systems that apply a standard of proof that is lower than the standard for a criminal conviction (which is not always the case in some civil law jurisdictions), there may still be sufficient evidence to establish liability on this lower standard (see Key Concept 14).

### **Key Concept 4.**

**Applicable evidentiary and procedural rules should be as specific as possible.**

Domestic NCB asset forfeiture systems benefit from legislated evidentiary and procedural rules that are specific and well defined. Such specificity promotes uniformity

53. Certain sanctions may present problems for international cooperation with some jurisdictions, particularly where sanctions would bar due process.

54. See *Director of the Assets Recovery Agency v. T and others*, (2004) EWHC 3340 (United Kingdom) (acquittal on money laundering for disclosure reasons does not bar NCB asset forfeiture of the funds); *National Director of Public Prosecutions v. Prophet*, [2006] ZACC 17 (acquittal on drug trafficking charges does not bar NCB asset forfeiture of the residence); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361–62 (1984) (acquittal on criminal firearms violation does not bar NCB asset forfeiture of the guns); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 234–35 (1972) (acquittal on criminal smuggling charge does not bar later NCB asset forfeiture of the smuggled items). For specific legislative examples, see Proceeds of Crime Act 2002 (Australia), Section 51; Prevention of Organised Crime Act (Am) 1998 (South Africa), Section 50(4); and the Civil Remedies Act 2001 (Ontario, Canada), Section 17(2), “In proceedings under this Act, an offense may be found to have been committed even if, (a) no person has been charged with the offense; or (b) a person was charged with the offense but the charge was withdrawn or stayed or the person was acquitted of the charge.”

55. See *Assets Recovery Agency v. Woodstock*, [2006] EWCA Civ 741 (United Kingdom) (lack of evidence to proceed criminally—after key witness recanted—did not bar NCB asset forfeiture).

in application and reduces the opportunity for judicially imposed rules that could be inconsistent with the intent of the legislation. While it is important to have a statute that is sufficiently flexible to evolve with changing times, a statute with only broad principles, rather than specific provisions and definitions, invites the court to complete the work of the legislature and may produce rules far more inhospitable to forfeiture than contemplated by the legislature or parliament. This is particularly problematic in regimes with a judiciary inexperienced in forfeiture and in situations in which corruption has permeated the administration of justice. The result is often a body of case law that develops inconsistency over time and creates uncertainty for prosecutors and citizens alike. This uncertainty and unpredictability becomes a disincentive for prosecutors to use such laws.

Laws, administrative rules, and rules of procedure should typically cover the following:

- Investigations, including methods for obtaining evidence
- Tracing required by the government to substantiate its case
- Restraint and seizure of assets, including the duration of restraints and seizures and the ability to seek judicially approved extensions of time
- Forfeiture, including
  - Requirements for the factual and legal basis for ordering forfeiture
  - Parties with standing, third party interests, status of fugitives (that is, fugitive disentitlement), decedents, and officials with immunity
  - Parties entitled to notice and how it is to be effected
  - Time limits for filing<sup>56</sup> and responding to forfeiture actions
  - Rules, if any, protecting against self-incrimination in criminal proceedings based on interviews conducted for NCB proceedings
  - Applicable defenses
  - Admissibility of evidence (for example, hearsay and summary documents)
  - The ability to request the court to dispose of one or more of the claims in favor of the moving party without need for further trial proceedings
  - Requirements for written reasons for judgment specifying factual and legal basis, which should also be a public document
  - Whether payment in lieu of forfeiture is permitted
  - Whether property representing the original property is recoverable (substitute assets)
- Asset management
- International cooperation, including whether dual criminality<sup>57</sup> is required for

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56. Many jurisdictions have a prescribed time limit for initiating forfeiture proceedings following a seizure, in addition to a statute of limitations for forfeiture.

57. The current practice, and requirement under UNCAC, Article 43, is that dual criminality will be fulfilled if the conduct underlying the offense is a criminal offense in both jurisdictions. It is to be fulfilled irrespective of whether the same terminology or category of offense is used in both jurisdictions.

international cooperation, and the extraterritorial effect of a restraint and recovery order (or final order)

In drafting the law, jurisdictions should consider whether existing procedures are applicable and can be incorporated or whether new procedures need to be created. If new procedures are needed, jurisdictions must determine whether those provisions should be set out in the substantive law or promulgated as regulations, an administrative code, or rules of court. If new procedures are enacted, some jurisdictions will also reference an existing code of procedure that is to be used in the event that the NCB law does not provide sufficient procedural direction on an issue.<sup>58</sup>

Many jurisdictions publish a legislative history or explanatory notes<sup>59</sup> to accompany new laws to clarify the intent of the legislature and aid courts when interpreting the law. Not only is it an extremely important measure for uniformity in applying the law, but it is also very useful for transparency and accountability purposes. This practice should be useful when enacting NCB asset forfeiture laws, especially if the country has no prior history of such laws.

In addition and where permitted by law, a country may wish to promulgate regulations or administrative rules of practice to supplement the NCB legislation,<sup>60</sup> so long as the administrative rules do not conflict with other legislation or expand NCB legislation. Such administrative rules or regulations would require enabling legislation that delegates to the executive branch (or other competent authority) the authority to promulgate the administrative rules or regulations. This can be a particularly efficient method of specifying many of the procedural and technical aspects of an NCB asset forfeiture scheme without requiring the legislature to expend time on the details of the scheme. For example, the administrative rules may provide for how seized property is maintained, the procedures for giving notice of the forfeiture action to interested parties, or how claimants may seek non-judicial relief from forfeiture such as through a petition for mitigation if the legislation allows. In other jurisdictions these issues may need to be determined by legislation. An important benefit of administrative rules is

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58. Law 9284 of 2004 on Preventing and Striking at Organized Crime (Albania), Article 4(3) states, “The investigations and trials according to this law are supported in the civil and administrative procedural rules in force, in addition to those contemplated and specifically referred to in this law.” The Anti-Money Laundering Act 1999 (Thailand), Sections 56 and 57, provide that the Civil Procedure Code applies in the absence of rules, procedures, and conditions prescribed in the Ministerial Regulations or Anti-Money Laundering Board Regulations.

59. See, for example, “Explanatory Memorandum to the Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005 (2005 No. 3382) (United Kingdom)” in CD-ROM appendix N.

60. While administrative rules are not the equivalent of legislation, they can prescribe procedures to implement the law. Colombia has administrative procedures to supplement the NCB asset forfeiture legislation, which include regulation of matters related to asset management. See also “Administrative Procedures in Colombia: Good Practices in Delegation to the Executive Branch” in part C.

that they can be revised at any time without judicial or legislative intervention. Legislatures are often slow to revise forfeiture laws, but administrative rules permit timely updates to address changing needs of a forfeiture program. Any administrative rules and the enabling legislation should provide that a breach of the administrative rule may not create enforceable rights or affect the validity of the forfeiture. In addition, it is important to note that such administrative rules or regulations are supplementary and are not to be used to override primary legislation.

# Defining Assets and Offenses Subject to NCB Asset Forfeiture

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## **Key Concept 5.**

Assets derived from the widest range of criminal offenses should be subject to NCB asset forfeiture.

Some jurisdictions have enacted laws that list the specific offenses that give rise to NCB asset forfeiture. Only proceeds and instrumentalities of these designated offenses are subject to forfeiture. If the list approach is used in drafting legislation, the list should be equivalent to, if not more expansive than, the list of offenses provided under international conventions<sup>61</sup> or in Recommendation 1 of the Financial Action Task Force (FATF) Forty Recommendations on Money Laundering.<sup>62</sup> Some jurisdictions have simply provided that all proceeds and instrumentalities of crime, or in some cases, proceeds and instrumentalities of any felony or serious offense, are subject to forfeiture.<sup>63</sup> The latter approach of subjecting all crimes to NCB asset forfeiture is more comprehensive, as well as easier to understand and apply.

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61. UNCAC, Articles 15–27; UNTOC, Articles 5, 6, 8, 23; Vienna Convention, Article 3.

62. Recommendation 1 of the FATF Forty Recommendations provides that countries should apply the crime of money laundering to all serious offenses, with a view to including the widest range of predicate offenses. It recommends that each country should at a minimum include a range of offenses and defines these “designated categories of offenses” as participation in an organized criminal group and racketeering; terrorism, including terrorist financing; trafficking in human beings and migrant smuggling; sexual exploitation, including sexual exploitation of children; illicit trafficking in narcotic drugs and psychotropic substances; illicit arms trafficking; illicit trafficking in stolen and other goods; corruption and bribery; fraud; counterfeiting currency; counterfeiting and piracy of products; environmental crime; murder; grievous bodily injury; kidnapping, illegal restraint, and hostage-taking; robbery or theft; smuggling; extortion; forgery; piracy; and insider trading and market manipulation.

63. See the Criminal Code (Switzerland), Article 70; Criminal Code (Liechtenstein), Section 20b; Proceeds of Crime Act (Am) 1996 (Ireland), Section 1; Prevention of Organised Crime Act (Am) 1998 (South Africa); Commonwealth Model Legislation, Section 1. The Proceeds of Crime Act 2002 (United Kingdom) defines unlawful conduct in Section 241 as follows: (1) Conduct occurring in any part of the United Kingdom is unlawful conduct if it is unlawful under the criminal law of that part. (2) Conduct which (a) occurs in a country outside the United Kingdom and is unlawful under the criminal law of that country, and (b) if it occurred in a part of the United Kingdom, would be unlawful under the criminal law of that part, is also unlawful conduct.

## Key Concept 6.

The broadest categories of assets should be subject to forfeiture.

NCB asset forfeiture legislation should be drafted so as to reach all assets of value, including proceeds of crime and property traceable thereto, instrumentalities of crime, fungible property, commingled goods and substitute assets (that is, equivalent goods), and proceeds derived from foreign offenses if the conduct giving rise to forfeiture is also a crime in the country where the assets are located (see box 9 for an example of the type of property that forfeiture legislation will need to reach).

### Proceeds and Instrumentalities

Proceeds are generally anything of value the person obtained directly or indirectly as the result of the criminal act. Instrumentalities, sometimes referred to as “facilitating property,” are generally any property used, or intended to be used, in any manner or part to commit or facilitate the commission of the criminal violation.<sup>64</sup> International conventions broadly define the proceeds or instrumentalities of an offense that may be subject to restraint, seizure, or forfeiture.<sup>65</sup> NCB legislation should be equally broad in the definitions of these terms. To capture instrumentalities of crime and property

#### BOX 9

#### Ensuring Forfeiture Legislation Captures All Forms of Property

*Prized rarities included in seizure.* In the United States, the Drug Enforcement Agency seized \$4 million of personal property of an indicted physician DuBrule, including more than 1,200 baseball cards with a total value of \$280,000. They included individual cards worth \$6,000 (from 1909) and \$15,000 (from 1912).

64. In South Africa, the Supreme Court of Appeal has had occasion to determine whether the subject property can be considered an “instrumentality of an offense” within the meaning of the Prevention of Organised Crime Act 1998. The Court has held that there must be a sufficiently close link or functional relation between the property and the crime; that the property must be instrumental in the commission of the illegal activities, not simply incidental: *NDPP v. RO Cook and Ors*, [2004] SACR 208 (house where kidnapped persons were held hostage and assaulted was incidental to the commission of the offences; hotel with tenants who were drug dealers was incidental to the offences on the premises); *NDPP v. Parker*, [2005] ZASCA 124 (home used for drug sale and storage was an instrumentality because it was a drug shop and therefore substantially instrumental in the commission of the offences); *NDPP v. Mohunram*, [2006] SCA 11 (the fact that only part of a property (a casino) was used in the commission of a crime (contravention of Gambling Act) does not determine whether the property was an “instrumentality,” although it may be relevant in considering proportionality).

65. UNCAC, Articles 2, 31(1); UNTOC, Articles 2, 12; Vienna Convention, Articles 1, 5; European Union Council Framework Decision 2005/212/JHA.

that facilitates crime, it is best to include property involved in crime and not limit the definition in the legislation to proceeds.<sup>66</sup>

### Proceeds Derived from Foreign Offenses

In addition, it is useful to have a provision in the legislation that authorizes the recovery of assets that have been obtained through unlawful acts conducted abroad, if the conduct was unlawful where it took place and would be unlawful in at least one part of the home jurisdiction.<sup>67</sup> Such a provision would capture situations where the criminal conduct is committed in a foreign jurisdiction and the proceeds of crime are invested in the home jurisdiction (see box 10). The legislation should authorize proceeds that are intended for use abroad to be forfeited if the conduct for which the proceeds are intended would be unlawful both in the home jurisdiction and in the country where the conduct was intended to occur.

### Substitute Assets

Given that criminal enterprises, especially covert ones, are able to convert specifically forfeitable assets to other assets by the time a forfeiture order is obtained, some jurisdictions have enacted laws providing for the forfeiture of substitute assets. This concept permits a government to forfeit untainted assets of an equivalent value to those assets that cannot be recovered because of some action by the violator.<sup>68</sup> In the United States,

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66. See Article 2 of Law 793 (Colombia) (upheld as constitutional by the Constitutional Court in Judgment C-1065/03). “Forfeiture shall be ordered through a court ruling under the following circumstances:

2. The property or properties were derived, directly or indirectly, from illegal activity.
3. The property has been used as a means or instrument to carry out an illegal activity, whether said property was to be used to carry out said activity or was part of the object of the offense.
4. The property or resources involved are derived from the transfer or exchange of other goods or resources obtained directly or indirectly from illegal activity, which were to be used to carry out illegal activities, or which were the product, result, instrument or object of the offense...”

67. In the Forfeiture of Money, etc in Civil Proceedings (Bailiwick of Guernsey) Law, 2007, Section 61 defines “unlawful conduct” as “conduct which (a) occurs in a country outside the Bailiwick and is unlawful under the criminal law of that country, and (b) if it occurred in any place in the Bailiwick would be unlawful under the criminal law of that place.” Similar provisions can be found in the Criminal Code (Liechtenstein), Section 20b(2); the Proceeds of Crime Act 2002 (United Kingdom), Section 241; the Civil Remedies Act 2001 (Ontario, Canada), Section 2; and the Prevention of Organised Crime Second Amendment Act, 1999 (South Africa), Section 1.

68. International conventions require countries to take measures as necessary to enable confiscation of substitute assets and commingled assets: UNCAC, Article 31(4)–(5); UNTOC, Article 12(3)–(4); Vienna Convention, Article 5(6); European Union Council Framework Decision 2005/212/JHA. See also 21, United States Code, Section 853(p); *United States v. Wingerter*, 369 F. Supp. 2d 799 (E.D. Va. 2005) (directing preservation of untainted funds violator obtained from inheritance because it was likely that this substitute asset would be needed to satisfy forfeiture order for assets which were no longer in the violator’s possession). See also Judgment C-1065/03 of the Constitutional Court of Colombia (upholding constitutionality of forfeiture of substitute assets as a necessary mechanism when property is no longer in the possession of the violator).

**BOX 10**

**Proceeds of Crimes Committed Outside the Jurisdiction: The Experience in Ireland**

When initially enacted in Ireland, the Proceeds of Crime Act 1996 did not have an express provision applying the Act to proceeds of crimes committed outside the country.

In *DPP v. Hollmann*,<sup>a</sup> the offense was a fraud in Switzerland and the proceeds had been deposited in Ireland. The claimant argued that the Act did not apply to proceeds of foreign crimes. Although this argument was rejected by the High Court for policy reasons, it was eventually considered by the Supreme Court in *McK v. D*,<sup>b</sup> where the Court reviewed the purpose of the legislation and held that the Act did not include proceeds of foreign crimes.

The Legislature responded with the Proceeds of Crime (Amendment) Act, 2005, which included a new definition of “criminal conduct” in Section 3, ensuring that foreign criminality would be covered by the scope of the legislation where there are proceeds of that criminality in Ireland.

a.[1999] IEHC 20 (July 29, 1999) (fraudulent offense committed in Switzerland, money deposited in Ireland) (High Court of Ireland).

b.[2004] 2 ILRM 419, [2004] IESC 31 (May 17, 2004) (Supreme Court of Ireland).

Congress provided an explanation of why it included substitute assets as part of the Criminal Forfeiture Act, noting that without such a provision,

[A] defendant may succeed in avoiding the forfeiture sanction simply by transferring his assets to another, placing them beyond the jurisdiction of the court, or taking other actions to render his forfeitable property unavailable at the time of conviction.<sup>69</sup>

\* \* \* \* \*

Thus, a person who anticipates that some of his property may be subject to criminal forfeiture has not only an obvious incentive, but also ample opportunity, to transfer his assets or remove them from the jurisdiction of the court prior to trial and so shield them from any possibility of forfeiture .... The important economic impact of imposing the sanction of forfeiture against the defendant is thus lost [unless the government can forfeit non-tainted, substitute property].<sup>70</sup>

These same considerations apply to NCB asset forfeiture actions; therefore, legislation should authorize the forfeiture of substitute assets or, where possible, imposition of a forfeiture money judgment.<sup>71</sup> (See box 11 for examples of legislation on substitute assets.)<sup>72</sup>

69. S.Rep. No. 98-225, at 201, 212, reprinted in 1984 U.S.C.C.A.N. at 3384, 3395.

70. S.Rep. No. 98-225, at 195, reprinted in 1984 U.S.C.C.A.N. at 3378.

71. A forfeiture money judgment is based on the notion that forfeiture should not be limited to the property traceable to the offense that may still be in the possession of the violator. It is a civil judgment against an individual in an amount equal to proceeds the individual obtained from the offense. As a judgment against an individual, it may be satisfied out of any assets the judgment debtor owns. The Criminal Code (Switzerland), Article 71, states, “Where assets to be confiscated are no longer available, the judge shall order a compensatory claim in favor of the State for an equivalent amount.”

72. Box 11 provides examples from Colombia, the United States, and the Philippines. Spain also provides for confiscation of substitute assets.

**BOX 11****Three Examples of Legislation on Substitute Assets****Colombia****Law 793, Article 3**

If it is not possible to locate or execute the seizure of the property declared subject to forfeiture at the time of ruling, the Judge may order the forfeiture of substitute property or goods owned by the same person and of equal value. This article shall not be interpreted to prejudice the rights of innocent third parties acting in good faith.

**United States****Title 18 United States Code, Section 853(p)**

(p) If any of the property described in subsection (a) of this section, as a result of any act or omission of the defendant

- (1) cannot be located upon the exercise of due diligence;
- (2) has been transferred or sold to, or deposited with, a third party;
- (3) has been placed beyond the jurisdiction of the court;
- (4) has been substantially diminished in value; or
- (5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

**The Philippines****Republic Act 9160, Section 12(c)**

Where the court has issued an order of forfeiture of the monetary instrument or property subject of a money laundering offense defined under Section 4, and said order cannot be enforced because any particular monetary instrument or property cannot, with due diligence, be located, or it has been substantially altered, destroyed, diminished in value or otherwise rendered worthless by any act or omission, directly or indirectly, attributable to the offender, or it has been concealed, removed, converted or otherwise transferred to prevent the same from being found or to avoid forfeiture thereof, or it is located outside the Philippines or has been placed or brought outside the jurisdiction of the court, or it has been commingled with other monetary instruments or property belonging to either the offender himself or a third person or entity, thereby rendering the same difficult to identify or be segregated for purposes of forfeiture, the court may, instead of enforcing the order of forfeiture of the monetary instrument or property or part thereof or interest therein, accordingly order the convicted offender to pay an amount equal to the value of said monetary instrument or property. This provision shall apply in both civil and criminal forfeiture.

Such a procedure would reach non-tainted assets when (1) it is possible to quantify the gain from the conduct giving rise to forfeiture or the loss to the victim, whichever is greater; (2) the violator has dissipated the tainted property, but retains other assets; or (3) tracing the specific property is impossible or impracticable. Without some provision to reach non-traceable property, the criminal has an incentive to spend the proceeds of the crime quickly if that is the only property the forfeiture laws may reach, while at the same time, retaining non-tainted property with the security of knowing that it is unreachable. By not imposing a tracing requirement and allowing for substitute assets, the jurisdiction enhances the possibility of recovery, while protecting the violator's rights, because the ju-



*Cash seized by the Anti-Money Laundering Office (Thailand). Photo courtesy of Police Major General Peeraphan Premabhuti.*

risdiction must still prove the value of the illicitly obtained property. Moreover, recovery is not frustrated by the violator's ability to move the assets in such a way that they could not be traced back to the specific acts giving rise to forfeiture.

Often, investigators and prosecutors are unable to identify with specificity the proceeds of crime. Proceeds can become intermingled with legitimate funds and cannot be traced to a specific bank account or other asset. Absent substitute asset provisions, it will be difficult to establish the requirements for forfeiture, although other NCB asset forfeiture provisions could be used to assist in meeting the burden, such as the lower balance-of-probabilities standard of proof (where applicable, see Key Concept 14), use of circumstantial evidence (Key Concept 16),<sup>73</sup> and use of presumptions (Key Concept 14). Sometimes, however, even NCB asset forfeiture cannot overcome a lack of evidence.<sup>74</sup>

73. For an example of the courts using circumstantial evidence to establish the link between the assets and the offense of money laundering, see *Prosecutor General v. W\_\_\_S\_\_\_*, December 21, 2007 First Instance Court (Canton of Geneva) in CD-ROM Appendix H.

74. For an example of how failing to trace or link the assets to the offense can be problematic for foreign legal assistance, see *Garnett Investments Ltd. v. BNP Paribas (Suisse) SA (Government of the Republic of Indonesia as a Third Party)*, Judgment 2/2009, Court of Appeal (Civil Appeals 389 and 400) January 9, 2009 (Guernsey) in CD-ROM appendix H.

## Forfeiture of a Residence

Some jurisdictions make it more difficult to forfeit a personal residence, based on the notion that residences should enjoy some higher level of protection from forfeiture or interference by the government because of the impact on potentially innocent family members and basic property rights.<sup>75</sup> However, special treatment for residences often results in the violator's family being able to enjoy the fruits of the crime even if the violator has been prosecuted or has absconded. The personal residence is often the most visible symbol of misconduct, and authorizing the forfeiture of a residence, like any other category of property, can be a powerful signal to violators that neither they nor their families will be able to enjoy the fruits and instrumentalities of crime; it also sends a powerful signal to the community that crime does not pay.

## Assets Intended for Use in Unlawful Conduct

Jurisdictions should consider specifying that assets that are intended for use in unlawful conduct are also subject to NCB asset forfeiture. For example, police may seize cash in a sting operation in which the violator intends to exchange the cash for illegal narcotics. It may not be possible, however, to prove that this cash is the proceeds of another criminal offense. If the state can prove that the cash is intended to be exchanged for drugs, it should be subject to forfeiture just as proceeds of a completed drug transaction are subject to forfeiture.<sup>76</sup>

## Key Concept 7.

The definition of assets subject to forfeiture should be broad enough to encompass new forms of value.

The definition of “property” or “assets” may not be drafted broadly enough to capture new forms of wealth, even in laws drafted just a few years ago. Stored value cards are an example of a form of value that did not exist a few years ago, yet they are commonplace today. Careful drafting in defining categories of property subject to forfeiture in NCB asset forfeiture legislation can prevent the need to constantly seek amendments to existing legislation as technology develops new forms of wealth.<sup>77</sup> Alternatively, a

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75. In the Criminal Code of Canada, Section 490(4), criminal forfeiture of offense-related property can be applied to a dwelling, but before the court orders forfeiture it is obligated to consider the impact of the forfeiture on immediate family members who reside in the house.

76. In Switzerland, cash intended to be exchanged for drugs can be considered as *instrumenta sceleris*. The Criminal Code (Switzerland), Article 69, allows it to be forfeited, even using NCB asset forfeiture provisions, and without statute of limitation (Supreme Court of Switzerland, ATF 117 IV 233).

77. As an example of the definitions for “records,” “documents,” and “materials,” these include all information recorded in any form, visual or aural, and by any means, whether in handmade form (including, but not limited to, writings, drawings, painting), photographic form (including, but not limited to, microfilm, microfiche, prints, slides, negatives, videotapes, motion pictures, photocopies),

legislative scheme that delegates to a minister of the executive branch the responsibility to define new forms of value allows for prompt changes.<sup>78</sup>

Property subject to forfeiture should also encompass intangible property rights, such as literary proceeds from commercial exploitation derived from the violator's notoriety in having committed an offense.<sup>79</sup>

### **Key Concept 8.**

**Tainted assets acquired prior to the enactment of an NCB asset forfeiture law should be subject to forfeiture.**

The retroactive or retrospective<sup>80</sup> application of NCB asset forfeiture laws against criminal proceeds that were acquired before the enactment of the forfeiture laws is an important concept. If the laws are not retroactively enforceable, the criminal defendants would be given the opportunity to profit from acts that were illegal at the time they were committed. Furthermore, allowing the retroactive application of the law is particularly important for recovering proceeds of corruption against officials who are in power for lengthy periods and have had years of opportunity to steal state funds. It is fundamentally inequitable that a corrupt official should be unjustly enriched by retaining proceeds that he or she never had a right to in the first place.

Initially, retroactive application may appear to conflict with the rationale of the prohibition on passing *ex post facto* laws, a general rule under countries' constitutions and basic law, which prohibits the application of a *criminal* offense or punishment to an act that did

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mechanical form (including, but not limited to, phonograph records, printing, typing) or electrical, electronic or magnetic form (including, but not limited to, tape recordings, cassettes, compact discs, electronic or magnetic storage devices such as floppy diskettes, hard disks, CD-ROMs, digital video disks (DVDs), Personal Digital Assistants (PDAs), Multi Media Cards (MMCs), memory sticks, optical disks, printer buffers, smart cards, memory calculators, electronic dialers, or electronic notebooks, as well as digital data files and printouts or readouts from any magnetic, electrical, or electronic storage device). See also "A Sample Order to Produce Corporate and Other Documents in a Corruption Investigation" in appendix V.

78. Title 31 of Bank Secrecy Act (United States).

79. Proceeds of Crime Act 2002 (Australia), Section 152.

80. To explain the terms "retroactivity" and "retrospectivity," the Supreme Court of Canada in *Benmer v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358 adopted the definition of E. A. Driedger, in "Statutes: Retroactive Retrospective Reflections" (1978), 56 Can. Bar Rev. 264, at pp. 268–69:

A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event. [Emphasis in original.]

not constitute a criminal offense at the time it was committed, as well as the imposition of heavier penalties than would have been applicable at the time the criminal offense was committed.<sup>81</sup> This means that a criminal offense or punishment cannot be created for an act that was not criminal or punishable before the passage of the law.

In the context of NCB asset forfeiture, the issue has been raised and resolved by courts in both civil and common law jurisdictions (see box 12). In cases in which NCB asset forfeiture laws have been applied to forfeit criminal proceeds that were generated and acquired before the enactment of the law, courts have held that the *ex post facto* prohibitions do not apply because forfeiture is not criminal or penal in nature, but is instead a civil law consequence of the fact that a perpetrator or other beneficiaries had obtained assets from an unlawful act. Nor does the seizure or forfeiture amount to a “penalty” that would violate the prohibition. Because an NCB asset forfeiture action is not dependent on a criminal conviction and because the past conduct was criminal at

**BOX 12**

**Retrospective Application of NCB Asset Forfeiture Laws in Civil and Common Law Jurisdictions**

**Thailand**

In the consolidated cases of *Charles Mescal and Mrs. Tayoy*,<sup>a</sup> the Thai Constitutional Court considered whether the retroactive application of Thailand’s Anti-Money Laundering Act 1999 (AMLA) to proceeds acquired prior to the enactment of AMLA violated section 32 of the Constitution, which protects persons against retroactive application of criminal law and criminal punishment.

In *Mescal*, the defendant was convicted of drug trafficking and imprisoned in Italy prior to enactment of AMLA and subsequently transferred money to Thailand on several occasions between 1998 and 1999. In *Tayoy*, the Criminal Court had acquitted Tayoy in 2000, but the assets seized in connection with the case had been handed over to the Anti-Money Laundering Office for forfeiture.<sup>b</sup>

The Constitutional Court held that there was no violation or conflict with the Constitution because the NCB asset forfeiture action under AMLA does not amount to a criminal prosecution or penalty as required under section 32.

**Liechtenstein**

In *Dassa Foundation v. Liechtenstein*,<sup>c</sup> an appeal of a decision by the Supreme Court in Liechtenstein, the European Court of Human Rights considered whether NCB asset forfeiture legislation could be retroactively applied to past criminal offenses without offending Section 61 of Liechtenstein’s Criminal Code and Article 7 of the European Convention on Human Rights (ECHR). The proceeds at issue had been generated in connection with bribery of a judge in Italy during the 1990s, prior to the introduction of the forfeiture provisions.

*(Box continues on the following page.)*

81. See, for example, the ECHR, Article 7; the United States Constitution, Article 1, Section 9; the African Charter on Human Rights, Article 7(2); the OAS American Convention on Human Rights, Article 9; and the Universal Declaration of Human Rights, Article 11(b).

**BOX 12**

**Retrospective Application of NCB Asset Forfeiture Laws in Civil and Common Law Jurisdictions (continued)**

**Liechtenstein (continued)**

The Court held that NCB asset forfeiture was “comparable to a civil law restitution of unjustified enrichment,” and therefore, any retroactive enforcement of the forfeiture laws “did not amount to a ‘penalty’ within the meaning of . . . the Convention.” The Court further pointed out that the Liechtenstein NCB asset forfeiture laws “were aimed at guaranteeing that crime did not pay.” If the laws were not retroactively enforced, the criminal defendants would be given the opportunity to profit from acts that were illegal at the time they were committed. For these reasons, the Court held that retroactive application of Liechtenstein’s objective (that is, NCB) forfeiture law did not violate the ECHR.

**United States**

In *U.S. v. Certain Funds Located at the Hong Kong and Shanghai Banking Corp.*,<sup>d</sup> involving the U.S. government’s action to forfeit funds in Hong Kong, China in an NCB proceeding at a time when its extraterritorial authority was not expressly stated, the Court held that such forfeiture laws are not criminal and that “there can be no ‘substantial doubt,’ or even the ‘spectre’ of an unconstitutional issue, haunting the retroactive application of [an NCB asset forfeiture statute].”<sup>e</sup>

In *U.S. v. Four Tracts of Property on the Waters of Leiper’s Creek*,<sup>f</sup> the Court held that retroactive application of NCB asset forfeiture laws was constitutional and such laws are not penal in nature because they do not “attach new consequences to past conduct because [the conduct] has always carried criminal penalties and the claimants never had a vested right to property obtained illegally.”<sup>g</sup>

a. *Charles Mescal and Mrs. Tayoy*, Case Nos. 40–41/2546 (October 16, 2003). For the text of the decision, see CD-ROM appendix H.

b. In the Anti-Money Laundering Act (Thailand), Section 58 allows the Anti-Money Laundering Office to proceed against assets subject to multiple proceedings where it would be expedient for it to do so.

c. *Dassa Foundation v. Liechtenstein*, ECHR, Application no. 696/05 (July 10, 2007). For the text of the decision, see CD-ROM appendix H.

d. *United States v. Certain Funds Located at the Hong Kong and Shanghai Banking Corp.*, 96 F.3d 20, 25–27 (2nd Cir. 1996) (“*Certain Funds*”).

e. *Certain Funds*, at 27.

f. *United States v. Four Tracts of Property on the Waters of Leiper’s Creek*, 181 F.3d 104, 1999 WL 357773 at \*3–4 (6th Cir. 1999) (unpublished opinion) (“*Four Tracts*”).

g. *Four Tracts*, at \*3.

the time it was committed and the claimant never had a vested right to the property, NCB legislation can be retroactively applied without offending the basic law.

So that there can be no doubt on this point, the legislation should include a provision that specifically authorizes the forfeiture of proceeds generated before the enactment of the NCB law, provided that the act that generated the proceeds was criminal at the time the act was committed.<sup>82</sup> Without such a provision, the judiciary

82. The Proceeds of Crime Act 2002 (United Kingdom), Section 340(4): “It is immaterial—(a) who carried out the conduct; (b) who benefited from it; (c) whether the conduct occurred before or after the

could be left to decide, and a possible loophole could be created that may effectively legitimize criminal assets.<sup>83</sup> Such forfeitures could be restricted by applicable statutes of limitations, if any (see Key Concept 17).

Notwithstanding the fact that retroactive or retrospective application of NCB asset forfeiture laws has withstood judicial scrutiny in several jurisdictions and should be regarded as an essential element when drafting an NCB asset forfeiture law, other principles should not be ignored and may be invoked to defeat challenges. For instance, where the conduct continues past the enactment of the forfeiture law, the issue of retrospectivity may be resolved if the offense constitutes a continuing violation. In addition, in many jurisdictions, possession of proceeds of crime is sufficient to establish a money laundering offense, which triggers forfeiture.<sup>84</sup> As a result, whether the assets were acquired before the enactment of the forfeiture statute is irrelevant—the mere possession of the illicit assets is sufficient.

### **Key Concept 9.**

#### **The government should have discretion to set appropriate thresholds and policy guidelines for forfeiture.**

It is neither cost-effective nor a deterrent to pursue forfeiture of assets that are limited or depreciating in value or are burdensome to maintain. A home used to store drugs may be heavily encumbered with a mortgage and have little equity in it. Live animals purchased with criminal proceeds may be difficult and expensive to maintain and sell. Articles of counterfeit clothing are subject to forfeiture in many jurisdictions, but they cannot be sold and thus incur storage costs. Such seizures can be a drain on a jurisdiction's resources. Likewise, a car—or aircraft or boat—may be subject to forfeiture as an instrumentality, but depending on the age and condition of the vehicle, the cost to seize, store, and forfeit may well exceed the value of the vehicle. Other items may have been destroyed during the seizure process and become worthless. Seizure of such assets has little deterrent effect and consumes resources that could be used to forfeit more substantial assets. A forfeiture system can quickly become overburdened to the point at

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*passing of this Act.*" [emphasis added] This applies to NCB cash forfeiture and the criminal prosecution of money laundering offenses. See also the definition of "proceeds of unlawful activity" in the Commonwealth Model Legislation, Section 1 (CD-ROM appendix D); Civil Remedies Act, 2001 (Ontario, Canada), Section 2; the Prevention of Organised Crime Act Second Amendment 1999 (South Africa), Section 1; and the Proceeds of Crime (Amendment) Act (Ireland), Section 3.

83. In *National Director of Public Prosecutions of South Africa v. Carolus and Others*, 2000 (1) SA 1127 (SCA), the Supreme Court of Appeal of South Africa held that the Prevention of Organised Crime Act 1998 could not be retrospectively applied to NCB asset forfeitures because the legislation did not state "whether before or after the commencement of this Act" in the relevant sections. As a result of the decision, Parliament amended the definitions of proceeds and instrumentalities to include this wording (Act No. 38 of 1999, Section 1).

84. UNCAC, Article 23 (1)(b)(i); UNTOC, Article 6(1)(b)(i); Vienna Convention, Article 3(1)(c).

which it is inoperative if officials are saddled with the responsibility to forfeit, maintain, and dispose of assets of insignificant value.

To address this issue, legislation should make forfeiture mandatory, but only assets of more than minimal (*de minimus*) economic value should be seized. This decision requires a measure of discretion, a concept that varies across jurisdictions and must be considered in the context of domestic legislation. In some jurisdictions, mainly common law jurisdictions, the prosecutor has broad discretion, ranging from determining whether there is sufficient evidence to proceed with a case to negotiating resolutions. Other jurisdictions, mainly civil law jurisdictions, do not permit or limit discretion.<sup>85</sup> At the same time, these differences are not determinative: even jurisdictions that do not allow discretion have introduced rules to limit seizures to assets of economic value (see box 13).

Clear policy guidance for decision makers should accompany this authority to ensure seizure decisions are informed, ethical, and transparent.<sup>86</sup> Even if the asset has negative or marginal value, consideration must still be given to circumstances in which there is an overriding public interest to be served by going forward with the forfeiture. The public policy interest in disrupting illicit activity, for example, will likely militate in favor of the seizure of drug houses and vehicles used to transport illegal aliens. For example, an abandoned house used to distribute drugs may have no value, but if forfeiture can lead to the demolition of the structure and a sale of the land, it may be appropriate to forfeit the property even if the government incurs a financial loss in the forfeiture process.

Establishing minimum equity thresholds is an appropriate mechanism for making forfeiture cost-effective and for preventing the system from breaking down as a result

**BOX 13     Discretion in Seizures**

In Mexico, if the value is under \$70 the government may destroy the item, or the funds or the product can be given to social programs.

Colombia, a country without prosecutorial discretion, found its system was burdened by worthless items (for example, ashtrays). As a result, Colombia established pre-seizure planning policy guidelines to analyze the cost and benefit of the seizure (see CD-ROM appendix M).

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85. In France, for example, the prosecutor can determine whether to bring charges, but cannot dismiss the charges without approval of the court (Code of Criminal Procedure, Article 40).

86. On a practical note, with performance management of an asset forfeiture team, care must be taken when setting performance indicators to ensure demonstrable integrity of decisions as to seizure of assets with depreciating value. Policies could set out mechanisms to ensure transparency and integrity, such as requiring a written record of the decision not to seize and ensuring that discretion is not left to a single law enforcement agency.



*Crocodile farm seized and auctioned by the Anti-Money Laundering Office (Thailand). Pictured is Police Major General Peeraphan Premabhuti. Photo courtesy of Police Major General Peeraphan Premabhuti.*

of a requirement to seek forfeiture in every instance that a statute may permit. Thresholds should not be codified in a statute because there should be flexibility to adjust them when it serves a law enforcement interest to do so or when the economic climate in the jurisdiction has changed. Accordingly, thresholds are best left to the executive branch (or other competent authority) through the issuance of clear policies, rules, or regulations. Pre-seizure planning guidelines should be implemented to assist in the cost-benefit analysis of a possible seizure as well as to prevent problems related to the seizure or management of certain types of assets.<sup>87</sup>

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87. The United States and Colombia have pre-seizure planning policy guidelines (CD-ROM appendix M). See also appendix V for a sample pre-seizure planning guide from the United States.



# Measures for Investigation and Preservation of Assets

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## **Key Concept 10.**

The specific measures the government may employ to investigate and preserve assets pending forfeiture should be designated.

Effective and efficient investigative and preservation methods, supported by human, financial, and material resources, are crucial to securing assets and gathering evidence for forfeiture proceedings. Preservation methods include provisional measures for freezing, seizing, and monitoring assets (see box 14 for the unique worldwide freezing orders available in the United Kingdom). Production orders, monitoring orders for bank accounts, and search and seizure orders are commonly used investigative tools. Jurisdictions should consider which measures may be compelled administratively or by a prosecutor, and which measures should require a court order. In some jurisdictions, an administrative official, typically associated with the financial intelligence unit (FIU), may issue a brief preservation order to a financial institution. This is an efficient, short-term tool that affords the police, prosecutor, or senior government official time to seek an extended order from a court.<sup>88</sup> Sometimes these administrative freeze orders are limited to cases involving specified underlying offenses such as political corruption or terrorism; however, a broad category of offenses is the preferred approach.

The most common form of asset preservation is a restraining order or preservation order directed at the person or entity with custody of the property. A restraining order directed to a bank typically freezes the account until conclusion of the forfeiture proceedings, although some jurisdictions limit the duration of the order.<sup>89</sup> Such orders

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88. In the Anti-Money Laundering Act 1999 (Thailand), Section 48 empowers the Transaction Committee to restrain or seize for a period not exceeding 90 days “if there is a probable cause to believe that there may be a transfer, distribution, placement, layering or concealment of any asset related to predicate offense.” In case of emergency, the Secretary-General may issue the order. Relevant regulations relating to taking into custody procedure, preservation, maintenance, or auction, and so forth may apply.

89. In Liechtenstein, the court must limit the duration for which the order is issued, but the deadline may be extended upon application (Code of Criminal Procedure, Section 97a(4)). In Albania, the court limits the duration of the order for a six-month period, but will extend on request of the

**BOX 14**      **Worldwide Freezing Orders in the United Kingdom**

In the United Kingdom, the court can grant a worldwide freezing order over a violator's foreign assets abroad if the order is necessary to prevent the violator from frustrating subsequent orders of the court.<sup>9</sup> The order will not be made if there are sufficient assets within the United Kingdom to satisfy a judgment. Sanctions for noncompliance are limited, but are possible (for example, barring the violator's right to defend in the event of disobedience of the order). For more information, see "Recovery of Proceeds of Corruption in the United Kingdom: Assistance of Law Enforcement and Tools for the Private Litigant" in part C.

a. *Derby v. Weldon* (No 2) [1989] 1, All ER 1002 (Court of Appeal) and *Babanaft Intl Co SA v. Bassatne* [1990], Ch 13 (Court of Appeal).

should be drafted to prevent the withdrawal of any funds from the account, while at the same time directing the bank to accept deposits so as to maximize the capture of deposits by the preservation order.

If there is concern or risk that a preservation, freeze, or restraining order may be ignored, and if there is tangible property in the hands of the violator or the violator's family, such as currency, jewelry, vehicles, and other moveable property, NCB asset forfeiture legislation should permit seizure of such moveable property before, or at the initiation of, the forfeiture action to preserve the availability of property. A preservation or restraining order directed to a financial institution is generally effective because a breach of the preservation order can be enforced against other assets of the institution. In cases of tangible property held by others, it is the actual seizure by the government that ensures the availability of property for forfeiture.

Some jurisdictions have special rules for personal residences subject to forfeiture that only permit physical seizure before conclusion of the forfeiture case if exigent circumstances exist. If the jurisdiction follows that model, the laws must also condition occupancy of real property pending conclusion of a forfeiture proceeding. The conditions should be aimed at preventing illegal use of the property, maintaining it in the same condition that it was in at the initiation of the forfeiture action, and paying any costs (for example, mortgage and property taxes) to ensure that the property does not diminish in value as a result of the seizure.

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prosecutor (Law 9284 of 2004). Other jurisdictions provide that preservation orders expire after a certain period, unless an application for a forfeiture order is commenced (for example, Prevention of Organised Crime Act (Am) 1998 (South Africa), Section 40; Proceeds of Crime Act 1996 (Ireland), Section 2; Commonwealth Model Legislation, Section 7 (CD-ROM appendix D)). Jurisdictions that impose a time period must ensure that it allows sufficient time for a proper investigation; if the time period is too short, the order may expire before the investigation is completed and the assets will likely be dissipated by the claimant.

Other jurisdictions specifically provide in their forfeiture legislation for the appointment of receivers or curators to manage property before conclusion of the forfeiture proceedings.<sup>90</sup> Receivers are particularly appropriate when the property subject to forfeiture is an ongoing business or some specialized form of property that, if not managed by a competent professional, will lose value. The cost of the receivers should be considered during the pre-seizure planning stages to ensure there are sufficient resources for the government to maintain the assets pending final forfeiture.

NCB asset forfeiture legislation should include prohibitions on tipping-off and provide that production orders or subpoenas to financial institutions not be disclosed to the account holder, notwithstanding other banking laws. Some jurisdictions provide criminal sanctions against banks that fail to preserve the confidentiality of production orders or for tipping-off.<sup>91</sup> In practice, a production order should include a reference to any confidentiality provision so that bank employees are reminded of the non-disclosure obligations. Any breach of a freezing, restraint, or investigative order should be dealt with as a contempt of court and the individual held personally responsible.<sup>92</sup> This

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90. Prevention of Organised Crime Act (Am) 1998 (South Africa), Section 42; Proceeds of Crime Act 2002 (United Kingdom), Sections 246–247; Rules of Procedure in Cases of Civil Forfeiture (the Philippines), Section 21; Law 785 of 2002 (Colombia). See also 18, United States Code, Section 983(j) (1): “Upon application of the United States, the court may enter a restraining order or injunction, require the execution of satisfactory performance bonds, create receiverships, appoint conservators, custodians, appraisers, accountants, or trustees or take any other action to seize, maintain, or preserve the availability of property subject to forfeiture...”

91. For example, in the United States, financial institutions and their employees who disclose the existence of certain categories of subpoenas are subject to civil sanction (12 United States Code, Section 3420(i)(2)) (permits bank regulatory agency to impose civil penalty of up to \$25,000 for each day a violation occurs), and criminal prosecution (18 United States Code, Section 1510(b)) (up to five years imprisonment upon conviction of financial institution employee who notifies customer or any other person of the existence of a subpoena for financial records). In Switzerland, disclosure by the financial institution or any third party (for example, asset manager, fiduciary) receiving a seizure or production order issued by a prosecutor, investigating magistrate, or court is an offense punishable by a fine (Criminal Code, Article 292). The order applies for a limited time in accordance with the complexity of the proceeding (Supreme Court of Switzerland, 1S.11/2005). For other examples of tipping-off provisions, see the Proceeds of Crime (Jersey) Law 1999, Section 35. See also Commonwealth Model Legislation, Section 9, which provides for sanctions for corporate bodies and individuals (CD-ROM appendix D).

92. The Forfeiture of Money, etc in Civil Proceedings (Bailiwick of Guernsey) Law 2007, Sections 26, 31, 37, 43; Proceeds of Crime Act 2002 (United Kingdom), Sections 342, 359, 366; Commonwealth Model Legislation, Section 9 (CD-ROM appendix D). See also, 18 United States Code, Section 2232(a), which provides, “Whoever, before, during, or after any search for or seizure of property by any person authorized to make such search or seizure, knowingly destroys, damages, wastes, disposes of, transfers, or otherwise takes any action, or knowingly attempts to destroy, damage, waste, dispose of, transfer, or otherwise take any action, for the purpose of preventing or impairing the Government’s lawful authority to take such property into its custody or control or to continue holding such property under its lawful custody and control, *shall be fined under this title or imprisoned not more than 5 years, or both.*” [emphasis added]

action would be in addition to consideration of whether any obstruction of justice and money laundering offenses have been committed.

To assist investigators and prosecutors, some jurisdictions have introduced investigative checklists and standard court forms for investigative and preservation applications and orders. A selection of these checklists and forms can be found in appendixes IV through VI and in CD-ROM appendixes K and L.

## **Key Concept 11.**

**Preservation and investigative measures taken without notice to the asset holder should be authorized when notice could prejudice the ability of the jurisdiction to prosecute the forfeiture case.**

The ability to obtain evidence without notice to the asset holder, or *ex parte*, is critical to an effective NCB asset forfeiture system.<sup>93</sup> Many jurisdictions permit a police officer<sup>94</sup> to appear before a judicial official *ex parte* to seek an order for seizure or preservation on the notion that advance notice would tip off the violator and enable him or her to take some action to prejudice the forfeiture case, such as secreting or transferring the assets.<sup>95</sup> Where an *ex parte* preservation order is authorized, the law may require the government to show some potential prejudice before the court will order the pretrial restraint or seizure. Typically, this requirement can be satisfied by showing that the government is likely to prevail and that dissipation of the assets is possible if notice is given. In some jurisdictions, an *ex parte* order is effective for a limited time during which the government must provide notice and an opportunity for an adversarial hearing.<sup>96</sup>

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93. In many jurisdictions, proceedings without notice to the asset owner are known as *ex parte* proceedings, or legal proceedings brought by one person in the absence of, and without representation or notification of, other parties. For a sample of an *ex parte* motion for a restraining order, see *United States of America v. Abbas Chouman*, Restraining Order, *In re Restraint of All Assets Held in the Name of Alain Gagnon*, and *In re Restraint of All Assets Held in the Name of Mario Marino Faro*, in CD-ROM appendix I.

94. Countries should consider whether to require the police official to consult with and obtain the consent of a prosecutor before proceeding to seek a court order.

95. In *NDPP v. Mohamed No and Ors*, [2003] ZACC 4, the South African Constitutional Court considered whether South Africa's *ex parte* statutory preservation provisions were unconstitutional because they denied a fair public hearing in court. The Court upheld the statute, stating in para. 52 that while the statute may be a temporary deprivation of the fair hearing rights under Section 34 of the Constitution, such a limitation was justified by Section 36 of the Constitution because "it enables the Act to function for the legitimate and most important purpose for which the Act was designed... and to reduce the dissipation of the proceeds and instrumentalities of organized crime."

96. In the Philippines, the preservation of assets through a freeze order is valid for six months under Rules of Procedure in Cases of Civil Forfeiture, Section 53:

- (a) Effectivity; post-issuance hearing. The freeze order shall be effective immediately for a period of twenty days. Within the twenty-day period, the court shall conduct a summary hearing, with notice to the parties, to determine whether or not to modify or lift the freeze order, or extend its effectivity as hereinafter provided.

The ability to obtain an *ex parte* order for financial or other evidence or for freezing an account should be clearly stated in forfeiture legislation.<sup>97</sup> The absence of such a provision risks providing a possible loophole and an opening for the dissipation of assets.<sup>98</sup> In addition, government officials should be able to obtain documentary evidence such as bank records without notice to the account holder because the account holder can quickly transfer and secret assets upon learning that an investigation is under way.<sup>99</sup>

### **Key Concept 12.**

There should be a mechanism to modify orders for preservation, monitoring, and production of evidence and to obtain a stay of any ruling adverse to the government pending reconsideration or appeal of any order that could place forfeitable property beyond the reach of the court.

All cases begin with an investigation, followed by a decision of whether to proceed criminally, with NCB asset forfeiture, or both. Therefore, to be effective, an NCB asset forfeiture regime must be agile. Investigative and preservation orders at the early stages of an investigation may uncover the tip of the iceberg, a small portion of the total proceeds in a complicated criminal fraud and money laundering scheme. Investigating agencies require sufficient flexibility to respond to new information and ensure assets are not dissipated. The enactment of a provision permitting law enforcement to immediately seek the modification of orders for the preservation of assets, monitoring accounts, and the production of information gives flexibility as conditions change. In addition, courts must be prepared to hear and rule on such requests promptly. A system that is not responsive to the reasonable needs of law enforcement cannot be effective in preserving the proceeds of crime—delay is the ally of the offender.

There should also be a provision permitting applications for a stay pending appeal because a court order declining to preserve property can effectively end any possibility of completing an NCB asset forfeiture action. Release of property from restraint—even for a few minutes—may be sufficient for the violator to transfer assets out of the country and effectively insulate the assets from forfeiture.

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- (b) Extension. On motion of the petitioner filed before the expiration of twenty days from issuance of a freeze order, the court may for good cause extend its effectivity for a period not exceeding six months.

97. Commonwealth Model Legislation, Section 3(2) (CD-ROM appendix F).

98. In the Philippines, the Supreme Court declared that the Anti-Money Laundering Act did not intend to allow “bank inquiry” *ex parte*, citing the failure of the law to simply state the words “*ex parte*” in the pertinent provision. The decision, however, has not attained finality: *Republic v. Eugenio, et al.*, G.R. No. 174629, 14 February 2008.

99. See Commonwealth Model Legislation; Section 30 authorizes police officers to direct financial institutions to provide certain information or documents; Section 31 provides for an offense for failing to comply with Section 30 (CD-ROM appendix D).



# Procedural and Evidentiary Concepts

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## **Key Concept 13.**

The procedural and content requirements for both the government's application and the claimant's response should be specified.

Specificity in the law is important in all aspects of a forfeiture regime because it creates uniformity and ensures that the legislature, not the judiciary, creates the rules that govern the forfeiture process. Some jurisdictions require a higher level of specificity in pleading the allegations in an NCB asset forfeiture complaint based on the concept that claimants whose property is subject to forfeiture should have sufficient facts from the complaint alone to prepare a defense. Other jurisdictions have no special rules regarding specificity and rely on the discovery process, whereby the parties exchange evidence before trial to allow the litigants to prepare their cases. Typically, the complaint or application for forfeiture filed by the government should allege the facts giving rise to forfeiture, the statutory basis for the forfeiture, and the legal theory of forfeiture.

The law should also explain how a person with an interest in the property can assert a claim to the property and contest or object to the forfeiture action, and should specify the time within which a claim must be filed. Time periods are typically tied to when the party received direct notice of the forfeiture action, or if direct notice was not received, some period after public notice. If proper notice is given, failure to file a timely response or claim should result in extinction of the owner's interest in the property. Because NCB asset forfeiture actions are not against an individual but against the property, most regimes require—as the first step—that an individual contesting forfeiture file in court a response or claim to the property describing a legal interest in the property. Responses or claims are generally required to be filed under oath on penalty of perjury. The claim process is important because it ensures that only those with a legal interest in the property are allowed to contest forfeiture.

There should also be procedures for exchange of evidence before the forfeiture hearing. See box 15 for the disclosure practice in the United Kingdom.

**BOX 15**    **Ensuring Disclosure Obligations**

In the United Kingdom, the disclosure obligations of criminal proceedings do not apply because NCB asset forfeitures are not criminal proceedings. Cash forfeiture hearings are heard in the Magistrates Court, where civil rules governing disclosure do not apply. The duty of disclosure in forfeiture cases must therefore be governed by the right to a fair trial enshrined in human rights legislation. Under this requirement, disclosure obligations may be discharged by ensuring that any material or information in the possession of law enforcement is disclosed to the respondent.

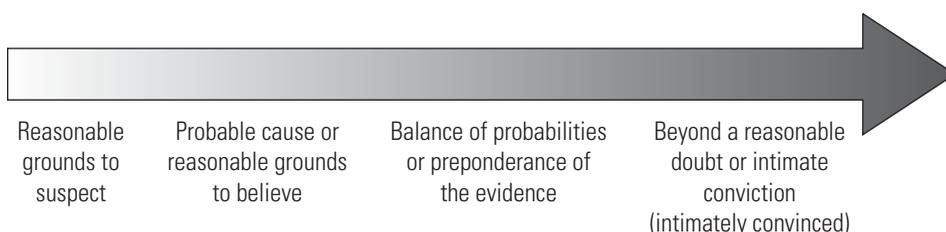
**Key Concept 14.**

Fundamental concepts such as the standard (burden) of proof and use of rebuttable presumptions should be delineated by statute.

**Standard of Proof**

Legal systems vary in the degree of proof that is required by the prosecutor to sustain a forfeiture action. The options range from probable cause or reasonable grounds to believe, a concept often defined as slightly more than mere suspicion, to the same standard required for a criminal conviction—proof beyond a reasonable doubt or proof that intimately convinces a judge (intimate conviction). Between these two extremes is the preponderance of the evidence or a balance of probabilities standard, which typically equates to more likely to be true than not true, or a greater than 50 percent chance that the proposition is true. This standard is most common in civil cases (non-criminal), particularly in common law jurisdictions. The figure below provides an illustration of the progression of standards of proof. Whatever standard of proof is deemed appropriate, specificity in the statute defining the standard of proof is essential.

**An Illustration of Standards of Proof**



Some jurisdictions permit the initial restraint and seizure of assets and investigatory orders on a probable cause or reasonable grounds to believe standard, the same evidentiary standard that permits the issuance of search and arrest warrants.<sup>100</sup> It is important that the standard provides the investigating agency with sufficient agility to obtain the order, while at the same time being sufficient to avoid unwarranted seizures.

For the actual forfeiture of such assets, a higher standard, often the balance of probabilities standard, is generally required.<sup>101</sup> With some exceptions,<sup>102</sup> most civil law jurisdictions require the even higher level of proof of beyond a reasonable doubt or intimate conviction for forfeiture. Applying the balance of probabilities standard has the obvious advantage of easing the burden of proof for the government. It is also the appropriate standard to apply in situations in which forfeiture proceedings are designated as civil, not penal, because it is the same standard applied to all other civil cases. In *Walsh v. Director of the Assets Recovery Agency*,<sup>103</sup> the claimant argued that the proceedings were criminal, not civil, and therefore required the criminal standard of proof. This argument was rejected by the Court, which distinguished civil recovery proceedings from the criminal process:

The essence of article 6 [of the ECHR] in its criminal dimension is the charging of a person with a criminal offence for the purpose of securing a conviction with a view to exposing that person to criminal sanction. These proceedings are obviously and significantly different from that type of application. They are not directed towards him in the sense that they seek to inflict punishment beyond the recovery of assets that do not lawfully belong to him. As such, while they will obviously have an impact on the appellant, these are predominantly proceedings *in rem*. They are designed to recover the proceeds of crime, rather than to establish, in the context of criminal proceedings, guilt of specific offences. The cumulative

100. For specific examples, see Prevention of Organised Crime Act (Am) 1998 (South Africa), Section 38; Civil Remedies Act (Ontario, Canada), Sections 4(2) and 9(2). Other countries apply the even lower standard of “reasonable grounds to suspect.” See the Proceeds of Crime Act 2002 (Australia), Sections 18–20; Code of Criminal Procedure (Liechtenstein), Section 97a(1); Criminal Procedure Code (Switzerland) (to be enacted in 2011), Article 263; and Supreme Court of Switzerland 1b.157/2007 and 1b.17/2008. In the Commonwealth Model Legislation, Section 3(3), both standards (reasonable grounds to believe, reasonable grounds to suspect) are proposed as options for states to consider (CD-ROM appendix D).

101. For specific examples of the balance of probabilities standard, see An Act Respecting the Forfeiture, Administration and Appropriation of Proceeds and Instruments of Unlawful Activity (Quebec, Canada), Section 4; Prevention of Organised Crime Act (Am) 1998 (South Africa), Sections 50, 52, 54; Proceeds of Crime Act 2002 (Australia), Section 317; Proceeds of Crime Act 2002 (United Kingdom), Section 241(3).

102. In Quebec, Canada, a civil law jurisdiction, the balance of probabilities standard is applied to civil cases as well as to the proposed NCB asset forfeiture legislation.

103. [2005] NICA 6 (CD-ROM appendix H).

effect of the application of the tests in *Engel v. Netherlands* [(1976), 1 EHRR 647 (ECHR)] is to identify these clearly as civil proceedings.<sup>104</sup>

Courts in other jurisdictions have addressed this issue and have reached the same conclusion with similar reasoning.<sup>105</sup>

These differing standards of proof can be an obstacle to foreign recognition of an NCB judgment where such judgment is regarded as remedial and obtained on a balance of probabilities standard. At the same time, there have been some successes in solving these obstacles.<sup>106</sup> Whatever standard of proof is deemed appropriate, whether for investigative orders, restraint, or forfeiture, specificity in the statute defining the standard of proof is essential.

### **Rebuttable Presumptions**

Jurisdictions should also consider the use of rebuttable presumptions to help meet the burden of proof. A presumption is an inference of the truth of a proposition or fact drawn by a process of probable reasoning in the absence of actual certainty. If a presumption is raised, the party against whom the presumption exists has the burden to overcome the presumption by the applicable standard of proof, either a preponderance of evidence or the balance of probabilities. Failing this, the *prima facie* presumption is converted to an uncontroverted fact. For example, a statute may create a rebuttable presumption that unexplained wealth accumulated during a period of service as a public official was attributable to corruption that results in the forfeiture of the increased wealth, unless the official can sufficiently explain how the increase in wealth occurred through legitimate means. This sort of presumption relieves the state of what is often an impossible proof hurdle in cases in which public officials—particularly those who have had long tenure in public service—would not be expected to have a dramatic increase in wealth while serving in office. Otherwise, they would be able to misuse their positions to conceal corrupt schemes and thwart investigation into their acquisition of assets.

Many jurisdictions have enacted rebuttable presumptions as part of their forfeiture laws. In Thailand, rebuttable presumptions are used to invalidate transfers to family members.<sup>107</sup> In Switzerland, assets belonging to a person who has participated in or

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104. *Walsh v. Director of the Assets Recovery Agency*, [2005] NICA 6 at para. 41.

105. *United States v. Ursery* 518 U.S. 276 (1996) (United States Supreme Court); *Murphy v. GM, PB, PC Ltd., and GH*, [1999] IEHC 5 (Supreme Court of Ireland); and *Martineau v. Canada* (Minister of National Revenue), [2004] 3 S.C.R. 737 (Supreme Court of Canada).

106. See “Good Practices in Non-Conviction Based Forfeiture: A Swiss Perspective” in part C, and *A\_\_\_ Company v. Federal Office of Justice* in CD-ROM appendix H.

107. Anti-Money Laundering Act 1999 (Thailand), Sections 51 and 52:

Section 51: “...if the claimant .... is related to or used to be related to any person who committed the predicate offense or the offense of money laundering, the presumption shall be that the money or asset related to an offense or has been transferred dishonestly, whichever the case may be.”

supported a criminal organization are presumed to be at the disposal of the organization.<sup>108</sup> The United Kingdom presumes that any property acquired six years before conviction was illegally derived.<sup>109</sup> There are also presumptions engaged upon conviction of a criminal offense.<sup>110</sup> See box 16 for examples of legislative presumptions in the Philippines and how they have been applied.

There have been objections to presumptions, most of which have centered around constitutional guarantees that one is presumed innocent until proven guilty by law. Provided that the presumption is restrictively worded, rebuttable, and reasonable, there is not necessarily a violation.<sup>111</sup> Even UNCAC and other international conventions have provisions that call for States Parties to consider the possibility of requiring an offender to demonstrate the lawful origin of assets liable to forfeiture.<sup>112</sup> The burden must remain on the prosecution to establish the case and the basis for the presumption, and the claimant must be permitted to offer a reasonable or credible explanation to rebut the presumption.

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Section 52: "...if the claimant in being a recipient .... is related to or used to be related to any person who committed the predicate offense or the offense of money laundering, *the presumption shall be that the claimant has acquired his vested interest in possession dishonestly.*" [emphasis added]

108. Criminal Code (Switzerland), Article 72. The presumption was recently used in the forfeiture of 7 million Swiss Francs (\$6 million) stolen by former Haitian President Jean-Claude Duvalier. The Swiss Federal Office of Justice held that the Duvalier clan acted in the same way as a criminal organization. The statements of account holders failed to provide evidence or explanation of the lawful origin of the funds sufficient to rebut the presumption. The Swiss Federal Office of Justice ordered the funds to be forfeited and returned to the Government of Haiti. As of this writing, the account holders had 30 days in which to appeal. See Federal Office of Justice media release, February 12, 2009, "Handover of Duvalier Assets to Haiti Ordered" ([http://www.ejpd.admin.ch/ejpd/en/home/dokumentation/mi/2009/ref\\_2009-02-12.html](http://www.ejpd.admin.ch/ejpd/en/home/dokumentation/mi/2009/ref_2009-02-12.html)) and World Bank media release, February 13, 2009, "World Bank Welcomes Swiss Handover of Duvalier Assets to Haiti" (<http://go.worldbank.org/22BHX75J0>).

109. Proceeds of Crime Act (United Kingdom), Section 10(8). South Africa has a similar provision that applies for a period of seven years: Prevention of Organised Crime Act Second Amendment 1999, Section 22.

110. An Act Respecting the Forfeiture, Administration and Appropriation of Proceeds and Instruments of Unlawful Activity (Quebec, Canada), Section 11. Title 21, United States Code, Section 853(d), a criminal forfeiture statute provides in pertinent part as follows: "There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter . . . is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that – (1) such property was acquired by such person during the period of the violation of this subchapter . . . or within a reasonable time after such period; and (2) there was no likely source for such property other than the violation of this subchapter . . ."

111. *Salabiaku v. France* (1998) 13 EHRR 379 (European Court of Human Rights held that a legal presumption did not violate the guarantee in Article 6(2) to be presumed innocent until proven guilty because it was "within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defense").

112. UNCAC, Article 31(8); UNTOC, Article 12(7); Vienna Convention, Article 5(7).

**BOX 16**

**Legislative Presumptions in the Philippines:  
Case Examples of Implementing Section 31 of the Rules of  
Procedure in NCB Asset Forfeiture Cases**

**Section 31 of the Rules of Procedure in Civil Forfeiture Cases**

In rendering judgment, the court may consider the following factors to determine where lies the preponderance of evidence:

- (a) That the monetary instrument, property, or proceeds are represented, involved, or related to an unlawful activity or a money laundering offense:
  - (1) If the value or amount involved is not commensurate with the business, financial or earning capacity of the person;
  - (2) If any transaction indicates a clear deviation from the profile or previous transactions of the person;
  - (3) If a person opens, maintains or controls an account with a covered institution not in his own name or registered business name unless authorized under existing law;
  - (4) If a person has structured transactions in order to avoid being the subject of reporting requirements under Republic Act No. 9160, as amended; or
  - (5) If any transaction exists that has no apparent underlying legal or trade obligation, purpose or economic justification; or
- (b) That the monetary instrument, property, or proceeds, the sources of which originated from or are materially linked to monetary instruments, properties, or proceeds used in the commission of an unlawful activity or money laundering offense, are related to the said unlawful activity or money laundering offense.

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**Life of Luxury: Value not commensurate with earning capacity**

A high-ranking military official was brought to the attention of law enforcement because his luxurious lifestyle was disproportionate to his earning capacity as a military official and that of his spouse. He was known for his luxury cars and exclusive properties in the Philippines and abroad, as well as for maintaining bank accounts in considerable amounts under his name or those of members of his immediate family. Law enforcement conducted a “lifestyle check,” an inquiry into his assets, and the investigation yielded a great disparity between his under-declared assets and his actual assets. To facilitate a more extensive investigation, an application for a freeze order was filed against the bank accounts as a provisional remedy and the presumption in Section 31(a)(1) was used. In addition, the accounts of the official’s spouse were subjected to the freeze order further to the presumption in Section 31(a)(3) on the basis that the “control” of the account remained with him.

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**Change of Course: Transaction deviating from the norm or purpose**

A company licensed to sell military and office supplies was discovered to have solicited investments from the public in a pyramid scheme that garnered interest at four times the market rate for a six-month period. The company’s bank filed a Suspicious Transaction Report given that the deposits represented a clear deviation from the profile established in the license and the transactions were unusually large and complex. An application for a freeze order was filed and issued, following which a petition for NCB asset forfeiture was filed. Because the company officials had fled the country, the presumption in Section 31(a)(2) was not rebutted at the NCB asset forfeiture proceedings and an order was issued.

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**BOX 16****Legislative Presumptions in the Philippines (continued)****Absence of underlying legal obligation, purpose, or economic justification**

A Japanese national visiting the Philippines was kidnapped and ransom of 2.6 million Philippine pesos (approximately \$55,000) was demanded for his release. When the kidnapper received a wire transfer in this amount from a Tokyo bank, the Philippine bank filed a Suspicious Transaction Report on the basis that the transaction involved a large sum and had “no apparent underlying legal or trade obligation, purpose or economic justification.” In applying for a freeze order during the initial investigation, the presumption in Section 31(a)(5) was used because there was insufficient evidence to link the unlawful activity and the account in the early stages. The freeze order was issued and subsequent investigations linked the unlawful activity to the money—it was discovered that the victim’s relatives in Japan had deposited the ransom funds into a Tokyo bank and transferred it to a Philippine bank, where it was withdrawn by the kidnapper. The Court ultimately ordered forfeiture of the money.

**Sources linked to the commission of unlawful activity**

A suspected drug dealer owned a retail business and maintained a bank account in his name. Upon a search of the premises further to a drug investigation, law enforcement confirmed that the business was not operating as a retailer of lawful goods, but rather, it was trading in illegal drugs. In the NCB asset forfeiture proceedings, the presumption in Section 31(b) was used, linking the money in the bank account maintained in his name to the commission of the crime of illegal sale of dangerous drugs.

**Key Concept 15.**

Where affirmative defenses are used, defenses to forfeiture should be specified, along with the elements of those defenses and the burden of proof.

In some legal systems, once the prosecutor establishes forfeitability, the burden shifts to the claimant to establish cognizable defenses.<sup>113</sup> A claimant must first prove that he or she has an ownership interest in the property. Following that, the recognized defenses to forfeiture may vary depending upon when the claimant acquired that interest in the property (for example, before or after the violation) and whether the property subject to forfeiture is alleged to be the proceeds or instrumentality of crime. Particular defenses could include (1) the police seized the wrong property; (2)

113. Not all countries provide for a system of applicable defenses. Countries must consider this concept in the context of their own domestic legislation.

the owner is a bona fide purchaser for value of the property without knowledge of the illegal conduct involving the property; or (3) in a case of property that facilitated the violation, the claimant did all that could reasonably be expected to prevent the illegal use of the property. Typically, claimants are required to prove any recognized defenses by the same burden of proof required of the government to prove the *prima facie* case for forfeiture.

Some jurisdictions also employ a proportionality defense for facilitating property cases. If the government establishes the property facilitated the offense, the claimant is given one additional opportunity to avoid or mitigate the forfeiture by proving that the value of the property and its connection to the crime are grossly disproportional to the gravity of the offense. However, mere value of the asset alone is not the determining factor (see box 17). If it were, claimants would be able to escape forfeiture by using high-priced cars and houses to transport and store illegal narcotics and then argue that the value of the property exceeds the value of the narcotics. The defense must consider the extent to which the property was integral to facilitating the crime. Additionally, this defense would have no application in a case in which the theory of forfeiture is that the property is proceeds of the illegal conduct. Because one never has the right to own ill-gotten gains, it would be impos-

**BOX 17      Forfeiture of a Residence in South Africa**

The Constitutional Court of South Africa balanced some of these proportionality considerations in *National Director of Public Prosecutions v. Prophet*,<sup>a</sup> a case in which the Court considered the forfeiture of a residence as an “instrumentality” of a drug operation. In determining whether the forfeiture was proportional to the offense, the Court weighed the severity of the interference with individual rights to property against the extent to which the property was used for the purposes of the commission of the offense, bearing in mind the nature of the offense.

The Court determined the property was closely connected to the manufacturing of drugs, focusing on the evidence that almost every room of the house had been adapted to facilitate the operation and giving little weight to the evidence that only a small quantity of illegal substances was found. The Court acknowledged the claimant’s property rights and the importance of considering personal circumstances when the property is used for residential purposes, but noted the claimant had rental income from other property owned by his late father. Balancing these factors in the context of the offense of drug manufacturing—which undermines the legitimate economy; threatens the national stability and security of the country; creates immeasurable society problems; and threatens the health, welfare, and safety of individuals—the Court upheld the forfeiture.

a. [2006] ZACC 17 (Constitutional Court of South Africa).

sible for a forfeiture of proceeds to ever be disproportional to the seriousness of the offense.

### **Key Concept 16.**

**The government should be authorized to offer proof by circumstantial evidence and hearsay.**

Most jurisdictions permit the use of circumstantial evidence<sup>114</sup> or inferences based on objective circumstances<sup>115</sup> to establish certain elements of an offense, even in criminal prosecutions. International conventions and agreements also provide for inferences, such as permitting the knowledge,<sup>116</sup> intent, or purpose required as an element of an offense to be inferred from objective factual circumstances.<sup>117</sup> Circumstantial evidence is extremely relevant in forfeiture cases in which the government can prove the violator was engaged in some criminal activity and that the violator acquired wealth beyond the violator's legitimate income, but the government is unable to prove the specific transactions that account for the increase in wealth.<sup>118</sup> This is particularly true in corruption cases in which the corrupt official acquired illicit wealth over a period of years from a variety of schemes against the government, but where it would be difficult, if not impossible, to prove that any given funds were derived from a particular scheme or "quid pro quo."

Many jurisdictions allow the use of hearsay<sup>119</sup> during the seizure and restraint phases of an NCB asset forfeiture proceeding.<sup>120</sup> It is not practical, for example, for witnesses

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114. Circumstantial evidence is one or more facts that can be used to infer another fact.

115. The OAS Model Regulations (CD-ROM appendix G) have defined "objective circumstances of the case" to include, "among others, those circumstances relating to the time or manner of acquisition, personal characteristics, economic characteristics, the convicted person's ordinary sphere of activities, or any other circumstances deemed relevant."

116. The NCB law can provide that knowledge can constitute willful blindness. An owner cannot consciously avoid seeking the truth and deliberately close his eyes and ignore what would have been obvious regarding the property's involvement in crime.

117. Recommendation 2 of the FATF Forty Recommendations on Money Laundering (mental intent for money laundering may be inferred from objective factual circumstance); Vienna Convention, Article 3 (3); UNTOC, Article 5(2); and UNCAC, Article 28 (knowledge, intent, or purpose required as an element of an offense may be inferred from objective factual circumstances).

118. In the OAS Model Regulations (CD-ROM appendix G), Article 9(2) permits the illicit origin or destination of assets to be inferred based on the objective circumstances of the case.

119. Hearsay is an out-of-court statement that is offered in court as evidence to prove the truth of the matter asserted. While civil law jurisdictions do not usually exclude hearsay from proceedings, in common law jurisdictions hearsay is inadmissible except for a number of exceptions. If hearsay is admitted, the court must also consider the appropriate weight to give the evidence.

120. For a case example, see *McK v. H and Anor*, [2006] IESC 63 (Supreme Court of Ireland) (hearsay evidence admissible in an NCB asset forfeiture proceeding in Ireland, where court had opportunity to carefully review its probative value).

with direct knowledge of fact to appear personally in court when only seizure and restraint are at issue. Typically, the police officer who has interviewed the witnesses is allowed to testify, usually by affidavit or declaration under penalty of perjury, as to what the witness told the investigator. This process is customarily followed for the issuance of search and arrest warrants. Some jurisdictions permit certain exceptions to hearsay during the trial process and have provided for this in their NCB legislation.<sup>121</sup>

### **Key Concept 17.**

**Applicable statutes of limitations (prescription) should be drafted to permit maximum enforceability of NCB asset forfeiture.**

There are a variety of rules addressing the circumstances in which a domestic forfeiture action must be initiated. Some jurisdictions have no limitations period,<sup>122</sup> based upon the theory that one can never obtain title to illegally acquired assets. Others tie the initiation of an NCB asset forfeiture proceeding to some other event such as a related criminal prosecution or a defined period of years following discovery of the acts giving rise to forfeiture.<sup>123</sup> Some suspend the limitations period so long as the property is beyond the reach of the court.<sup>124</sup>

While statutes of limitations may promote prompt resolution of cases, limitations periods also reward those offenders who succeed in concealing their conduct or who

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121. Rule of Procedure in Cases of Civil Forfeiture, Asset Preservation, and Freezing of Proceeds of Money-Laundering Offenses (The Philippines), Section 30.

122. Colombia is a jurisdiction with no limitation period: Law 793 (2002), Article 24, states, “(...) forfeiture may be ordered regardless of when the acquisition or illegal use of the property occurred. At all times it is to be understood that the illegal acquisition of the property does not constitute a just title, is seriously detrimental to the social welfare of the country, and is an activity that bears permanent effects.”

123. In the Philippines, while the crime of plunder has a 20-year limitation period, the right to recover assets related thereto is not “barred by prescription, laches, or estoppel” (Republic Act No. 7080, Section 6).

124. In the United States, the statute of limitations begins to run from the discovery of the criminal offense giving rise to the NCB asset forfeiture action. Title 19, United States Code, Section 1621, in relevant parts provides as follows:

No suit or action. . . [for the] forfeiture of property. . . shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered, or in the case of forfeiture, within 2 years after the time when the involvement of the property in the alleged offense was discovered, whichever was later; except that—. . . the time of the absence from the United States of the person subject to the penalty or forfeiture, or of any concealment or absence of the property, shall not be reckoned within the 5-year period of limitation.

This provision essentially suspends the period of limitations for bringing a forfeiture action when the property is located beyond U.S. borders. As an example, U.S. prosecutors were allowed to bring a forfeiture action against drug proceeds placed in another country even though more than five years had passed since their detection. *U.S. v. All Funds in Account Nos. 747.034/278, 747.009/278 and 747.714/278 in Banco Espanol de Credito, Spain*, 295 F.3d 23 (D.C. Cir. 2002).

operate in an environment that prevents prompt initiation of the NCB asset forfeiture action. Official corruption is generally impossible to prosecute while the violator is in office, and corrupt officials may remain in office for many years.

Therefore, legislation should be drafted to provide that no NCB asset forfeiture action would be barred as a result of the passage of time unless the conduct giving rise to forfeiture pertained to official corruption or was committed by a politically exposed person (PEP).<sup>125</sup> For all other criminal acts, the limitations period should not commence until some period, perhaps 20 years, after the discovery by the government of the acts giving rise to the forfeiture action. For those NCB asset forfeiture actions governed by a limitations period, laws should have appropriate provisions to exclude periods of time when (1) the government is waiting for the production of evidence from a foreign authority in response to an official request,<sup>126</sup> (2) witnesses are beyond the subpoena power of the court, and (3) the assets subject to forfeiture have been placed beyond the control of the court.<sup>127</sup> Legislation should provide that forfeiture judgments may be enforced in perpetuity without limitation.

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125. Politically exposed persons are defined as individuals who are, or have been, entrusted with prominent public functions and their family members and close associates (UNCAC, Article 52(1)). See also the glossary to the FATF Forty Recommendations, which defines PEPs as “individuals who are or have been entrusted with prominent public functions in a foreign country, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials. Business relationships with family members or close associates of PEPs involve reputational risks similar to those with PEPs themselves. The definition is not intended to cover middle ranking or more junior individuals in the foregoing categories.”

126. See Title 18 United States Code, Section 3292: “Upon application of the United States, filed before return of an indictment, indicating that evidence of an offense is in a foreign country, the district court before which a grand jury is impaneled to investigate the offense shall suspend the running of the statute of limitations for the offense if the court finds by a preponderance of the evidence that an official request has been made for such evidence and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.”

127. UNCAC, Article 29, requires that countries establish long limitations periods, and even longer limitations periods or a suspension of the statute of limitations if the alleged offender has evaded justice.



# Parties to Proceedings and Notice Requirements

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## **Key Concept 18.**

Those with a potential legal interest in the property subject to forfeiture are entitled to notice of the proceedings.

Fundamental principles of due process and basic fairness require that persons with a potential interest in property subject to an NCB asset forfeiture action are entitled to notice of the action. The NCB law should prescribe how notice of the forfeiture action is to be given to such parties and who is responsible for giving that notice.<sup>128</sup> The responsibility for giving notice may fall on the prosecutor or on the court. Typically, some sort of notice is sent to individuals the government believes may have a legal interest in the property subject to forfeiture. While most forfeiture schemes do not require the formal service of process of civil cases, notice must be appropriate under the circumstances.<sup>129</sup> For example, if the person from whom property has been seized is incarcerated, notice must be sent to the jail where the person is housed.

Because the forfeiture extinguishes all rights in the property, some additional form of notice to the population at large is given. The form of this general notice has evolved over the years as new methods of communication and information dissemination have been introduced. In many jurisdictions, a general notice is given by publication in newspapers or legal gazettes; this form of notice has replaced the posting of notices at the courthouse, police station, or in the case of real property, at the property itself. More recently, jurisdictions have begun to use the Internet to post all notices regarding forfeiture action (see box 18). Internet notice is more universally accessible and probably provides better notice to the public because it is available 24 hours a day from anywhere in the world. In addition, it costs less than a newspaper publication.

In Thailand, the Anti-Money Laundering Act's Ministerial Regulation No. 10 (2000) prescribes how notice is to be given. The competent official must provide personal notice of the seizure order to the owner or the persons claiming an interest in the asset. If such persons are not found, notice shall be made to the possessor of the asset or family

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128. See, for example, Commonwealth Model Legislation, Section 6 (CD-ROM appendix D).

129. The United Kingdom has clear rules on what constitutes service in the Civil Procedure Rules 1998.

**BOX 18**      **Providing Notice at a Reduced Cost**

The United States Asset Forfeiture Unit publishes notice on a Web site, [www.forfeiture.gov](http://www.forfeiture.gov). Notices are posted for 30 days and a search engine is provided for ease of use. This method saves \$5 million a year compared with the previous method (newspaper notices).

member of the possessor of the asset. Additionally, the competent official will post the seizure notice where the immovable property is located and at the Anti-Money Laundering Office, land office, and metropolitan district office or provincial district office of the locality in which this immovable property is located.<sup>130</sup>

In Colombia, Law 793 of 2002 requires the prosecutor to identify the individuals holding rights to the property or those with a legitimate interest and to provide notice in the form of an edict that is published in a widely circulated newspaper and announced by radio in the local area.<sup>131</sup>

Jurisdictions must also consider the parties that fall into the definition of a “legal interest” and how to address service to entities outside the jurisdiction. For example, in Liechtenstein, the concept of legal interest is narrowly defined. In addition, there is a proposed law that would require that entities outside the jurisdiction nominate a person within Liechtenstein if they wish to be served with notice.

### **Key Concept 19.**

**A prosecutor or government agency should be authorized to recognize secured creditors without requiring them to file a formal claim.**

Often, the property subject to forfeiture is encumbered by a lien or other security interest held by a person or entity that had no involvement in the criminal activity or no

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130. Anti-Money Laundering Act 1999 (Thailand), Ministerial Regulation No. 10 (2000), Clause 9:

Clause 9. In seizing the movable property, the competent official shall issue a notice in writing to the property owner and combined owners or the persons entitled to the property. If the said persons could not be notified, the seizure notifications shall be posted at the police station of the locality in which such property is seized and at the workplaces of the Office, both in the central and provincial areas.

In case of seizing the movable property with title register, e.g., ship or ship having tonnage from six tons or more, steam ship or motor boat having tonnage from five tons or more, houseboat, machinery or aircraft, the competent official shall notify the registrar of such property of the seizure and the registrar shall record such seizure.

131. Law 793 of 2002 (Colombia), Article 13(4): “The identification shall be made in the form of an edict, which shall remain posted at the Office of the Clerk for five (5) days as well as be published, during the same period of time, in a widely circulated national newspaper and announced by radio in the area where the property is located.”

knowledge of the illegal use of the property. For example, a commercial lender, such as a bank, may hold a mortgage on a home that was used by the owner to store narcotics. The bank did not know that the property owner used the home in an illegal manner and had no reason to know the owner was a drug trafficker at the time the loan was granted. If a bank, lienholder, mortgagee, or secured creditor is able to demonstrate that it acted in good faith and exercised appropriate due diligence, there should be a mechanism to recognize the claims without the need to file a formal claim and participate in the proceedings.

Typically, the commercial lender's security interest is evidenced by recordation of appropriate documents in land records or with some public agency. If the creditor is able to present this type of proof to the prosecutor to establish a security interest and the prosecutor is satisfied that the creditor was not complicit in any way in the illegal activity, there should be a procedure to recognize that interest without additional proof. By having a process—pursuant to legislation or regulation—to recognize the claims of legitimate mortgagees and lienholders as innocent owners, those interested parties can preserve their interest in the property and the government can streamline the forfeiture proceedings and avoid unnecessary litigation. Once the forfeiture proceedings are complete and the property is forfeited and sold, the creditor can be paid from the gross proceeds and the remainder can be realized by the government.

### **Key Concept 20.**

**A fugitive who refuses to return to the jurisdiction to face outstanding criminal charges should not be permitted to contest NCB asset forfeiture proceedings.**

Most criminal defendants who have evaded criminal prosecution by fleeing a jurisdiction would welcome the chance to contest the related NCB asset forfeiture in that same jurisdiction through local lawyers. Such a fugitive property owner should not, however, be allowed to avail himself or herself of the court proceedings to challenge the NCB asset forfeiture while simultaneously refusing to appear for a related criminal case.<sup>132</sup>

The United States has enacted the Fugitive Disentitlement Act (see box 19). This statute prevents a claimant from formally appearing in an NCB asset forfeiture proceeding and raising a defense to the action. The government must establish that the claimant is a fugitive in a criminal action related to the forfeiture action and has actual

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132. Fugitive disentitlement may not be appropriate or necessary in jurisdictions that allow criminal trials in absentia. Also, certain sanctions may present problems for international cooperation with some jurisdictions, in particular, where sanctions would bar due process.

knowledge of the pending criminal charges or such knowledge can be imputed based on the totality of the circumstances. In addition, it must be demonstrated that the claimant is not confined in another jurisdiction, but rather, has deliberately avoided prosecution by purposefully leaving the United States, declining to enter or reenter the United States, or otherwise evading the jurisdiction of the court where the criminal case is pending against him.

Many criminals hold their illicit wealth in the names of companies to conceal the true ownership of such assets. The Fugitive Disentitlement Act takes this into account and bars fugitives from challenging the forfeiture action in the name of the company that is controlled by the fugitive and holds title to the forfeitable property. In this way, the statute prohibits fugitives from using corporate entities to gain vicarious access to a court for NCB asset forfeiture matters, while refusing to submit individually to a criminal court for a related criminal matter.<sup>133</sup>

The Commonwealth Model Legislation prevents a fugitive from justice from obtaining an order protecting his or her interest in the property.<sup>134</sup>

**BOX 19**

**Fugitive Disentitlement Act (United States)**

Title 28 United States Code, Section 2466 provides

- (a) A judicial officer may disallow a person from using the resources of the courts of the United States in furtherance of a claim in any related civil forfeiture action or a claim in third party proceedings in any related criminal forfeiture actions upon a finding that such person—
  - (1) after notice or knowledge of the fact that a warrant or process has been issued for his apprehension, in order to avoid criminal prosecution—
    - (A) purposefully leaves the jurisdiction of the United States;
    - (B) declines to enter or reenter the United States to submit to its jurisdiction; or
    - (C) otherwise evades the jurisdiction of the court in which a criminal case is pending against the person; and
  - (2) is not confined or held in custody in any other jurisdiction for commission of criminal conduct in that jurisdiction.
- (b) Subsection (a) may be applied to a claim filed by a corporation if any majority shareholder, or individual filing the claim on behalf of the corporation is a person to whom subsection (a) applies.

133. *U.S. v. \$6,976,934.65 Plus Interest*, 520 F.Supp.2d 188 (D.D.C. 2007), appeal pending, No. 07-5383.

134. Commonwealth Model Legislation, Section 13(4) (CD-ROM appendix D).

## **Key Concept 21.**

The government should be authorized to void transfers if property has been transferred to insiders or to anyone with knowledge of the underlying illegal conduct.

A universal problem encountered in forfeiture litigation is that criminals typically place title to forfeitable property in the names of insiders, including close friends and family members, as a way to avoid detection and forfeiture. In some instances, the offender transfers title to assets but for little or no value in return. Indeed, if the offender holds assets in his or her own name, it can demonstrate that he or she has acquired an excessive amount of wealth in contrast to his or her legitimate income.

Legislation can defeat these insider transfers and work in conjunction with a number of other Key Concepts in this guide. As discussed at Key Concept 14, the law can impose a presumption that such transfers are suspect; this shifts the burden of proof to the titleholder to prove that such property was the subject of an arm's length transaction that involved payment of fair market value for the property acquired from the offender. The law could also permit inferences of a third party's lack of good faith based on circumstantial evidence or the objective circumstances of the case (see Key Concept 16).<sup>135</sup> In addition, in setting out statutory defenses to forfeiture, the law can require that an innocent owner must prove that he or she acquired the property as a bona fide purchaser of value without knowledge of the illicit source (see Key Concept 15).<sup>136</sup>

Another useful concept is to include a provision in the law similar to that used in the United States, referred to as the "relation back doctrine," which holds that title to forfeited assets vests in the government at the time of the unlawful act giving rise to forfeiture (see box 20). If the property is subsequently transferred it remains subject to forfeiture, unless the transferee establishes that the transferee was a bona fide purchaser for value without knowledge that the property was subject to forfeiture. Courts in the United States have accepted the doctrine and recognized its importance in defeating transfers to insiders and associates. In *United States v. Lazarenko*,<sup>137</sup> the Court held that the Government's interest in the property vests at the time the criminal defendant commits the crime under the relation back doctrine, "otherwise, a defendant could attempt to avoid criminal forfeiture by transferring his property to another before conviction."

135. OAS Model Regulations (CD-ROM appendix G), Article 10(3), allows the court or competent authority to infer a third party's lack of good faith from the objective circumstances of the case.

136. In Colombia, if assets have been transferred or sold to a third party, it is necessary for the third party to prove good faith free of blame. This has been applied in the case of assets transferred to a trustee, where the court held that the fiduciary entity should have known better.

137. *United States v. Lazarenko*, 476 F.3d 642, 647 (9th Cir. 2007) (Mr. Lazarenko was the former prime minister of Ukraine).

**BOX 20**      **Relation Back Doctrine (United States)**

Titles 21 United States Code, Sections 853(c), 881(h), and 18 United States Code, Section 1963(c) provide

All right, title, and interest in property [subject to forfeiture proceedings] vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing . . . that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture. . .

In *United States v. Gilbert*,<sup>138</sup> the Court held that the Government's interest dates back to the time of the act that made the property subject to forfeiture, adding that Congress included the provision to prevent a criminal defendant from attempting to transfer property to a third party before the criminal's conviction. Allowing the government to assert its interest under the relation back doctrine defeats the claims of an owner who acquired an interest in the property subject to forfeiture after the crime occurred and before the forfeiture judgment was entered by the court. In addition, the doctrine enables the government to set aside subsequent transfers to associates of the offender who may be assisting the offender in shielding the property from forfeiture by claiming title without having paid proper value for it.

**Key Concept 22.**

The extent to which a claimant to forfeitable assets may use those assets for purposes of contesting the forfeiture action or for living expenses should be specified.

Granting a claimant access to forfeitable assets (those that have been frozen or seized) to pay for living expenses or lawyers' fees is a controversial topic. Access to such assets depends upon a number of domestic law and policy considerations, such as the tainted nature of the restrained funds, preventing purposeful dissipation of the funds,<sup>139</sup>

138. *United States v. Gilbert*, 244 F.3d 888, 902 n.38 (11th Cir. 2001).

139. If the criminal offender can expend the proceeds of crime without limitation to challenge the forfeiture action and with the knowledge that when the case is lost, whatever is left will be forfeited to the state, the offender has no incentive to do anything other than to fight the forfeiture until all of the restrained funds have been exhausted. This can be particularly frustrating in fraud and corruption cases in which the overall goal is to return the assets to the victim but instead that amount is depleted by the offender.

competing third party interests, the existence or sufficiency of a legal aid system, due process, and the right to counsel. With respect to the right to counsel, for example, considerations include whether the right extends to NCB asset forfeiture proceedings in which there is no liberty interest at stake (incarceration unlikely); whether there is a system for court-appointed counsel or government funded legal aid available to indigents in NCB asset forfeiture cases; and whether corporate entities are entitled to have counsel provided at government expense.

The result is that there are various systems and policies with respect to the use of forfeitable assets for legal fees or living expenses. At one extreme, some jurisdictions allow a claimant to expend such assets without limitation to hire lawyers to contest the forfeiture and to provide living expenses for the claimant and even the claimant's family. At the other extreme, some jurisdictions do not permit the use of such assets by a claimant for any purpose on the notion that a criminal should not be allowed to spend proceeds of crime and benefit from that crime, regardless of the intended use (see box 21). In between these two extremes, there are jurisdictions that allow access to restrained funds under a regulatory framework that safeguards the way assets are released (see box 22).

**BOX 21****Use of Restrained Assets for Legal Representation Not Permitted in Some Jurisdictions**

In a landmark decision in the United States concerning the constitutionality of an accused criminal's right to use proceeds of the crime to hire criminal defense counsel when those assets were pending forfeiture, the Supreme Court likened the situation to the bank robber who seeks to use the funds he has just stolen from the bank to hire counsel, and concluded that there is no constitutional protection to use the proceeds of crime even if the offender has not yet been convicted:

The Government's interest in winning undiminished forfeiture thus includes the objective of returning property, in full, to those wrongfully deprived or defrauded of it. Where the Government pursues this restitutionary end, the Government's interest in forfeiture is virtually indistinguishable from its interest in returning to a bank the proceeds of a bank robbery; and a forfeiture-defendant's claim of right to use such assets to hire an attorney, instead of having them returned to their rightful owners, is no more persuasive than a bank robber's similar claim.

*Caplin & Drysdale v. United States*, 491 U.S. 617, 629–30 (1989).

In Colombia, the forfeiture process does not allow for legal or living expenses to be paid from the seized proceeds. However, there have been three cases in which applicants have used other legal means, outside the forfeiture process, to have their expenses covered: In one case funds were used to cover medical expenses. In two other cases, the proceeds were used to fund the living expenses of minor children. The major issue was that the order was not for the vital minimum, but an amount corresponding with the standard of living to which they had become accustomed.

**BOX 22**

**Use of Restrained Assets for Legal Representation  
(United Kingdom)**

In the United Kingdom, the Government initially prevented access to restrained assets for legal representation in NCB asset forfeiture cases to prevent the purposeful dissipation of the assets in legal fees. Representation was to be ensured through the civil legal aid scheme; however, operational experience showed that the scheme was ill-suited to NCB asset forfeiture cases because of the scope of the scheme, particularly the financial eligibility limits and the rules surrounding these limits. In addition, cases involved complex financial affairs that delayed the legal aid process because of a statutory requirement to investigate the applicant's means.

To address these issues, the Government amended the Proceeds of Crime Act to allow the High Court to exclude property from a freezing order for the purpose of meeting legal expenses and introduced a regulatory framework to safeguard the release of assets. Legal aid remains available in exceptional cases in which the court is unable to release the assets to cover legal costs, for example, because of competing third party interests. See CD-ROM appendix N for the text of the regulation, the Explanatory Memorandum, and a sample application, witness statement, and order for payment of legal expenses from restrained funds. See also Sections 5B and 7A of the Practice Direction—Civil Recovery Proceedings, in CD-ROM appendix J.

In jurisdictions in which a claimant may apply for access to forfeitable assets for payment of legal fees and for living expenses, the use of tainted funds by the violator should be a last resort and the law should impose conditions and limit access.<sup>140</sup> This goal can be accomplished in a number of ways. As a precondition, the claimant should have to demonstrate or prove that he or she has no untainted assets with which to hire counsel or to pay living expenses before there is even consideration of a request for the use of such assets. Such a precondition should be mandatory in any system that permits use of restrained funds. Once that precondition has been met, the claimant's counsel should have to submit a bill of costs to the court for the judge to determine the reasonableness and necessity of the fees incurred or to be incurred.<sup>141</sup> Additionally, a jurisdiction can consider whether to place a statutory cap on the fee that lawyers may charge.

A related consideration that should be addressed by legislation is whether, or under what circumstances, a criminal defendant has a right to use forfeitable assets to hire

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140. See also the Commonwealth Model Legislation, Section 5 (CD-ROM appendix D); Prevention of Organised Crime Act (Am) 1998 (South Africa), Sections 44–45 (claimant can apply to the court for release of reasonable legal expenses where certain conditions are met). In Ontario, Canada, where a defendant may also apply to the court for the release of reasonable legal expenses, the payments are subject to limits set in Regulation 91/02 of the Civil Remedies Act. The maximum amount of funds available for legal expenses is calculated as a percentage of the total funds. In addition, there are limits and calculations for a lawyer's hourly rate, costs for travel time, and disbursements.

141. In Switzerland, the Supreme Court upheld an order requiring lawyers to disclose their services rendered to the violator. This enabled the prosecution to seize part of the funds that had been paid as advances by the violator (1S.5/2006).

counsel if there is a related criminal case pending concurrently with the NCB asset forfeiture action. Some jurisdictions that have already addressed this issue have concluded that there is no right to use forfeitable assets to hire counsel. Other jurisdictions may permit use of forfeitable assets only if a claimant establishes no other source of funds to hire counsel, and yet others may permit use of restrained funds even though other funds are available. At a minimum, claimants with access to assets that are not forfeitable (assets not seized or frozen) must first use these funds to defend against forfeiture or a criminal prosecution. If the claimant is otherwise indigent, there should be strict monitoring of the fees authorized. Otherwise, the forfeiture action quickly becomes pointless if the victim (the state in corruption cases) is paying the full costs for a claimant who has nothing to lose by litigating until the restrained funds have been completely depleted.

Some jurisdictions have a “loser pays” system that requires the losing party to pay the opponent’s legal fees. Such schemes are designed to deter frivolous objections to forfeiture by claimants, and to deter government misconduct for bringing forfeiture cases for political or other improper motives. However, such schemes rarely result in the government collecting fees when it is successful because all of the violator’s assets usually have been forfeited.

The NCB asset forfeiture legislation should permit the use of forfeitable assets to pay living expenses of the violator and his family only if the violator establishes that he or she has no assets other than the restrained assets available to pay living expenses. Without that limitation, a violator has every incentive to delay resolution of the forfeiture case until the seized assets have been dissipated. A particularly troublesome concept in some jurisdictions is the notion that the violator and the violator’s family are entitled to maintain the lifestyle to which they have become accustomed. Such concept ignores the fact that it was only through crime that the violator and violator’s family became accustomed to the lifestyle they seek to maintain after the commencement of the forfeiture action. If living expenses are to be permitted at all, only subsistence-level support should be permitted.



# Judgment Proceedings

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## **Key Concept 23.**

Consider authorizing default judgment proceedings when proper notice has been given and the assets remain unclaimed.

The applicable procedures in NCB asset forfeiture legislation should require the court to promptly enter a default judgment of forfeiture in favor of the government once the appropriate person has received proper notice of the forfeiture action, the period for filing a response to the forfeiture action has expired, and no response has been received. The government should be required to establish that all applicable notice requirements have been satisfied and provide proof that no claims have been filed. Typically, that can be accomplished when the prosecutor submits an affidavit or statement (under penalty of perjury) stating when and how notice of the forfeiture action was given to interested parties and stating that a review of the court files reflects that no claim to the property was filed within the prescribed period.<sup>142</sup>

Allowing a procedure for default judgments ensures that there can be prompt resolution of uncontested cases. Such a process promotes judicial efficiency by relieving the government from having to prove the forfeiture case and the court from having to hear a case when no one is contesting the forfeiture.

## **Key Concept 24.**

Consider permitting the parties to consent to forfeiture without a trial and authorizing the court to enter a stipulated judgment of forfeiture when the parties agree to such procedure.

In an effort to avoid needless litigation, the NCB asset forfeiture law should permit claimants to consent to the forfeiture of assets without a trial through a process that is supervised by a court.<sup>143</sup> In jurisdictions that allow for prosecutorial discretion and

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142. For example, in the United States, Federal Rules of Civil Procedure, Rule 55, provides that when a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend and that fact is made to appear by affidavit or otherwise, the clerk of court shall enter the party's default, and a judgment by default may thereafter be entered by the court.

143. Trials may be compulsory in some civil law jurisdictions, even if both parties agree on a disposition. Some civil law jurisdictions have permitted exceptions to compulsory prosecution in certain

criminal plea agreements, stipulating to an NCB asset forfeiture may be part of a global resolution to a case.<sup>144</sup> In such circumstances, the parties are required to provide a proper factual basis, and once satisfied that there is a proper basis and that the agreement is not coerced, the court will enter the order of forfeiture without proceeding to trial.<sup>145</sup> The parties should not be required to conduct a trial and the court should not be allowed to reject a stipulation of forfeiture to which the government and claimant have agreed, provided that all statutory or court-ordered conditions have been satisfied.

### **Key Concept 25.**

**Specify any remedies that are available to the claimant in the event the government fails to secure a judgment of forfeiture.**

Jurisdictions should consider what relief, if any, should be available to the claimant if the government does not succeed in securing a forfeiture judgment. While the law should mandate that the seized property be returned immediately, the law should also address whether the claimant should be allowed compensation for damage to property or consequential damages resulting from a freeze or seizure when the case does not result in a judgment of forfeiture. If the concept of sovereign and official immunity<sup>146</sup> exists, countries must consider whether there would be circumstances under which the immunity would be waived (for example, claims based on damage to property), or whether it would be retained in all cases, as long as the prosecutor, investigator, and other responsible officers acted in good faith and in the scope of their official duties.

If the property was sold before judgment, the claimant should receive whatever money was realized from the sale. In addition, the law should prescribe the extent to which an award of interest can be approved and at what rate and from what time (that is, the time of seizure or the time of judgment). The law should also indicate whether the government is liable for the legal fees of the claimant, any limits to liability (for ex-

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circumstances (for example, Code of Criminal Procedure (Guatemala), Article 25; Code of Criminal Procedure (Chile), Article 170). Countries must consider this concept in the context of their own domestic legislation.

144. Where trials are compulsory, there is typically no procedure to resolve or conclude a case by a guilty plea. Other civil law jurisdictions have permitted a variation of the plea bargaining procedure—often for specified offenses—which allows for negotiations between prosecution and defense and permits the conviction of the defendant without holding a trial. These jurisdictions include Italy (Code of Criminal Procedure, Articles 444–48), France (Code of Criminal Procedure, Articles 41–42), Argentina (Criminal Procedure Code, Article 431), and Peru (Law 27.738).

145. In addition to the facts that are read in by the prosecution and agreed to by the defense, there may be cases in which the court may wish to hear the testimony of a particular witness to ensure the proper factual basis.

146. Under sovereign immunity or crown or official immunity, the sovereign or state and its agents cannot commit a legal wrong and are immune from civil suit or criminal prosecution.

ample, cases of bad faith, or where a judge ruled there was probable cause for the initial seizure), and the type of fees that are recoverable (for example, actual fees or set fees).

Permitting compensatory claims fairly reimburses the claimant and may also deter government misconduct, particularly the misuse of forfeiture for political purposes or other improper motives. Such government misconduct is a particular problem in corruption-related forfeiture cases, where the government in power is in a position to misuse a forfeiture law to go after the assets of its political enemies.

Consideration should also be given to restricting the personal liability of law enforcement officers, prosecutors, and others responsible for forfeiture. Lawsuits for damages against law enforcement officers and prosecutors in their individual capacities can become a powerful tool of criminals seeking to deter pursuit of a forfeiture action. It is highly recommended that the legislation create a mechanism to substitute the government as defendant in an action for damages and immunize government officials in their individual capacities unless the conduct was in bad faith.

These same considerations will apply in cases in which the government is only partially successful in a forfeiture action.

An NCB asset forfeiture regime should also anticipate that an undertaking to pay costs and damages may need to accompany a request for foreign assistance (see box 23).

### **BOX 23**     **Undertakings to Pay Costs and Damages**

Countries that have ratified UNCAC have an obligation to extend both technical and financial assistance to other countries seeking support to recover assets taken following activities defined as offenses in UNCAC (see UNCAC, Articles 46 (1), 51, and 57 (4)).

Notwithstanding this, some jurisdictions require a commitment to pay costs and damages as a prerequisite for mutual legal assistance. One of the rationales is that the requested country may take action and expose itself to liability and the requesting state could fail to follow through in providing promised proof, or the facts could turn out to be not as compelling as the requesting state had alleged. Through no fault of its own, the requested state will be facing an award of costs entered against it.

For jurisdictions that lack the resources to make the undertaking, there are instances where these costs may be recovered from the restrained assets. Alternatively, a country that has an asset forfeiture fund may be able to use that fund to purchase a bond that would cover the costs that would be due in the event of an unsuccessful action. At a minimum, jurisdictions are obliged to afford each other the widest measure of assistance, without presenting barriers and limitations.

While there are no easy answers to this potential impediment, an NCB asset forfeiture regime should anticipate that advancement of costs associated with a request for foreign assistance could be an obstacle to obtaining that assistance, and should endeavor to write into the law some mechanisms to address the issue.

## **Key Concept 26.**

The final judgment of NCB asset forfeiture should be in writing.

Any final judgment should be in writing, contain the statutory basis for the forfeiture, and recite a summary of the factual findings and legal conclusions supporting the court's ruling in favor of forfeiture (see box 24 for important inclusions). A written judgment that explains the basis for the court's findings is important for many reasons. It provides the parties with an explanation of the court's reasoning and application of the facts to the law so that they will know the precise outcome of the litigation. The written decision provides a basis for an appellate court to consider the proceedings in any appeal. Finally, a sufficiently detailed written judgment is critical for enforcement in a foreign jurisdiction. A foreign jurisdiction almost always requires more than the simple details of the order, including the facts that are the basis for the decision, the laws applied, and procedures followed. Switzerland, for example, looks to the foreign judgment for the link between the assets and the offense committed.<sup>147</sup> Because the court makes the findings of law and fact and issues the final order, the court is best positioned to provide this essential clarity.

### **BOX 24**

#### **Important Inclusions in a Written Judgment**

- ✓ Facts, with a legal description of property and specific details of assets and their location (for example, bank account details, monetary value)
- ✓ Offenses and relevant laws (for example, NCB provisions)
- ✓ General procedures (for example, burden of proof, party with onus, defenses) and any procedural decisions
- ✓ Notice requirements, including to third parties, and whether the claimant attended
- ✓ Application of the law to the facts
- ✓ Link between assets and unlawful activity carried out by persons who have been suspected, accused, or convicted of an offense

147. For more information on forfeiture in Switzerland, see "Good Practices in Non-Conviction Based Forfeiture: A Swiss Perspective" in part C.

# Organizational Considerations and Asset Management

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## **Key Concept 27.**

Specify which agencies have jurisdiction to investigate and prosecute forfeiture matters.

Forfeiture investigative authority should be given to all law enforcement agencies with responsibility for investigation of financial crimes. However, given the technical nature of forfeiture and the special financial skills required to follow the money and establish the nexus to the underlying offense, some specialization may be appropriate to ensure that forfeiture cases are handled by competent investigators. Where it is not practical or efficient to train all police personnel in asset forfeiture, some jurisdictions have adopted specialized authorities<sup>148</sup> or regional forfeiture units staffed with specially trained investigators who support multiple police agencies (see box 25). Some countries already have a financial crimes clearinghouse, an anti-money laundering agency, or a financial intelligence unit (FIU), which may possess the requisite investigative skills to support NCB asset forfeiture cases. Existing agencies may thus be able to provide the investigative resources to support an NCB asset forfeiture regime without creating a new agency.

### **BOX 25**

#### **Regional Asset Recovery Teams (RART) in the United Kingdom**

The aim of the Wales RART team is to maximize opportunities under the Proceeds of Crime Act. The team seeks to make a significant contribution to a reduction in crime and ensure the effective delivery of justice by

- making asset recovery through forfeiture an integral part of criminal investigation;
- using cash forfeiture powers;
- increasing action to disrupt those involved in money laundering;
- referring suitable cases to the Serious Organised Crime Agency, where civil or taxation provisions may be applied; and
- maximizing financial intelligence opportunities.

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148. In the Anti-Money Laundering Act 1999 (Thailand), Section 41 authorizes the establishment of an Anti-Money Laundering Office as a specialized authority: “There shall be an office of Anti-Money Laundering...which shall have the power to: ... (6) carry out other functions in accordance with the provisions of this act or other laws.”

Similarly, prosecution of forfeiture cases requires technical expertise and familiarity with the forfeiture legislation, which is unrealistic to expect all prosecutors to possess. Jurisdictions that are effectively using NCB asset forfeiture tend to have special units within prosecutors' offices to handle forfeiture matters, and this has proven to be more effective than trying to train all prosecutors in this specialized area of the law.

Many jurisdictions strive to make forfeiture a routine part of every criminal investigation for offenses for which forfeiture is available. Thus, in jurisdictions with well-trained law enforcement agencies capable of conducting financial investigations, it may be counterproductive to limit the investigation or prosecution to a specialized component such as a special police and prosecution unit. Jurisdictions should study the various models and select the one that works best for them.

### **Key Concept 28.**

**Consider the assignment of judges and prosecutors with special expertise or training in forfeiture to handle NCB asset forfeitures.**

Clearly, there must be sufficient training and financial, material, and human resources at all levels to ensure the efficient and effective handling of forfeiture cases. There may also be circumstances, particularly if a country does not have expertise in NCB asset forfeiture, in which a country should consider dedicating specific judges and prosecutors to deal with forfeiture cases (see box 26 for examples of specialization in criminal and NCB asset forfeiture). While not necessary or appropriate in most jurisdictions, there are advantages to assigning specialized judges and prosecutors to deal with NCB cases. Until expertise in NCB asset forfeiture is more widely developed, specialization and training can help to ensure that the judiciary and prosecutors are prepared to handle NCB asset forfeiture cases, that the law will be applied uniformly, and that an appropriate body of case law will be developed. Specialization can also be useful if there is a backlog of cases before the courts,<sup>149</sup> judges lack the technical expertise to competently apply the country's forfeiture laws, or judicial corruption is an obstacle to proper enforcement.

Specialization entails costs that may be beyond the financial or operational reach of less developed countries. A jurisdiction must consider an appropriate funding mechanism to ensure sufficient financial resources (see Key Concept 30). Judges' salaries

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149. Where courts are overwhelmed with other types of cases, forfeiture cases can languish for years. Not only is the delay a problem for due process, it can also result in the dissipation of assets for legal and living expenses (see Key Concept 22). Another way to address the backlog issue is to enact special "fast track" procedures that provide time limits within which a judge must rule on cases. Law 793 (2002) (Colombia), Articles 13(9) and 13(10), establish time limits for judicial rulings, specifically 15 days in the first instance, and 30 days on appeal.

**BOX 26****Country Experience with Specialized Anti-Corruption Judges and Prosecutors**

**Colombia:** To address case backlogs, the Judiciary Superior Council ordered a number of judges to sit exclusively for forfeiture proceedings. These judges have developed an expertise in NCB asset forfeiture.

**United Kingdom:** NCB asset forfeiture cases were initially assigned to a particular division of the High Court where judges were trained and had special expertise. Eventually, as more judges were trained and gained experience, the cases moved to the Queens Bench Division.

**Bangladesh:** There are “special judges” who are assigned to corruption cases, although they remain part of the whole judicial system.

**Peru:** To address the corruption of Montesinos and associates, the Government established six Anti-Corruption Courts (trial level) and a Court of Appeal. Specialized prosecutors were appointed by the Attorney General and an Ad Hoc Prosecutors Office was appointed for the high profile cases.

**Indonesia:** In 2003, the Government established a Corrupt Crimes Court to accompany the Corruption Eradication Commission (KPK), an agency with specialized investigators and prosecutors.

**United States:** The United States Department of Justice has a specialized unit, the Asset Forfeiture and Money Laundering Section.

should not be paid from forfeited assets; nor should seized assets pending forfeiture be used for this purpose, because this creates the appearance of, if not a real, conflict of interest. However, forfeited assets can appropriately fund other aspects of the forfeiture and judicial infrastructure without affecting the impartiality of the process.

### **Key Concept 29.**

**There should be a system for pre-seizure planning, maintaining, and disposing of assets in a prompt and efficient manner.**

Creating an effective NCB asset forfeiture system requires not only the enactment of a comprehensive law, but also an organizational infrastructure to cope with the myriad practical issues that occur when handling seized and forfeited property, including the custody, safe storage, management, and disposition of such property.<sup>150</sup> At the outset, a government must consider which national body will have responsibility for managing property involved in the forfeiture process. The duties of the asset manager can be complex, requiring familiarity with law, finance, business, and real estate issues. The manager will need to be empowered to, among other responsibilities, take possession

150. For information on specific asset management programs, see “Asset Management Measures in Thailand” and “Asset Management in Colombia” in part C.

of assets; manage them; hire contractors, consultants, and other experts; contract with brokerage companies and storage facilities; operate businesses; hire and fire employees; invest money; and initiate and defend litigation. See boxes 27, 28, and 30 for examples of what might be seized and what actions might be required.

A successful forfeiture program should include pre-seizure planning to consider the specific actions that will be required to take custody of particular property and consider whether the property should be seized in the first instance.<sup>151</sup> The Government of Colombia has a dedicated agency with responsibility for asset management in its Dirección Nacional de Estupefacientes (National Anti-Narcotics Agency, Special Administration Unit). In an effort to develop consistent practices for dealing with types of assets that could pose maintenance or disposition problems, and to prevent lawsuits resulting from irregular asset seizure and management, the Colombian Attorney General’s Office issued a directive entitled “Pre-Seizure Planning Guidelines as Part of

<b>BOX 27     Preparing for All Types of Seizures</b>	
Houses	Hotels
Hobby farms (for example, crocodiles)	Commercial farms
Collector items	Antiques
Ski resorts	Counterfeit clothing
Planes, boats, cars	Factories

<b>BOX 28     Asset Management Examples: The Philippines</b>	
<b>Sections 19–20, A.M. No. 05-11-04-SC, Rule of Procedure in Cases of Civil Forfeiture, Asset Preservation, and Freezing of Proceeds of Money-Laundering Offenses</b>	
<i>Perishable property</i> that is liable to deteriorate or is disproportionately expensive to maintain may be sold at any stage of the proceedings and the proceeds of sale deposited according to final judgment.	
<i>Real property</i> may not be physically seized or its occupants evicted before final order of forfeiture.	

151. See “Pre-Seizure Planning Guide” in appendix VI; “Financial Profile Form” in appendix IV; and “Financial Investigations Checklist” in CD-ROM appendix K.

Asset Forfeiture Procedures” on October 19, 2007.<sup>152</sup> Once seized, the property should be appraised and carefully managed so that its value is preserved until the forfeiture proceedings are completed.

Effective management and disposition of seized and forfeited assets have been considered by both the G-8 countries and the Organization of American States (OAS). In 2005, the G-8 issued its “Best Practices for the Administration of Seized Assets” and “Principles and Options for Disposition and Transfer of Confiscated Proceeds of Grand Corruption.”<sup>153</sup> In 2006, the OAS issued model regulations with a specific article on the Administration of Seized Assets.<sup>154</sup> The G-8 guidance details specific principles that should be incorporated into a forfeiture law. Many of the principles are directed at operating a forfeiture program with integrity, accountability, and transparency (see box 29). In addition, the principles focus on good management practices, such as pre-seizure planning, preservation, and pre-forfeiture sales of perishable and depreciating property. As the G-8 notes, “[w]hile the main objective of forfeiture is to strip criminals of their ill-gotten gains and the instrumentalities that make crimes possible, good fiscal decisions are also an important factor; assets, rather than liabilities, should be seized for forfeiture.”

In addition, the G-8 guidance encourages countries to make use of information technology systems to manage assets. The managing agency needs to have accountability, and must maintain an accurate inventory of all assets, recording their whereabouts, value, condition, and status in the litigation process, for the benefit of not only the administrator of the assets, but also for the benefit of the court, prosecutor, and claim-

**BOX 29**

**Ensuring Integrity, Accountability, and Transparency in a Forfeiture Program**

Among the principles that the G-8 advocates for the administration of seized assets are principles directed at integrity, accountability, and transparency:

- ✓ There should be a clear separation of duties such that no one person has complete control over all aspects of managing the assets.
- ✓ Administration should be subject to an annual examination by independent auditors.
- ✓ No one should receive a personal benefit or use seized property for personal purposes.
- ✓ No person officially responsible for the seizure of assets should receive a personal financial reward connected to the value of a seizure.

152. Directive No. 0001, October 19, 2007. For the text of the directive, see CD-ROM appendix M. See also the text of the “Pre-Seizure Planning Policy Guidelines (United States Department of Justice Asset Forfeiture Policy Manual)” in CD-ROM appendix M.

153. G-8 Lyon/Roma Group Criminal Legal Affairs Subgroup, “Best Practices for the Administration of Seized Assets” (April 27, 2005); G-8 Asset Recovery Initiative, “Principles and Options for Disposition and Transfer of Confiscated Proceeds of Grand Corruption” (November 9, 2005). For the text, see CD-ROM appendix E.

154. OAS Model Regulations, Article 7. For the text of the model regulations, see CD-ROM appendix G.



*Items seized by the National Anti-Narcotics Agency (Colombia) and the Anti-Money Laundering Office (Thailand). Photos of ostriches, eggs, and crocodiles courtesy of Police Major General Peeraphan Premabhuti; villa photo courtesy of Clara Garrido.*

ants. The United States Department of Justice, through its asset managing agency, the U.S. Marshals Service, operates the Consolidated Assets Tracking System, which is its database for managing the more than \$2 billion in assets that it has under seizure at any given time.

The OAS Model Regulations on the administration of seized assets considered many of the same concerns that the G-8 guidance recognized. In addition, the OAS Model Regulations address the controversial issue of provisional official use of seized property and concludes that government officials should not use property that has been seized, but not yet forfeited. Once there is a final order of forfeiture, the state is free to use or dispose of the property in any manner provided by law, including dedicating it to use

**BOX 30****Difficulties in Asset Management: Forfeiture of an “Animal Fighting Venture”**

In the United States, Title 7 United States Code, Section 2156(f) provides for the NCB asset forfeiture of animals involved in an “animal fighting venture.” In executing search warrants at one of the homes of a professional athlete, law enforcement seized various items and equipment associated with an illegal dog fighting venture, including approximately 53 pit bulls. Such ventures involve training dogs for fights and the fights generally last until the losing dog is killed. Betting on the dogs is commonplace.

An NCB asset forfeiture complaint was filed before the criminal indictment of the violator and his associates. The easy part was obtaining the forfeiture order; the more difficult problem was determining what to do with the dogs upon forfeiture. Unlike most U.S. forfeiture statutes, which allow the government to determine the disposition of forfeited property, the relevant statute requires the court to determine the disposition. Prosecutors recognized this would be a difficult and sensitive issue for the judge to determine, so they sought the appointment of a special master to evaluate the dogs, their temperament, and medical condition to determine the options aside from euthanizing the dogs.

It cost approximately \$100,000 to house and care for the dogs for six months, to pay for the medical and behavioral assessments, and to pay the costs of the special master, a law school professor who specializes in animal law. The testing determined that all but one of the dogs could be safely maintained. The special master recommended that one dog that was too aggressive to be around humans or other dogs be euthanized, that some dogs needed to be maintained at an animal sanctuary where they would not have contact with the general public, but that a third category of dogs could eventually be placed in homes after they met certain behavioral criteria. The long-term care of the dogs, especially sanctuary care, was estimated at \$20,000 per dog.

These interim care costs were covered by the Asset Forfeiture Fund. Subsequently, the claimant agreed to pay restitution to the United States as part of his guilty plea agreement in the related criminal matter. He eventually paid approximately \$950,000 to reimburse the Asset Forfeiture Fund for costs incurred for interim care and the prospective costs of “grants” to the organizations adopting the dogs.

In the end, 50 dogs were saved from euthanizing. This success was possible because (1) the federal forfeiture statute provided for forfeiture in cases of animal fight ventures, (2) the Asset Forfeiture Fund was sufficient to cover the interim costs of \$100,000, and (3) the costs were eventually shifted to the claimant, who reimbursed the asset forfeiture fund through restitution in the related criminal case. Without adequate funding and specific statutory provisions allowing for forfeiture, the dogs would likely have been euthanized.

by law enforcement. Using property before the entry of a court order of forfeiture can diminish the value of the property and is inappropriate because it signals to the public that the police can cavalierly target and take property and use it without the imprimatur of the court. The OAS does recognize that there may be times when provisional use is unavoidable and, in such cases, there must be strict controls on the purpose and time limits for such use.

### **Key Concept 30.**

**Establish mechanisms to ensure predictable, continued, and adequate financing for the operation of an effective forfeiture program and limit political interference in asset forfeiture activities.**

Resources need to be allocated for all phases of the asset forfeiture process, including tracing, freezing, seizing, and managing the forfeited assets. Cases that involve the seizure of assets that must be maintained or businesses that must be operated until the forfeiture process is complete can be very expensive. Additionally, in cases involving transnational crime, there are other expenses, such as travel to interview witnesses, translation of documents, and other related investigative expenses. Meeting these resource requirements is essential for a successful asset forfeiture program. Therefore, it is critical that jurisdictions establish mechanisms to ensure predictable and adequate financing.

From a public finance perspective, government programs are best financed from the general budget so that available monies from all sources can be allocated to their highest priority use. Forfeited funds are deposited into the general treasury and resources are appropriated to law enforcement through the general budget.

Unfortunately, in many jurisdictions asset forfeiture activities are chronically underfinanced. This may be due to difficulties in predicting progress in and the results of asset forfeiture actions, which result in agencies underestimating their budgetary requirements. Because decision makers do not have access to information on the potential law enforcement and economic benefits of ongoing cases, they may underinvest in law enforcement generally and asset forfeiture programs in particular. In some cases, decision makers may deliberately underfund asset forfeiture activities to impede investigations or may use their authority over resources to influence these activities. Where asset forfeiture is underfinanced, the potential for forfeiture as a source of public monies and as a means of deterrence is not fully realized and in some cases the economic benefits can be lost completely as forfeited assets deteriorate.

Because an established forfeiture program can often generate enough funds to pay the costs of the program and may even generate a surplus that the legislature allocates to other needs, jurisdictions have sought to resolve the concerns noted above and ensure adequate funding for asset forfeiture by establishing an asset forfeiture fund. Forfeiture funds are usually established through specific legislation that earmarks all or part of the proceeds of asset forfeiture to designated law enforcement purposes for case-related and programmatic expenses, including the purchase of equipment, training, investigative expenses, prosecutorial and property management and liquidation costs. The proceeds of asset forfeiture can also be assigned for other related expenditures (see box 30). Allocating the proceeds of asset forfeiture for law enforcement efforts helps to ensure that a program can be self-sustaining. In addition, it conveys a symbolic message in the fight against crime and corruption when criminals have the fruits of their crimes used against them.

Perhaps the longest standing forfeiture fund is the one administered by the United States Department of Justice, which has operated since 1986. Its annual deposits exceed \$1.5 billion. Other jurisdictions’ operating funds are listed in box 31. Asset forfeiture funds have been particularly prominent in countries in which there is large-scale drug trafficking and organized crime.

The 181 jurisdictions of the Global AML/CFT (FATF, the associate members, the other FSRBs, and the OGBS) have recommended forfeiture funds in the interpretive

<b>BOX 31</b>		<b>Asset Forfeiture Funds</b>
<b>Country</b>	<b>Name of fund</b>	<b>Enabling legislation</b>
Antigua and Barbuda	Forfeiture Fund	Money Laundering Prevention Act of 1996 (Am 2001), Section 20A
Argentina	Forfeiture Fund	Law 25.246 of 2000, Section 27
The Bahamas	Confiscated Assets Fund	Proceeds of Crime Act (2000), Section 52
Brazil	National Anti-Drug Fund (FUNAD)	Law 7560 of 1986
Canada	Seized Property Proceeds Account	Seized Property Management Act, S.C. 1993, c. 37, Section 13
Chile	National Fund for Regional Development	Act 19.366, Article 28
Colombia	Rehabilitation, Social Investment and Fight against Organized Crime Fund (FRISCO)	Law 333 of 1996, Article 25, and Law 793 of 2002, Article 12
Costa Rica	Account of the National Drug Prevention Centre	Law 7786, Article 84
Dominican Republic	Fund of the National Drugs Council	Law 50 of 1988, Article 76
Grenada	Confiscated Assets Fund	Proceeds of Crime Act 2002, Section 57
Guernsey	Seized Assets Fund—Drugs Seized Assets Fund—Proceeds of Crime	No statutory provision
Guatemala	Forfeiture Fund	Law Against Drug-Related Activities, Article 18
Haiti	Special Fund to Fight against Drugs (for crimes related to drugs and money laundering)	Control and Repression of Drug Trafficking, Article 88
Israel	Forfeiture Fund	Prohibition on Money Laundering Law, Section 23, applies the Dangerous Drugs Ordinance, Section 36H(a)

*(Box continues on the following page.)*

**BOX 31**      **Asset Forfeiture Funds (continued)**

<b>Country</b>	<b>Name of fund</b>	<b>Enabling legislation</b>
Luxembourg	Fund for the Fight against Drug Trafficking (Fonds de Lutte contre le Trafic Stupéfiants)	Law of 29 January 1993
Paraguay	Forfeiture Fund	Law No. 1015 of 1996, Article 37
Saint Kitts and Nevis	Forfeiture Fund	Proceeds of Crime Act (2000), Section 61
Saint Vincent and the Grenadines	Seized Assets Fund	Proceeds of Crime Act (2000), Section 58
South Africa	Criminal Assets Recovery Account (for both criminal and NCB asset forfeiture)	Prevention of Organised Crime Act (Am) 1998, Section 63
Switzerland	No national fund; fund in Geneva (for narcotics offenses)	
Thailand	Anti-Money Laundering Fund	Anti-Money Laundering Act 1999 (Am No. 2 2008)
Trinidad and Tobago	Seized Assets Fund	Act 55 of 2000, Section 58
Turks and Caicos	Forfeiture Fund	Proceeds of Crime Ordinance of 1998 (2007 Am)
United Kingdom	An asset forfeiture scheme No statutory provision	
United States	Department of Justice Assets Forfeiture Fund	Title 28 United States Code Section 524(c)

Countries that do not have a fund: Mexico, Liechtenstein, Nigeria, the Philippines. Rather than a forfeiture fund, the Government of Mexico distributes the forfeited funds, in equal shares, to the ministries responsible for health, law enforcement, and the judiciary.

notes to the Forty Recommendations on Money Laundering. The interpretive notes for Recommendation 38 state, “Countries should consider... (a) Establishing an asset forfeiture fund in its respective country into which all or a portion of confiscated property will be deposited for law enforcement, health, education, or other appropriate purposes...” This paragraph is reiterated in the FATF “Methodology for Assessing Compliance with the FATF 40 Recommendations and the FATF 9 Special Recommendations” at 38.4 of the Essential Criteria.<sup>155</sup> Provisions for forfeiture funds can also be found in

155. FATF (Financial Action Task Force), “Methodology for Assessing Compliance with the FATF 40 Recommendations and the FATF 9 Special Recommendations” (FATF/OECD, Paris, 2006).

the Commonwealth Model Legislation,<sup>156</sup> the OAS Model Regulations<sup>157</sup> and the “G8 Best Practices for the Administration of Seized Assets.”<sup>158</sup>

While asset forfeiture funds may provide a dedicated source of revenues for asset forfeiture the choice of this particular instrument will depend on the country context and should take into account potential risks. If public finance legislation prohibits earmarking of revenues and requires all revenues and expenditures to be channeled through a single treasury account, a forfeiture fund is not an option. Where a forfeiture fund is put in place, decision makers may simply reduce the amount of funds appropriated through the budget, leaving the forfeiture program with little or no additional funding. Revenues from seizures and expenditures on cases may not be synchronized, leaving the forfeiture program starved of resources for extended periods followed by a huge increase in resources that exceed immediate needs. The program may also generate incentives that distort law enforcement priorities, encouraging the pursuit of cases that maximize revenues rather than those that pose the greatest risk to society but offer little prospect of generating revenues. Box 32 identifies possible solutions to some of these problems.

Key considerations for jurisdictions that decide to establish a forfeiture fund relate to the design of financial management arrangements and the designation of revenues and expenditures. Financial management arrangements should ensure that funds are used efficiently and transparently, respecting the accountability framework for all public monies. Ideally, the forfeiture fund should be established within the framework of the public financial management system, which would require the establishment of a special treasury account in the central bank into which the proceeds from forfeiture are deposited and designated expenditures are paid. The application of these funds would follow relevant budgetary procedures. If program expenditures exceed resources available through the forfeiture fund, complementary budgetary appropriations will be needed, which can be considered through budget reviews and authorizations for extraordinary expenditures. Expenditures should be regulated by guidelines and should be subject to reporting and auditing as required for all public expenditures. In addition to these financial arrangements, the forfeiture fund should ensure transparency and accountability through the publication of periodic—at least annual—performance and statistical reports and their presentation to the legislature for public review.

Legislation creating the forfeiture fund should identify the source of deposits (for example, proceeds from the sales of forfeited property, including settlements, money judgments, or incoming asset sharing from other jurisdictions); which agency will have the authority to administer this fund; and which agency will have responsibility for

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156. Commonwealth Model Legislation, Section 34 (CD-ROM appendix D).

157. OAS Model Regulations, Article 7(1) (CD-ROM appendix G).

158. “G8 Best Practices for the Administration of Seized Assets” (April 27, 2005), General Principle 4 (CD-ROM appendix E).

**BOX 32**

**Potential Risks and Solutions in Asset Forfeiture Fund Management**

**Potential risks**

Improper targeting of individuals for purposes of seizing assets for personal gain or institutional purposes.

Fund misuse in jurisdictions with weak financial management, especially in jurisdictions with endemic corruption.

Reduction of appropriated funds in anticipation of forfeiture revenue.

Operation of a forfeiture fund imposes additional costs on government.

**Solutions**

Senior-level supervision over case initiation and seizure approvals.  
No direct payment of salaries of investigators and prosecutors involved in the seizure process. Salaries of property managers, analysts, and support staff are appropriately paid from fund receipts.  
No personal incentives or rewards from seized assets.

External auditing, transparent reporting, practice guidelines, periodic statistical reports, all of which would be publicly available.

The enabling legislation for a forfeiture fund should state that forfeited assets are used to *supplement* appropriated funds, not *supplant (replace)* them.

An adequately funded forfeiture program will offset the costs to government. Additional benefits of a segregated fund include better oversight and greater opportunity to protect against misuse.

program administration. In some cases, the country may want to partition the deposits so that only a portion goes into the forfeiture fund and a portion goes to the general treasury or national budget, or provide for a transfer of the balance from the forfeiture fund to the general budget. The law should also designate which expenditures can be paid from the forfeiture fund. For instance, allowable payments could be for case-related expenses; property management and disposition expenses; fees for a receiver, trustee, manager, or other professional assisting in the recovery and liquidation of property; payments of mortgages and liens against the property; and costs associated with the administration of the forfeiture fund.<sup>159</sup> The law can also contain authority (subject to regulations and the mutual legal assistance legislation) to share forfeited property with foreign governments. It can authorize interlocutory sales as a means to limit property management expenses (with the proceeds held in the forfeiture fund until the outcome of the case; see Key Concept 29). The legislation can identify when forfeited proceeds from the forfeiture fund can be used to pay victims of crime (see Key Concept 35).

159. Article 19 of Law 793 (Colombia) states, “Costs generated by the forfeiture proceedings, as well as those generated by the administration of the property in the Rehabilitation, Social Investment, and Anti-Organized Crime Fund shall be paid by the earnings generated by the assets that have been deposited in said fund.” On a practical note, the law does not provide for a percentage, which means that it is necessary to explain how and why the money is to be allocated for every fiscal year, making the system more dependent on political will.

# International Cooperation and Asset Recovery

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## **Key Concept 31.**

**Correct terminology should be used, particularly when international cooperation is involved.**

The selection and definition of key terms are important in all aspects of forfeiture legislation, but they are absolutely critical in the context of international cooperation. Past experience has demonstrated that the use of certain terms has led to significant confusion, delay, and even the refusal of mutual legal assistance requests. This confusion stems mainly from differences in terminology between civil law and common law jurisdictions, as well as from the fact that certain terms do not have corresponding terms in different languages (for example, confiscation vs. forfeiture).

An example of this misunderstood terminology is “civil forfeiture,” the term that many common law jurisdictions use to describe what this guide refers to as “NCB asset forfeiture.” It is the use of the term “civil” that has been particularly problematic because some civil law jurisdictions have equated civil forfeiture to a “civil action,” a private law action that is not afforded the mutual legal assistance that a “criminal action” is afforded (see box 33). Further adding to this confusion is the fact that the standards of proof required for criminal asset and NCB asset forfeiture differ among jurisdictions, and that specifically in some jurisdictions criminal forfeiture requires a criminal conviction—established on the higher “beyond a reasonable doubt” standard—whereas NCB asset forfeiture simply requires proof of the offense on the lower “balance of probabilities” standard (see also Key Concept 14 on the standard of proof).

However, looking beyond terminology and labels to the substance of the proceedings, it is clear that a civil forfeiture proceeding in a common law jurisdiction can be very similar to an NCB asset forfeiture proceeding in a civil law jurisdiction. Some civil law jurisdictions have NCB asset forfeiture, but it exists under their penal code and is regarded to be a “criminal” proceeding to which the criminal procedural laws apply. These jurisdictions provide assistance in NCB asset forfeiture proceedings, including the freezing of assets, the obtaining of bank records, and the enforcement of foreign forfeiture orders, based on their domestic mutual legal assistance laws or on bilateral treaties. However, this is usually under the precondition that the foreign proceeding is a criminal one, in the sense that the state acts against the assets and certain procedural standards are met.

**BOX 33**

**Two Illustrations of Terminology Difficulties: Enforcing “Civil” Forfeiture Judgments in Civil Law Jurisdictions**

On appeal by an American offender who held tainted assets in a civil law jurisdiction, the highest court of the civil law jurisdiction held that its government could not render assistance to the United States on a forfeiture order against drug proceeds, though arising out of a criminal matter that resulted in a criminal conviction, because the U.S. order was denominated as a “civil” forfeiture order, obtained in a civil rather than a criminal proceeding, which the Court held was not covered by the mutual legal assistance treaty between the two countries.

In *A\_\_\_ Company v. Federal Office of Justice* (U.S.A.),<sup>a</sup> the Supreme Court of Switzerland held that the name of the foreign proceeding (“civil” forfeiture) would not be determinative as to whether Switzerland could give assistance to the United States in an NCB asset forfeiture case. In upholding Switzerland’s ability to freeze assets in response to the request, the Court held that there can be circumstances in which a forfeiture procedure could be likened to a case of “criminal character” even in the absence of criminal proceedings.

a. 1A.32612005, ATF 132 II 178 (for the text of the decision, see CD-ROM appendix H).

For NCB asset forfeiture legislation to support universal enforcement of judgments, especially in mutual legal assistance, it is important that the forfeiture laws use terminology that will enhance and not frustrate their enforcement outside the country of origin. Use of the term “non-conviction based forfeiture” to describe *in rem* actions against property is important. It can avoid the problem of a foreign state being unable to enforce another state’s forfeiture order that, because of terminology, appears to be something other than what it really is. It is recommended that jurisdictions avoid using the term “civil forfeiture” if possible, in favor of the term “non-conviction based forfeiture,” which should help achieve maximum mutual legal assistance, including enforceability, in some primarily civil law jurisdictions.

The second area of confusion, the fact that the definitions of certain terms do not have corresponding definitions across the various languages, is best demonstrated by use of “forfeiture” in some jurisdictions and “confiscation” in others (see box 34). Article 2(g) of UNCAC states that “Confiscation, which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority.” This same definition was used in the 1998 Vienna Convention, although further explanation and clarification was provided in the Convention’s Commentary on the definition:

Reference is made to “forfeiture” in order to meet the needs of some national legal systems, in which this was a more appropriate term than “confiscation.” The French and Spanish versions [of the Convention] do not have the phrase “which includes forfeiture where applicable,” since the terms “*confiscation*” in French and

**BOX 34** “Forfeiture” Versus “Confiscation”

In Mexico, the term “forfeiture” is preferred. Forfeiture refers to the proceeds and instrumentalities of crime, whereas “confiscation” refers to the entire assets of an individual.

In Jersey, “forfeiture” relates to the instrumentalities of crime, whereas “confiscation” relates to the proceeds of crime.

“*decomiso*” in Spanish were deemed the only appropriate ones. It was stressed, in particular, that in Spanish the use of the term “*confiscacion*” should be avoided.<sup>160</sup>

Countries should use the term most consistent with their legal systems.

Notwithstanding these terminology difficulties, it is important for countries to keep in mind that they are obliged to afford one another the widest measure of cooperation and assistance for asset recovery.<sup>161</sup> Requested states should be encouraged to substantively evaluate the request, rather than focus on terminology.<sup>162</sup> However, because this best practice is not always followed, requesting countries should invest themselves in understanding the terminology adopted in the countries to which they are addressing their mutual legal assistance requests.

### **Key Concept 32.**

#### **Extraterritorial jurisdiction should be granted to the courts.**

Extraterritorial jurisdiction is needed for the court to reach assets located in another jurisdiction. Extraterritorial jurisdiction is the ability of a court to exercise jurisdiction over individuals or property located outside the geographic confines of the jurisdiction in which the court is located. Typically, such laws permit the exercise of extraterritorial jurisdiction if certain conditions are met, such as that the acts giving rise to forfeiture occurred within the territorial jurisdiction of the court and an established connection between the jurisdiction and the assets.<sup>163</sup>

160. United Nations, *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988* (New York: United Nations, 1999), pp. 30–31.

161. UNCAC, Article 46; UNTOC, Article 18; Vienna Convention, Article 7.

162. For examples in which courts have focused on substance rather than relying on terminology, see “Enforcement of Restraint Orders Based on Foreign Non-Conviction Based Forfeiture Orders Before the Introduction of NCB Asset Forfeiture Legislation in England and Wales and the Crown Dependencies” in part C. See also *In re Al Zayat*, [2008] EWHC 315 (whether the foreign court constituted a “competent overseas authority”) in CD-ROM appendix H.

163. See 28 United States Code, Section 1355 (b)(2) and 21 United States Code, Section 853(j) (establishes jurisdiction over property “without regard to the location of the property”). See also the Anti-Money Laundering Act 1999 (Thailand), Section 6, which extends jurisdiction outside the country as

The grant of extraterritorial jurisdiction is also helpful to permit a government to seek the restraint of assets when they are located in another jurisdiction, even though the actual restraint or enforcement will be governed by the law of the state in which the assets are located (see box 35). Increasingly, jurisdictions are enacting laws to enable them to enforce foreign restraint and forfeiture orders.<sup>164</sup> The asset recovery provisions of UNCAC, particularly Articles 54, 55, and 57, contemplate that victim countries will be able to exercise jurisdiction over assets located outside their physical jurisdiction on the basis of a final judgment in the requesting jurisdiction.<sup>165</sup> The ability of the victim country to obtain a forfeiture judgment against property in another jurisdiction, and for the jurisdiction where the property is located to execute that judgment, greatly facilitates the implementation of the mandatory asset return provisions involving embezzled funds covered in Article 57(3)(a). Thus, for an effective asset recovery regime, it is essential that courts of the victims' countries have the authority to enter orders affecting proceeds of crimes located beyond their borders.

**BOX 35**

**Extraterritorial Jurisdiction: Implementation Issues in Switzerland and Colombia**

In Switzerland, the court or the prosecutor can forfeit assets located abroad as long as there is a territorial jurisdiction to prosecute the underlying offense. This was the ruling of the Federal Tribunal in interpreting Article 70, para. 1 of the Criminal Code of Switzerland, which stipulates that "The judge shall order the confiscation of assets resulting from an offense." Because there is no restriction in the law regarding the location of the assets, the tribunal held that it is possible to forfeit assets, even if they are located abroad.<sup>a</sup>

In Colombia, the judge could not declare forfeiture of a significant sum placed in a United States bank account because of the lack of authority to enter a forfeiture order in a different jurisdiction.

a. SJ 1986 520 (January 31, 1986).

follows: "Whoever commits a money laundering offense, even if the offense is committed outside the Kingdom, shall receive the penalty in the Kingdom, as provided in this Act, if:

- (1) either the offender or co-offender is a Thai national or resides in the Kingdom
- (2) the offender is an alien and has taken action to commit an offense in the Kingdom or is intended to have the consequence resulting there from in the Kingdom, or the Royal Thai Government is an injured party, or
- (3) the offender is an alien whose action is considered an offense in the State where the offense is committed under its jurisdiction, and if that individual appears in the Kingdom and is not extradited under the Extradition Act, Section 10 of the Penal Code shall apply *mutatis mutandis*."

164. Civil Asset Recovery (International Co-operation) (Jersey) Law 2007.

165. The requirement for a final judgment can be waived by the requested State Party (UNCAC, Article 57).

### **Key Concept 33.**

**Countries should have the authority to enforce foreign provisional orders.**

Bilateral treaties on mutual legal assistance and multilateral conventions, such as the Vienna Convention, UNTOC, and UNCAC, require States Parties to adopt measures to provide assistance in freezing and seizing assets for the purpose of eventual forfeiture.<sup>166</sup> Because of the speed with which assets can move from one jurisdiction to another, requests typically involve urgent circumstances under which it is critical to preserve assets before they are dissipated or hidden (see box 36). It is important that jurisdictions have a streamlined capacity to restrain forfeitable assets and accept the findings of the court of the jurisdiction in which the underlying criminal activity took place.

Because giving effect to a foreign court order will obviate the need to initiate domestic proceedings, it is recommended that jurisdictions provide for the registration and enforcement of foreign restraining orders, including those issued in a foreign NCB asset forfeiture proceeding.<sup>167</sup> With such a provision, a jurisdiction can treat such orders as if they were entered by a local court. In addition to time efficiencies, registration conserves judicial and prosecutorial resources.

#### **BOX 36**

#### **StAR Interpol Focal Point Contact List**

To assist developed and developing countries in their efforts to recover stolen assets, the StAR Initiative and INTERPOL are working together to establish a 24/7 Focal Point Contact List of national officials who could respond to emergency requests for international assistance. This will be a first-of-its-kind, worldwide list of national officials who are available—24 hours a day, seven days a week—to help countries with stolen asset cases, especially those involving politically exposed persons, and bribery of public officials. For more information, see appendix III.

In the United States, for instance, pursuant to 28 United States Code, Section 2467(d)(3), federal courts are authorized to enforce a foreign restraining order to pre-

166. Countries that have ratified UNCAC have an obligation to restrain and seize assets at the request of another country and permit the enforcement of foreign provisional orders. See UNCAC, Articles 52, 54, 55.

167. Jersey has provisions that permit the Attorney General to provide mutual legal assistance to other countries involved in NCB asset recovery investigations or proceedings as long as the Attorney General has reasonable grounds to suspect that the evidence is proceeds or instrumentalities of unlawful conduct: Civil Asset Recovery (International Cooperation) (Jersey) Law 2007, Part 2. There are also provisions for restraint orders, including *ex parte* orders, in Section 6. A property restraint order can be obtained if proceedings have or are to be instituted, have not been concluded, and there are reasonable grounds that an external NCB asset forfeiture order may be made.

serve property in anticipation of receipt of an enforceable foreign forfeiture order from the requesting jurisdiction.<sup>168</sup> In issuing such a restraining order, a U.S. court may either rely on information from an affidavit “setting forth a reasonable basis to believe property to be restrained will be named in a judgment of forfeiture” or it may register and enforce a foreign restraining order. A foreign restraining order can be enforced if (1) the United States and the foreign jurisdiction in which the order was issued are parties to a formal international agreement providing for mutual forfeiture assistance, (2) the restraining order has been issued by a court of competent jurisdiction in the foreign jurisdiction, (3) violation of foreign law giving rise to forfeiture would constitute a violation or offense that would give rise to forfeiture if committed in the United States, and (4) the Attorney General determines it is in the interest of justice to certify the order for enforcement.

### **Key Concept 34.**

**Countries should have the authority to enforce foreign forfeiture orders and should enact legislation that maximizes the enforceability of their judgments in foreign jurisdictions.**

The ease and speed with which assets can be transferred from one jurisdiction to another requires that forfeiture laws be as nimble as the criminals who generate the proceeds of crime. Having an NCB asset forfeiture law is essential to a country’s ability to recover criminal proceeds. Strong international assistance provisions give jurisdictions the ability to provide assistance to other countries by preserving assets and enforcing foreign forfeiture orders (see boxes 37 and 38). A forfeiture regime that complies with UNCAC and other relevant conventions better ensures the enforceability of a forfeiture judgment beyond the requesting jurisdiction’s borders.<sup>169</sup> Indeed, the mandatory return obligation of UNCAC arises upon the execution of the requesting jurisdiction’s final forfeiture judgment by the requested jurisdiction.<sup>170</sup> Hence, it is necessary for a jurisdiction to have *both* the capacity to obtain a forfeiture judgment against property located beyond its borders when it is the requesting country *and* the capacity to enforce a forfeiture judgment of another country when it is the requested country.

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168. For examples of foreign restraint applications and orders, see *In re Restraint of All Assets Held in the Name of Alain Gagnon*, and *In re Restraint of Assets Held in the Name of Mario Mariano Faro, Labcare and Supplies Corporation, and Mediscientific Corporation* in CD-ROM appendix I.

169. UNCAC, Articles 54 and 55, require that States Parties “to the greatest extent possible” recognize and enforce foreign forfeiture orders or bring their own application for a domestic order on the basis of information provided by another State Party. Other conventions contain similar provisions: UN-TOC, Article 13; Vienna Convention, Article 5.

170. UNCAC, Articles 57(3)(a) and 55(1)(b). Another way to invoke the mandatory asset return provision under Article 57(3)(a) is in accordance with Article 55(1)(a), whereby the requested jurisdiction applies for and obtains the order of forfeiture further to the request of the requesting jurisdiction.

**BOX 37** Enforcement Issues and Legislative Solutions

Although Thailand’s Anti-Money Laundering Act provides for NCB asset forfeiture authority, international cooperation and asset sharing for foreign cases is limited to *criminal* forfeiture.

To resolve this, the Office of the Attorney General has proposed amendments to the mutual legal assistance laws that, if enacted, would authorize Thailand to provide assistance *in both* criminal *and* NCB cases, as well as authorize asset return and sharing. It has been approved by the cabinet and awaits further approvals.

Some jurisdictions enforce a foreign forfeiture judgment by literal enforcement, (that is, giving effect to the foreign forfeiture order), known as “direct execution.” Giving effect to another jurisdiction’s forfeiture judgment rather than litigating anew the forfeitability of the assets conserves resources and allows the forfeiture proceeding to occur in the jurisdiction as the underlying offense. Another option is for the foreign government to “domesticate” the foreign order (that is, bring an application for a domestic order on the basis of information provided) and enforce a foreign forfeiture order in the name of the country where the assets are located and that is enforcing the order.

When drafting a law to permit the enforcement of foreign forfeiture judgments, it is important to allow for the enforcement of foreign money judgments because not all forfeiture judgments are directed against specific property. If criminal assets have been spent or cannot be located, some jurisdictions allow for the entry of judgments against substitute assets or a money judgment (see Key Concept 6). Additionally, the law should allow for the enforcement of NCB asset forfeiture judgments.<sup>171</sup> The law should also be drafted to permit enforcement of foreign forfeiture orders even in cases in which the government that obtained the order may subsequently disburse the recovered funds to crime victims (after deduction of governmental costs associated with the forfeiture, property liquidation, and recovery).

When a jurisdiction obtains a forfeiture judgment against property located in another jurisdiction, it cannot simply execute that judgment. Instead, the requesting jurisdiction needs to forward that judgment to the competent authority of the jurisdiction where the property is located, pursuant to a legal assistance request seeking enforcement of the judgment. The requested state will determine whether the forfei-

171. Where laws have not specified that NCB judgments can be enforced, courts without NCB asset forfeiture have had to consider whether a “criminal” restraint or confiscation order could be made on the basis of an NCB order. In the United Kingdom, Isle of Man, and Jersey—all before the enactment of NCB asset forfeiture in the respective countries—courts recognized foreign NCB orders despite the lack of an express statutory reference. For a more detailed discussion on these cases, see “Enforcement of Restraint Orders Based on Foreign NCB Asset Forfeiture Orders Before the Introduction of NCB Asset Forfeiture Legislation in England and Wales and the Crown Dependencies” in part C.

ture judgment is valid for execution under its domestic law.<sup>172</sup> Typically, the judgment must be certified by a court, and the requesting jurisdiction will need to verify that the judgment is final and no longer on appeal or, where no appeal has been filed, the time for filing an appeal has expired.

The legal assistance request must also demonstrate that the interested parties had an opportunity to challenge the forfeiture action. Thus, the request should confirm that the interested parties (1) were provided notice of the proceedings in accordance with domestic law, (2) were afforded an opportunity to participate in the proceedings, and (3) either did participate and their efforts were unsuccessful or declined to participate. With regard to notice, it is not always possible to guarantee that a violator who has absconded received actual notice of the forfeiture action. Many jurisdictions authorize forms of notice that are less than actual notice (such as posting on the property, notice to owner's last known address, notice to relatives or an attorney, and the like). Due process generally requires that adequate, although not necessarily actual, notice be given. The law should be drafted so that an alternate form of notice will not be an obstacle to enforcement outside the jurisdiction of origin.<sup>173</sup> Careful attention to drafting the types of notice is important so that the enforcing jurisdiction can determine whether notice was adequate under the circumstances.

The law should also detail the applicable procedures for enforcement, such as the defenses that will be recognized and whether the property owner would be allowed in the enforcement proceedings to challenge the underlying forfeitability decision. Some jurisdictions prevent that type of challenge on the grounds that the asset owner would have had the opportunity to make that challenge in the country in which the judgment was originally rendered. If the government "domesticates" the foreign order, the need for an asset-sharing agreement becomes apparent so that the jurisdiction that rendered the forfeiture judgment can receive a portion of the proceeds once they are realized (see Key Concept 36).

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172. Alternatively, the requested state may initiate its own investigation and prosecution of offenses occurring within its jurisdiction, such as money laundering.

173. For example, 28 United States Code, Section 2467(d), permits enforcement of a foreign forfeiture order. It provides in pertinent part

The district court shall enter such orders as may be necessary to enforce the judgment on behalf of the foreign nation unless the court finds that—

- (A) the judgment was rendered under a system that provides tribunals or procedures incompatible with the requirements of due process of law;
- (B) the foreign court lacked *persona* jurisdiction over the defendant;
- (C) the foreign court lacked jurisdiction over the subject matter;
- (D) the foreign nation did not take steps, in accordance with the principles of due process, to give notice of the proceedings to a person with an interest in the property of the proceedings in sufficient time to enable him or her to defend; or
- (E) the judgment was obtained by fraud.

**BOX 38****Enforcement Issues: Prohibitions on Foreign Ownership**

In a case in the United States, the violator was convicted of defrauding his parish of over \$590,000. Most of the funds had been wired to the Philippines and used to purchase real estate. The violator was ordered to forfeit a number of the properties; however, the Philippines Government, while willing to assist in enforcement, was stymied by the constitutional prohibition on foreign governments owning real property.

Because this particular violator wanted to cooperate with the United States, other options were available that accomplished the same goal of liquidating the illegally acquired property for the benefit of the victims. With the agreement of the violator, the property will be sold and the proceeds wired to a United States government account. This would not be an option if the violator refused to cooperate.

**Key Concept 35.****NCB asset forfeiture should be used to restore property to victims.**

Any forfeiture system should take the interests of victims of crime into consideration. A victim of a fraud, for example, unwittingly turns money over to a criminal fraudster, who purchases a car or home with the funds.<sup>174</sup> The victim does not have any ownership interest in the property, and thus, typically cannot assert a claim to such property should it become subject to forfeiture. Indeed, to allow all of the victims or unsecured creditors to contest a forfeiture would turn a forfeiture case into an insolvency proceeding. Nevertheless, even though the victim's money may not be directly traceable to the violator's assets, governments should have the flexibility to allow restitution<sup>175</sup> if the victim is able to demonstrate a loss.<sup>176</sup> Once the violator's assets have been forfeited, the government should have the legislative authority to return forfeited funds to the victim(s) of the offense giving rise to forfeiture, or in some cases, to the victim(s) of similar or related offenses. This is a matter of fairness and is in accord with international commitments.<sup>177</sup>

174. For this Key Concept and the specific purpose and scope of this guide, "victim" is used to encompass all identifiable victims (for instance, individuals, companies, or countries), which goes beyond the UNCAC definition.

175. "Restitution" is used when there is an identifiable victim (for example, individual, government, company) and an order of restitution is made to put the victim in the position he or she would have been in if not for the improper action of the offender.

176. In the Proceeds of Crime Act 2002 (United Kingdom), Section 301 provides for release of cash to victims. Subsection (3) relates to a person who claims that some or all of the cash rightfully belongs to him, and he was deprived of it through unlawful conduct. An example of this would be a person who claims that the cash was stolen from him. If the court is satisfied, it may order the applicant's cash to be released to him. Subsection (4) relates to the case of any other true owner who is not the person from whom the cash was seized. Here, if the court is satisfied, the cash may be released, but only if the person from whom it was seized does not object. See also Commonwealth Model Legislation, Section 35(2) (CD-ROM appendix D).

177. UNCAC, Article 57 (3)(c) requires States Parties to give priority consideration to compensating victims of the crime. See also UNTOC, Article 14 para. 2, which requires States Parties to give priority

In addressing recoveries for victims in the law, the preferred model is to authorize a pro rata distribution of the funds recovered. Any other distribution scheme would reward those who act quicker or, fortuitously, may be able to trace their loss to the seized property when other victims, usually those involved early on, cannot trace their funds.

NCB asset forfeiture legislation should also contemplate how foreign victims are treated. For example, a fraud occurs in the country in which the victims are located but the violator transfers the proceeds to another jurisdiction. If the country in which the property is located cannot enforce a foreign forfeiture judgment and return the proceeds for disbursement to the victims, the victims may be left without relief unless they institute a civil suit in the foreign jurisdiction, which in most cases is not practical.

International treaties regulate the return of assets to victims; however, the methods or provisions vary depending on the underlying offenses. Recommended principles to be included in forfeiture laws should be based on the following commitments:

- UNTOC, Article 14(2): ...When acting on the request made by another State Party in accordance with article 13 of [UNTOC], States Parties shall, to the extent permitted by domestic law and if so requested, give priority consideration to returning the confiscated proceeds of crime or property to the requesting State Party so that it can give compensation to the victims of the crime or return such proceeds of crime or property to their legitimate owners.
- UNCAC, Article 57(3): The requested State Party shall...In the case of embezzlement of public funds or of laundering of embezzled public funds....when forfeiture was executed in accordance with article 55 [of UNCAC] and on the basis of a final judgment in the requesting State, a requirement that can be waived by the requested State Party, return the confiscated property to the requesting State Party.
- Requested States Parties to UNCAC shall, under certain circumstances, give priority consideration to directly compensating victims of crime. Such circumstances would arise for corruption offenses outlined in the Convention, except for cases of embezzlement (outlined above) or cases in which the State establishes prior ownership or damages.<sup>178</sup> States may also consider the claims of prior legitimate owners or agreements between the States concerned when negotiating these circumstances.<sup>179</sup>
- “States Parties [to UNCAC] may also give special consideration to concluding agreements or mutually acceptable arrangements, on a case-by-case basis, for the final disposal of confiscated property.”<sup>180</sup> These agreements could be used to

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consideration to returning the confiscated proceeds of crime or property to the requesting State Party so that it can give compensation to the victims of the crime.

178. UNCAC, Article 57 (3)(a) and (b)

179. UNCAC, Article 57 (3)(c).

180. UNCAC, Article 57 (5).

return assets to victims.

A related issue, although outside the scope of NCB asset forfeiture legislation, is private litigation or civil proceedings.<sup>181</sup> With regard to discovery requests related to the location of assets, these should be as broad as possible under the circumstances of each case.<sup>182</sup>

Jurisdictions should ensure that victims have the right to initiate private legal proceedings against those responsible for the damage they have suffered. In the context of corruption offenses, UNCAC requires States Parties to take measures to ensure that individuals and entities who have suffered damages have a right to initiate such legal proceedings.<sup>183</sup> Furthermore, UNCAC permits a state to bring a private action in the civil courts of the foreign jurisdiction where corruptly acquired assets are located.<sup>184</sup>

### **Key Concept 36.**

**The government should be authorized to share assets with or return assets to cooperating jurisdictions.**

Countries need to determine what to do with proceeds realized through forfeiture. If there are victims or prior legitimate owners, assets should be returned in accordance with the provisions of UNCAC and UNTOC.<sup>185</sup> Furthermore, in cases of embezzlement of public funds or laundering of embezzled public funds in which a forfeiture order has been enforced by the jurisdiction holding the assets, UNCAC mandates the return of assets.<sup>186</sup> In all such cases, States Parties may give consideration to concluding agree-

181. For a discussion of the options available for the private litigant, see “Recovery of Proceeds of Corruption in the United Kingdom: Assistance of Law Enforcement and Tools for the Private Litigant” in part C. For case examples, see *Attorney-General of Zambia v. Meer Care & Desai & Ors*, [2007] EWHC 952 (Ch) and *Banco Central de Paraguay v. Paraguay Humanitarian Foundation and Tulac*, 1 Civ. 9649 United States District Court, Southern District of New York (January 6, 2005) (successful civil case to recover \$16 billion from a state bank) in CD-ROM appendix H.

182. In *Banco Central de Paraguay v. Paraguay Humanitarian Foundation, Inc. and John Tulac*, 01 Civ. 9649 (JFK) (United States District Court, Southern District of New York), Judge Keenan stated, “...even if the discovery request is a “fishing expedition,” ...this Court recognized long ago that “a judgment creditor [emphasis added] is entitled to fish for assets of the judgment debtor.” *Capital Co. v. Fox*, 15 F. Supp. 677, 678 (S.D.N.Y. 1936). *Banco Central* is entitled as a judgment creditor to a very broad inquiry regarding the location and identity of the Principal Defendants’ assets. See *British International Ins. Co.*, 2000 U.S. Dist. LEXIS 7509 at 16 (noting that a judgment creditor is “ordinarily entitled to a very thorough examination of a judgment debtor with respect to its assets, including discovery of the identity and location of any of the judgment debtor’s assets, wherever located”)....

183. UNCAC, Article 35.

184. UNCAC, Article 53.

185. UNCAC, Article 57(3)(c); UNTOC, Article 14(2).

186. UNCAC, Article 57(3)(a).

**BOX 39**     **Asset Sharing Agreements**

Countries may agree to specific uses for repatriated funds. One example involving an NCB asset forfeiture is an agreement between the United States, Switzerland, and Kazakhstan following an action against \$84 million in a bank account in Switzerland. The funds were subject to NCB asset forfeiture as proceeds traceable to the bribery of three senior Kazakh officials by an American businessman for oil and gas rights in Kazakhstan.

The agreement established three programs:

- Projects to benefit poor children, administered by the Bota Foundation, a reputable nongovernmental organization, and supervised by the World Bank.
- A five-year Kazakh government program for improving its public financial management.
- Implementation of a comprehensive action plan for transparency in oil, gas, and mining industries in Kazakhstan. This was part of the Extractive Industry Transparency Initiative, an initiative that the World Bank was assisting in implementing.

ments or arrangements on the final disposal of assets<sup>187</sup> and may deduct reasonable expenses incurred in investigations, prosecutions, or judicial proceedings.<sup>188</sup>

In cases in which the return of assets is not mandated, the NCB asset forfeiture law should authorize the government to share those forfeited assets with jurisdictions that facilitated the successful forfeiture effort (see box 39).<sup>189</sup> Several United Nations conventions encourage asset sharing, including the Vienna Convention,<sup>190</sup> the International Convention for the Suppression of the Financing of Terrorism,<sup>191</sup> and

187. UNCAC, Article 57(5), and UNTOC, Article 14(3). Some countries return assets to victims or prior legitimate owners through sharing legislation.

188. UNCAC, Article 57(4).

189. For instance, the sharing law in the United States, 21 United States Code, Section 881(e)(1)(E), provides as follows: “Whenever property is civilly or criminally forfeited under this subchapter the Attorney General may— . . . transfer the forfeited personal property or the proceeds of the sale of any forfeited personal or real property to any foreign country which participated directly or indirectly in the seizure or forfeiture of the property, if such a transfer—(i) has been agreed to by the Secretary of State; (ii) is authorized in an international agreement between the United States and the foreign country; and (iii) is made to a country which, if applicable, has been certified under section 2291j(b) of Title 22.”

190. The Vienna Convention, Article 5(5)(b)(ii) encourages parties to “give special consideration to concluding agreements on . . . sharing with other Parties on a regular or case-by-case basis, such proceeds or property, or funds derived from the sale of such proceeds or property, in accordance with its domestic law, administrative law, or bilateral or multilateral agreements entered into for this purpose.”

191. In the United Nations International Convention for the Suppression of the Financing of Terrorism, Article 8(3) states, “Each State Party concerned may give consideration to concluding agreements on the sharing with other States Parties, on a regular or case-by-case basis, of the funds derived from the forfeitures referred to in this article.”

UNTOC.<sup>192</sup> Other multilateral agreements encourage member states to enter into bilateral arrangements on asset sharing.<sup>193</sup> In some countries, sharing legislation is used to comply with the other treaty requirements on asset return, whether return to victims or to prior legitimate owners or in cases involving corruption.

If the country in which the property is located will, upon forfeiture, retain all of the forfeited proceeds without regard to the effort expended by the country that cooperated in the forfeiture effort, or without regard to the fact that the proceeds being retained were generated as a result of a crime committed against the laws of another jurisdiction, the result of such a system is to reward such jurisdictions for serving as havens for criminal wealth. This result is contrary to the spirit of global cooperation in the fight against international criminals.

Reciprocal asset sharing, however, promotes international cooperation. Jurisdictions agree to share the results of a successful forfeiture proceeding, without regard to where the property is found and without regard to which country conducts the forfeiture. Knowing that, in the end, the results of a successful forfeiture support the fight against international crime and do not reward country havens encourages law enforcement agencies to cooperate with their counterparts across borders.

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192. UNTOC, Article 13(9), states, “State Parties shall consider concluding bilateral or multilateral treaties, agreements or arrangements to enhance the effectiveness of international cooperation undertaken pursuant to this article.” Article 14(3) states, “[w]hen acting on the request made by another State Party in accordance with articles 12 and 13 of this Convention, a State Party may give special consideration to concluding agreements or arrangements on: . . . (b) Sharing with other States Parties, on a regular or case-by-case basis, such proceeds of crime or property, or funds derived from the sale of such proceeds of crime or property, in accordance with its domestic law or administrative procedures.”

193. UNODC fostered the development of a “Model bilateral agreement on the sharing of confiscated proceeds of crime or property covered by the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988,” which was adopted by the UN General Assembly as part of the resolution on Strengthening the United Nations Crime Prevention and Criminal Justice Programmes (Resolution number A/RES/60/175) on December 16, 2005.



## **PART C**

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### Special Contributions



# Good Practices in Non-Conviction Based Forfeiture: A Perspective from Switzerland

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Yves Aeschlimann\*

## Background: Criminal Law in a Civil Law System

Criminal law is a matter of federal law in Switzerland. The main source of law is the *Code pénal*, or Criminal Code of Switzerland, adopted in 1937. The Criminal Code is based on the *principe de la légalité* (principle of legality), which means that one can be found guilty only based on an offense that is included in the Criminal Code. The Latin says *nullum crimen nulla poena sine lege* (no offense, no punishment without a statute). This must be understood as a “firewall” against the arbitrariness of the judicial power. It empowers Parliament to decide whether a behavior is an offense, and which punishment should be given to the offender (either custodial sentence or another penalty).

Currently, in Geneva and federal courts, a prosecutor conducts the prosecution and the defendant can choose a lawyer for his or her defense. The investigating magistrate, together with the police force, handles the inquiries in the case at hand. They are not parties to the proceedings and are supposed to be as objective as possible. During the investigation, the investigating magistrate has to find the truth. The investigating magistrate must investigate the facts, find evidence of the offense, and if there is an offense, must try to find the offender, indict the offender, and arrest him or her if necessary. During the investigation, if the offender is indicted, he or she can be assisted by a lawyer, who must be present any time a witness or an expert testifies before the investigating magistrate. If the offender remains unknown, but there are proceeds of an alleged offense, the investigating magistrate will continue the enquiry to establish that the assets are the proceeds of an offense.

In 2011, the investigating magistrate will cease to exist. The prosecutor will be in charge of the investigation from beginning to end.

## Forfeiture under the Criminal Code of Switzerland

There is both conviction based forfeiture and non-conviction based (NCB) asset forfeiture in Switzerland. They are based on the same provisions in the Criminal Code of Switzerland, Articles 70 to 72 (see box 40), and the same procedures apply. Specifically

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related to NCB asset forfeiture, Article 70, paragraph 1, states, “The judge shall order the confiscation of assets resulting from an offense or which were intended to induce or to reward the offender, provided that they do not have to be returned to the injured party to restore his rights.” Thus, forfeiture occurs even without a conviction.

Switzerland applies the criminal standard of proof in all forfeiture cases rather than the civil “balance of probabilities” standard of proof that applies in many common law jurisdictions. This criminal standard is called “intimate conviction” and means that after all the charges have been brought before the judge, the judge must be “intimately convinced” that the assets are the proceeds of an offense. One can be intimately convinced even without proof, but with an “accumulation of clues” (*faisceau d’indices*). As in other jurisdictions, forfeiture is an *in rem* action; and it is understood to be a “measure” and not a “punishment.”

In all cases, the prosecution must prove that there has been an offense and that the assets are the proceeds of the offense or were intended to be used in the commission of a criminal offense or as payment thereof.<sup>194</sup>

The term “assets” must be understood broadly. They can be objects or values, or any kind of economic advantage that can be estimated, either by increase of the assets or decrease of the liabilities.<sup>195</sup>

To be forfeited, the assets must be the proceeds of an offense. The proceeds can result from any type of offense, as long as it is set forth in the Criminal Code of Switzerland or any other criminal provisions in other Swiss laws (for example, the Federal Law on Narcotics). The proceeds are understood as the direct proceeds of the offense or assets that have been purchased with the proceeds of the offense. As long as one can trace the proceeds, they can be forfeited (that is, the assets must be linked to the offense). As soon as the link no longer exists, forfeiture is no longer possible. The prosecutor could then ask for a “compensatory claim” in accordance with Article 71 para. 1 of the Criminal Code of Switzerland.

Asset forfeiture also requires that the Swiss criminal justice authorities have jurisdiction to prosecute the offense, with the exception of proceeds from a narcotics offense.<sup>196</sup> Jurisdiction is established when the offense is committed in whole or in part on the territory of Switzerland or if the offender or the victim is a Swiss citizen. An offense is deemed to have been committed at the place where the offender committed the act and at the place where its result occurred.<sup>197</sup>

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194. There is one exception for criminal organizations, see Criminal Code (Switzerland), Article 72. In this case, the prosecutor will have to prove the existence of a criminal organization and that the organization has the power of disposal over the assets. It is not necessary to prove that there has been a specific offense and that the assets are its proceeds.

195. FF 1993 II 299, n. 223.1.

196. According to the Federal Law on Narcotics (Switzerland), Article 24, assets can be forfeited even when the Swiss criminal justice authorities have no jurisdiction to prosecute the offense.

197. Criminal Code (Switzerland), Articles 3–7.

Because forfeiture is an *in rem* measure, it can be decided regardless of who the actual owner of the assets is, even if the owner is not involved with the criminal offense.<sup>198</sup> If the assets have been transferred to a third party, the third party may be liable to forfeiture or ordered to pay a compensatory amount, unless the third party acquired the assets without knowing the facts that would have justified forfeiture, and insofar as the third party has paid an adequate value or if forfeiture is shown to be excessively harsh in this case (Article 70 para. 2 Criminal Code of Switzerland).

Because of this specific forfeiture procedure, there is no place in the Swiss system for NCB asset forfeiture based on civil procedure, in which the prosecutor would act just like a private person and assert a claim for the assets. There is a possibility for the victim of the offense to assert a claim through civil action, generally based on the Aquilian liability of the offender or his contractual liability. But in such actions, there will be a defender, so there is no analogy to “civil forfeiture.”

## Mutual Legal Assistance (MLA) for NCB Asset Forfeiture

In Switzerland, international cooperation in criminal matters is guided by the principles of reciprocity, dual criminality, specialty, and proportionality in the execution of any MLA requests. MLA operates under three concurrent regimes: international conventions, bilateral treaties, and domestic law.

The MLA procedures for NCB asset forfeiture are set forth in the Federal Act on International Mutual Assistance in Criminal Matters (IMAC). According to IMAC, the Swiss authorities can, as a rule, upon request of a foreign authority, hand over restrained assets or return them to the person entitled in execution of a foreign court decision.<sup>199</sup> The assets that can be handed over are the proceeds of a crime, their replacement value,<sup>200</sup> or contributions that served to instigate the offense or recompense the offender.<sup>201</sup> There is no requirement that a person be finally convicted for the crime in the requesting state or elsewhere. When the asset return is based on a foreign decision that is in force, the foreign decision will be determinative of whether the assets to be restituted are the proceeds of crime.<sup>202</sup>

The assets may be retained in Switzerland if

- the victim resides in Switzerland and assets have to be returned to the victim;
- an authority asserts rights over the assets;
- a person not involved in the offense and whose claims are not guaranteed by the requesting state convincingly shows that he or she has acquired rights over

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198. FF 1993 III 300, n. 223.3.

199. IMAC (Switzerland), Article 74a para. 1.

200. Not to be understood as a substitute asset, because for a replacement value the link between the offense and the value must still exist (paper trail).

201. IMAC (Switzerland), Article 74a para. 2.

202. ATF 131 II 169 consid. 6, p. 175.

the assets in good faith in Switzerland or, if he or she resides in Switzerland, in a foreign country; or

- the objects or assets are necessary for pending criminal proceedings in Switzerland or are likely, because of their nature, to be subject to forfeiture in Switzerland.<sup>203</sup>

According to IMAC Article 74a para. 5, if someone claims to have rights over the assets under para. 4, the handing over to the requesting jurisdiction is suspended until the legal situation is clear. The objects or assets claimed may be handed over to the person entitled if

- the requesting state agrees to it;
- in case of para. 4(b), the authority gives its consent; or
- the claim has been recognized by a Swiss court.

IMAC rules for MLA apply to Article 72 of the Criminal Code of Switzerland, as determined by the Federal Supreme Court in the case against General Sani Abacha of Nigeria.<sup>204</sup>

## **Asset Return Based on a Money Value Judgment**

When the criminal proceeds subject to forfeiture have been disposed of, the judge can order an equivalent compensatory payment called a “money value judgment.” The Federal Supreme Court has held that it is not possible to return assets to a foreign jurisdiction based on a money value judgment because there is no nexus between the crime and the assets.<sup>205</sup> In addition, returning assets that have not been linked to an offense would allow the foreign jurisdiction to circumvent the usual procedure for enforcement of domestic compensatory claims issued under Article 71 para. 3 Criminal Code of Switzerland. This requires enforcement of the judgment in accordance with the Swiss Federal Act on Debt Collection and Bankruptcy and, if necessary, validation through a civil action in accordance with the Law on Civil Procedure, as for any other private creditor.

To enforce a money value judgment, the requesting jurisdiction should ask for an exequatur procedure based on IMAC Article 94. The procedure is complex and does not appear to have been used.<sup>206</sup> Nonetheless, if such a procedure was conducted and if the foreign money value judgment was exequatored, the requesting state could then follow the usual procedure for enforcement of a judgment (outlined above).

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203. IMAC (Switzerland), Article 74a para. 4.

204. ATF 131 II 169.

205. ATF 133 IV 215; ATF 129 II 453.

206. For example, the judge competent to exequatur a foreign judgment may vary depending on the Canton’s procedural law.

There may be circumstances in which the terminology used by the foreign jurisdiction does not accord with Swiss terminology. For example, the judgment may be called a “money value judgment” even though it is possible to show the nexus between the crime and the assets. In these cases, the jurisdiction should follow the NCB asset forfeiture procedure in IMAC Article 74a rather than the suggested procedure for money value judgments under IMAC Article 94. Swiss authorities are not bound by the terminology and will look at the meaning of the terms.

## Asset Return Based on NCB Asset Forfeiture

As indicated above, the Swiss criminal forfeiture system does not require a conviction to forfeit the proceeds of a crime. Nor do Swiss authorities require a conviction to assist a foreign jurisdiction. However, criminal judiciary cooperation can be granted only when the requesting state is handling a criminal procedure.<sup>207</sup> This does not mean that an indictment must exist, but there must be an ongoing criminal investigation. In addition, criminal judiciary cooperation cannot be used for civil proceedings.<sup>208</sup>

The Federal Supreme Court addressed the issue of criminal judiciary cooperation in NCB asset forfeiture in *A\_\_ Company v. Federal Office of Justice*.<sup>209</sup> In that case, the requesting state (the United States) was pursuing an NCB asset forfeiture case with no intention, at the time, to initiate criminal proceedings. Based on NCB asset forfeiture, the United States asked Switzerland for bank account statements. The Federal Supreme Court examined whether NCB asset forfeiture could be analogous to criminal proceedings. The Court resolved the question according to Swiss legal principles, establishing that the terminology used by the United States would not be binding.

In reaching its decision, the Federal Supreme Court summarized the criminal and NCB asset forfeiture proceedings in the United States, as well as the criminal forfeiture system in Switzerland (*in rem*). The Court found that forfeiture measures in both Swiss and American systems are tools to fight against criminality, that is, to buttress the concept that “crime does not pay.” Both are *in rem* measures in which the guilt of the offender does not have to be examined. Furthermore, when the forfeiture procedure is undertaken independently of the criminal proceedings of the offender, the presumption of innocence cannot be invoked.

The Federal Supreme Court held that the NCB asset forfeiture procedure in the United States was sufficiently similar to the “criminal case” seizure procedures under Swiss law (IMAC). However, the Federal Supreme Court added that the requesting state must have jurisdiction to punish, even if the authorities did not actually intend to

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207. ATF 126 II 258.

208. ATF 113 Ib 257 consid. 5 p. 270.

209. ATF 132 II 178. See CD-ROM appendix H for *A\_\_ Company v. Federal Office of Justice*.

exercise it. On this point, there was insufficient evidence in the file and the case was sent back to the Central Office to ask the United States for the required information relating to the criminal jurisdiction of the American authorities.

This case underlies the principle that when asked to assist in a criminal judiciary cooperation case, the authority should not limit its analysis to the terminology used by the requesting state; rather, it must examine if the cooperation meets the legal requirements.

**BOX 40 Forfeiture of Assets In Switzerland**

**Criminal Code of Switzerland, Articles 70–72**

Article 70

1. The judge shall order the confiscation of assets resulting from an offense or which were intended to induce or to reward the offender, provided that they do not have to be returned to the injured party to restore his rights.
2. Confiscation shall not be ordered where a third party has acquired the assets without knowledge of the facts which would have justified it, and in so far as he has given an adequate counter value or if confiscation is shown to be excessively harsh in his case.
3. The right to order the confiscation of assets shall be subject to a prescriptive period of seven years, unless the prosecution of the offense in question is subject to a longer prescriptive period which shall then apply.
4. The confiscation order shall be the subject of an official announcement. The claims of injured parties or third parties shall expire five years after the official announcement of the confiscation.
5. If the total amount of assets subject to confiscation cannot be determined precisely or if such determination necessitates disproportionate expenditure, the judge can estimate the amount.

Article 71

1. Where assets to be confiscated are no longer available, the judge shall order a compensatory claim in favor of the State for an equivalent amount. It can be awarded against a third party only in so far as the conditions set by article 70 paragraph 2 are not met.
2. The judge can dispense with the compensatory claim in whole or in part if it is probable that it would not be recovered or that it would seriously impede the rehabilitation of the person concerned.
3. The investigation authority can sequester part of the property of the person concerned in order to secure the enforcement of the compensation claim. Sequestration does not create a preferential right in favor of the State when the compensation claim is enforced.

Article 72

The judge shall order the confiscation of all assets over which a criminal organisation has power of disposal. Assets belonging to a person who has participated in or supported a criminal organisation (Article 260<sup>ter</sup>) are presumed to be at the disposal of the organisation until the contrary is proved.

**BOX 40**

**Forfeiture of Assets In Switzerland (continued)**

Article 260<sup>ter</sup>

1. Whoever participates in an organisation, the structure and personal composition of which is kept secret and which pursues the objective of committing crimes of violence or securing financial gain by criminal means, whoever supports such an organisation in its criminal activities, shall be punished with custodial sentence not exceeding five years or monetary penalty.
2. The judge shall have the discretion to mitigate the penalty imposed (Art. 48a) in the event that the offender makes an effort to foil the criminal activities of the organisation.
3. The foregoing penalties shall also apply to anyone who commits the offense outside Switzerland provided the organisation carries out or intends to carry out its criminal activities wholly or partly in Switzerland. Art. 3 (1) paragraph 2 shall apply.

**Federal Act on International Mutual Assistance in Criminal Matters (IMAC), Article 74a**

Upon request, the objects or assets subject to a precautionary seizure may be handed over to the competent foreign authority after conclusion of the mutual assistance proceeding (art. 80d) for the purpose of forfeiture or return to the person entitled.

1. The objects or assets referred to in paragraph 1 include:
  - a. instruments which served to commit the offence;
  - b. products or profits of the offence, their replacement value and an illicit advantage;
  - c. gifts and other contributions which served to instigate the offence or recompense the offender, as well as their replacement value.
2. The handing over may intervene at any stage of the foreign proceeding, as a rule based on a final and executable order of the requesting State.
3. However, the objects or assets may be retained in Switzerland if:
  - a. the victim has his habitual residence in Switzerland and they have to be returned to him;
  - b. an authority asserts rights over them;
  - c. a person not involved in the offence and whose claims are not guaranteed by the requesting State shows probable cause that he has acquired rights over these objects and assets in good faith in Switzerland, or if he has his habitual residence in Switzerland, in a foreign country; or
  - d. the objects or assets are necessary for a pending criminal proceeding in Switzerland or appear, because of their nature, to be subject to forfeiture in Switzerland.
4. Whenever somebody claims to have rights over the objects or assets under paragraph 4, its handing over to the requesting State shall be suspended until the legal situation is clear. The objects or assets claimed may be handed over to the person entitled if:
  - a. the requesting State agrees;
  - b. in case of paragraph 4, letter b, the authority gives its consent;
  - c. the claim has been recognized by a Swiss court.
5. Article 60 shall apply to fiscal liens.



# Recovery of Proceeds of Corruption in the United Kingdom: Assistance of Law Enforcement and Tools for the Private Litigant

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Organized crime and corrupt officials are audacious in their enterprise. Many infiltrate or establish networks of international businesses; set up family trusts; and use their ill-gotten gains to invest in or purchase other financial instruments, accumulating, for example, real property, and depositing money in either their own name, or the names of family members or associates.

In the international finance arena, London exports some £19 billion (approximately \$26.9 billion) more financial services than it imports, and supports an industry that generates approximately 8.5 percent of the U.K. economy and 1 million jobs.<sup>210</sup> It is not surprising, therefore, that in the same way that the United Kingdom attracts legitimate business, it is also a target for organized crime and corrupt officials. As well as its reputation for being innovative, the U.K. financial sector relies on its international reputation for integrity and fair dealing.<sup>211</sup> In meeting its commitment to international standards and agreements and to safeguard the United Kingdom's prosperity and security for the future, the Government has developed a strategy to tackle crime and terrorism, which is to be found in *The Financial Challenge to Crime and Terrorism* (HM Treasury 2007). Part of that strategy includes engagement with international partners.

The United Kingdom has ratified the United Nations Convention against Corruption (UNCAC). In keeping with its obligations under that Convention, the United Kingdom has both conviction based and NCB asset forfeiture regimes under which mutual legal assistance can be sought by foreign states. These routes, however, are not suitable or available in every case. Criminal proceedings may not be possible, for example, because the corrupt official may be dead or have fled the jurisdiction, or the country of origin may have neither a conviction based nor an NCB asset forfeiture regime.

There are a number of ways in which a foreign state can seek to recover the proceeds of corruption in the United Kingdom. Depending on the circumstances, this may

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210. *The Financial Challenge to Crime and Terrorism* (London: HM Treasury, 2007), p. 5.

211. *The Financial Challenge to Crime and Terrorism* (London: HM Treasury, 2007), p. 3.

either be with the assistance of U.K. law enforcement or a state bringing proceedings in the civil courts of England and Wales (the court) as a private litigant. This special contribution will provide a short summary of the assistance the United Kingdom may lend a foreign state, followed by an overview of the powers at the disposal of a private litigant using the civil courts.

## The Assistance of U.K. Law Enforcement

When trying to trace, freeze, and recover the illicit gains of a corrupt official found either to be in or to have been laundered through the United Kingdom, a foreign state may do one of the following:

- Invoke the mechanism of mutual legal assistance, and working with a U.K. law enforcement agency either
  - restrain assets<sup>212</sup> (during a criminal investigation) and having obtained a criminal conviction in the foreign state, enforce its own recovery order in England and Wales<sup>213</sup>; or
  - freeze assets and having obtained either an NCB or conviction based asset recovery order in the foreign state, give effect to that order by means of an NCB asset forfeiture order in England and Wales (known in the United Kingdom as civil recovery).<sup>214</sup>
- Invite a U.K. law enforcement agency to adopt the case for investigation with a view to bringing in England and Wales
  - a criminal prosecution in the United Kingdom (if that is feasible) and if a conviction is obtained, seek a criminal confiscation order;
  - cash detention and forfeiture (if applicable); or
  - NCB asset forfeiture proceedings (civil recovery) and seek a civil recovery order.

If a criminal confiscation order is obtained, a compensation order (in favor of a victim) may also be made in the same case. A foreign state may also, therefore, intervene in criminal confiscation proceedings and seek a compensation order. A criminal confiscation order requires the defendant to pay back the value of the benefit from a

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212. Requests will go through the United Kingdom Central Authority (with the exception of requests seeking enforcement via the NCB route, which should go through the High Court of England and Wales), which passes it to the appropriate law enforcement agency, such as the Serious Organised Crime Agency (SOCA), the Crown Prosecution Service (CPS), Her Majesty's Revenue and Customs (HMRC), or the Serious Fraud Office (SFO).

213. Proceeds of Crime Act 2002 (United Kingdom) Part 11 and Order in Council 2005/3181 Parts 2, 3, and 4 re cooperation in the recognition and enforcement of foreign, conviction-based asset recovery orders.

214. Proceeds of Crime Act 2002 (United Kingdom) Part 11 and Order in Council 2005/3181, Part 5 re the cooperation in the recognition and enforcement of foreign, NCB asset recovery orders.

given crime (the proceeds).<sup>215</sup> If there are insufficient funds with which to fulfill both a criminal confiscation order and a compensation order, the court can require a proportion of the realized assets under the criminal forfeiture order to be used to discharge the compensation order.<sup>216</sup> A detailed consideration of this area is outside the scope of this contribution.

In proceedings for NCB asset forfeiture, the true owner of property is entitled to seek a declaration from the civil court that he has a valid claim to the property (or property which it represents) because it was unlawfully taken from him.<sup>217</sup>

If either a conviction based confiscation or NCB asset forfeiture order is registered and enforced in England, the recovered property (or money equivalent) is not automatically transmitted to the foreign state and the English court has no power with which to remit the property to the foreign jurisdiction. Instead, the proceeds of the recovered property (or money equivalent) are placed in the U.K. Government's Consolidated Fund. Some countries have entered into asset-sharing agreements with the United Kingdom in respect of conviction based confiscation cases. These, however, are not thought to apply to NCB asset forfeiture. The United Kingdom is taking steps to enter into either bilateral treaties or memoranda of understanding with foreign states with regard to NCB asset forfeiture. Asset sharing agreements may also be entered into on a case-by-case basis. With respect to corruption cases, the United Kingdom has ratified UNCAC, and as such is mindful of its obligations under that Convention.

## Private Civil Litigation

If the mechanism of mutual legal assistance or the adoption of the case by U.K. law enforcement is not feasible, a foreign state has the option to bring proceedings in the civil courts. It is not the purpose of this special contribution to explore the myriad of potential claims available in the United Kingdom when seeking to recover the ill-gotten gains of corrupt officials. A foreign state, in its capacity as a private litigant may, however, apply to the court for a variety of orders, such as

- a freezing order (including worldwide);
- the disclosure of information by third parties;
- gagging orders;

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215. Proceeds of Crime Act 2002 (United Kingdom), Section 6, and *The Financial Challenge to Crime and Terrorism* (London: HM Treasury, 2007), p. 24. In confiscation proceedings it is not necessary to link a particular crime to a particular benefit. The court can, therefore, assume that all of the defendant's properties held over the previous six years are the proceeds of crime. This is known as the option of "general criminal conduct confiscation." Prior to the making of the confiscation order a restraint order may be obtained from the court to prevent the dissipation of assets that may later need to be sold to satisfy the confiscation order.

216. Proceeds of Crime Act 2002 (United Kingdom), Section 13 (5)–(6)

217. Proceeds of Crime Act 2002 (United Kingdom), Section 281.

- search and seizure orders; and
- appointment of a provisional liquidator over a company.

The speed of deployment and the variety of tools available in civil litigation in England and Wales makes it a jurisdiction of choice when trying to freeze, trace, and recover stolen assets. It is not unusual, however, if there is an overseas element, for a challenge to be raised to the jurisdiction of the English court. The English courts, however, have jurisdiction to determine proceedings if, for example,

- a defendant is in England;
- a defendant submits to the jurisdiction;
- the assets in question are within or have passed through the jurisdiction; or
- the act of corruption was within the jurisdiction.

Laundering of the proceeds of corruption through England should be sufficient for the court to have jurisdiction.<sup>218</sup>

## Litigation Tools for the Private Litigant

### **Freezing Injunctions (including with extra-territorial effect)**

A freezing injunction<sup>219</sup> (now known as a freezing order) can be used to freeze assets and monies suspected of being the proceeds of corruption, pending the outcome of the claim.<sup>220</sup> It is an interim injunction, and may be made by the court wherever it is “just and convenient” to do so. It is usually made without notice, and often before the claim has been issued. There are a number of requirements for a freezing order to be made:

- the plaintiff<sup>221</sup> has a good, arguable case;
- the plaintiff can adduce sufficient evidence as to the existence and location of assets that the injunction, if made, would affect;
- there is a real risk of dissipation of the assets before a judgment could be enforced;
- it is just and convenient; and
- the plaintiff must give a cross-undertaking in damages.

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218. An illustration of where the English court will consider that it has sufficient jurisdiction to determine a matter is *Attorney General of Zambia v. Meer Care & Desai & Ors*, [2007] EWHC 952 (Ch) in CD-ROM appendix H.

219. Supreme Court Act 1981, Section 37(1).

220. Once known as the Mareva Injunction after the case of *Mareva Compania Naviera SA v. International Bulkcarriers SA*, [1975] 2 Lloyd’s Rep 509.

221. The term “plaintiff” is no longer used in litigation in England and Wales. Following reforms to the Civil Procedure Rules in 1998 (known as the “Woolf reforms”), English legal language was changed from the use of “plaintiff” to “claimant” when referring to a party bringing proceedings within the courts of England and Wales.

As mentioned above, the plaintiff must have a substantive claim capable of being brought in the English court if an injunction (which provides only interim relief and is ancillary to the main cause of action) is to be granted.<sup>222</sup> The English court, however, does have the power to grant interim relief (including freezing orders) when proceedings between the same parties are pending in the courts of another convention state.<sup>223</sup>

The requirement to show a good, arguable case relates to the merits of the substantive claim against the defendant.<sup>224</sup>

Ordinarily, the plaintiff will have to show that the defendant has some assets within the jurisdiction. The meaning, however, of “asset” is wide, and can include motor vehicles, *objets d’art*, jewelry, and choses, as well as money.

If a defendant’s bank account in England is overdrawn, the court is still likely to infer the presence of assets within the jurisdiction. Equally, the court may still freeze an account that is held jointly with somebody who is not a party to the action.<sup>225</sup>

Regarding land, a freezing injunction cannot be registered at the Land Registry as a charge against the property.<sup>226</sup> It can, however, be registered as a restriction, which will have the effect of preventing the sale of the asset to any third party who is either reputable or is being funded by a reputable financial institution.

In certain circumstances, the court may be prepared to pierce the corporate veil and look beyond a company structure to grant injunctive relief.<sup>227</sup>

Freezing orders may, in exceptional circumstances, be granted by a court covering assets both in England and Wales and abroad. The court can grant a freezing order over assets abroad where there are no assets in England and Wales, although this is not common.<sup>228</sup> Such an order will not, however, be made if there are sufficient assets within the jurisdiction to satisfy a judgment in favor of the plaintiff.<sup>229</sup> These worldwide freezing orders will be crafted so as not to affect third parties unless it may be enforced by the court of the state in which the assets are located.<sup>230</sup>

222. *Siskina v. Distos Compania Naviera SA*, [1979] 2 AC 210, HL.

223. Civil Jurisdiction and Judgments Act 1982, Section 25.

224. *The Niedersachsen*, [1983] 2, Lloyds Rep 600, 605.

225. *SCF Finance Ltd v. Masri*, [1985] 1 WLR 876.

226. For the purposes of the Land Charges Act 1972, Section 6 (1)(a). See *Stockler v. Fourways Estates Ltd*, [1984] 1, WLR 25.

227. *TSB Private Bank Ltd International SA v. Chabra*, [1992] 1 WLR 231.

228. *Derby v. Weldon (No 2)*, [1989] 1 All ER 1002, CA.

229. *Derby v. Weldon (No 1)*, [1990] Ch 48, CA.

230. *Derby v. Weldon (No 2)*, [1989] 1, All ER 1002, CA; *Babanaft Intl Co SA v. Bassatne* [1990], Ch 13, CA.

A defendant does not have to be resident within the jurisdiction of England and Wales for a freezing order to be made against him or her.<sup>231</sup> The court, however, is more likely to infer that there is a risk of dissipation of assets if the defendant is resident overseas. If, however, a defendant is “established within the jurisdiction in the sense of having assets here which they could not, or would not, wish to dissipate, merely to avoid some judgment which seems likely to be given against them,”<sup>232</sup> then the court is unlikely to infer that there is a risk of disposal of assets by virtue of the defendant being based overseas.

Interim injunctions are granted before trial, and as such, before the merits of the case have been determined. For this reason, the plaintiff is required to give a cross-undertaking to pay damages, that is, a promise to pay the defendant compensation if the plaintiff later fails to establish a right to the injunction. The undertaking is ordinarily unlimited, although it may be possible in some circumstances to limit the amount. The enforcement of the undertaking, however, is only after an enquiry into the loss suffered by the defendant arising out of the injunction. The undertaking is given to the court, not the defendant, and the court has the discretion to enforce it or not. Unless there are special circumstances, there is a presumption that the undertaking will be enforced.<sup>233</sup>

The court may grant a freezing order if it is “just and convenient.”<sup>234</sup> However, even if a plaintiff has satisfied all of the principle elements necessary for the making of a freezing order, the court may still refuse to grant the order. In exercising its discretion, for example, the court will assess whether the defendant’s assets satisfy, in any substantive way, any judgment the plaintiff may obtain. In the case of *Rasu Maritima SA v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*,<sup>235</sup> a Liberian company sought a freezing order, the underlying claim for which related to substantial damages for breach of a charter party, against an Indonesian state-owned company. The freezing order related to part of an Indonesian fertilizer plant, valued at approximately \$12 million. Its scrap value, however, was approximately \$350,000. In his judgment, Lord Denning MR described the scrap value as a “drop in the ocean”<sup>236</sup> compared with the size of the claim.

A freezing order preserves the assets over which it is granted and binds the parties to which it is addressed. Those parties together with any third parties with knowledge of it owe a duty to the court to comply with the terms of the order. Anyone who permits or knowingly assists a breach of the order risks being held in contempt of court.<sup>237</sup>

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231. Supreme Court Act 1981, Section 37 (3).

232. Per Denning MR in *Z Ltd v. A-Z*, [1982] 1 QB 558, at 585.

233. *Lunn Poly Ltd and Ors v. Liverpool and Lancashire Properties Ltd*, [2006] EWCA Civ 430.

234. Supreme Court Act 1981, Section 37 (1).

235. [1978] QB 644, CA.

236. *Rasu Maritima SA v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, [1978] QB 644, CA, p. 663.

237. *HM Customs and Excise v. Barclays Bank plc*, [2006] All ER (D) 215 (Jun).

The court may appoint a receiver<sup>238</sup> whenever it is “right or just” to do so,<sup>239</sup> either in support of a freezing order or independently.

### *Living Expenses and Legal Costs*

A freezing order will ordinarily contain an order for the payment of the defendant’s ordinary living expenses. In deciding the amount of ordinary living expenses, the court will take account of the defendant’s lifestyle.

With respect to legal costs, the court will be reasonably liberal in allowing the draw-down on legal expenses for the purpose of defending the present litigation.<sup>240</sup> The careful monitoring of living expenses and legal costs is often a litigation pressure point.

If the defendant is a company, the order will ordinarily make provision for the dealing and disposal of assets in the ordinary course of business. Trade debts, however, must be payments made in good faith in the ordinary course of business.<sup>241</sup>

### *Ancillary Orders*<sup>242</sup>

Other orders that may accompany a freezing order include

- an order for the delivery up of the defendant’s passport, if the defendant is within the jurisdiction of England and Wales;<sup>243</sup>
- an order for the repatriation of assets outside the jurisdiction back to England and Wales;<sup>244</sup>
- an order preventing third parties from informing the defendants of the existence of a freezing order (see gagging orders, below);
- an order requiring the defendant (anticipated defendant) to disclose the identity and location of his assets;<sup>245</sup> this, however, cannot be used as a “fishing expedition”;
- in exceptional and justifiable circumstances, an order for the cross-examination of the anticipated defendant’s disclosure affidavit;<sup>246</sup> (this order, however, can only be obtained for the legitimate purpose of cross-examining a defendant on his disclosure affidavit to establish the extent of his assets; this order will not be granted where sufficient assets are known about to meet the claim);<sup>247</sup> and

238. Supreme Court Act 1981, Section 37 (1).

239. *Derby v. Weldon* (nos. 3 & 4) [1990] Ch 65.

240. *Furylong Ltd v. Masterpiece Technology* [2004] EWHC 3103 (Ch).

241. *Iraqi Ministry of Defence v. Arcepey Shipping Co SA* [1981] QB 65.

242. Supreme Court Act 1981, Section 37 (1).

243. *Bayer AG v. Winter* (No 1), [1986] 1WLR 497 and *B v. B* [1997] 3 All ER 258.

244. *Derby v. Weldon* (No 6), [1990] 1 WLR 1139 and *DPP v. Scarlett* [2000] 1 WLR 515.

245. *A J Bekhor and Co Ltd v. Bilton*, [1981] QB 923.

246. *A J Bekhor and Co Ltd v. Bilton*, [1981] QB 923.

247. *Great Future Intl Ltd v. Sealand Housing Corporation*, [2001] CPLR 293.

- an order requiring the defendant to deliver up certain assets to the plaintiff's solicitors.<sup>248</sup>

At the time of the making of the freezing order, a plaintiff will have to give the following undertakings to the court, which will, in turn, be incorporated into the freezing order:

- the cross-undertaking as to damages, as explained above;
- to notify the defendant forthwith of the terms of the order, and to serve a copy on the defendant, including the supporting evidence, together with the application, a thorough note of the *ex parte* hearing, and the claim form;
- to inform any third parties affected by the order of their right to apply to the court for directions, or to vary the order; and
- to indemnify any third party for any expenses incurred in complying with the order, for example, the reasonable costs incurred by a bank in complying with an order freezing a bank account.<sup>249</sup>

### *Duty to Disclose all Material Facts*

When applying for any *ex parte* relief, the applicant must disclose to the court all material facts<sup>250</sup> so the court can take these into account in deciding whether to grant the relief requested. That duty to make full and frank disclosure is ongoing and is strictly applied by the court on applications for freezing or search orders because of the substantial damage to a defendant or other party that may be caused by such orders.

If, therefore, at any time after the making of a freezing order, the plaintiff becomes aware of a material fact (including one not in his favor) that was not disclosed to the court at the time of the making of the order, it must be brought to the attention of the court at the earliest opportunity, even if it leads to the discharge of the freezing order. The hearing of the material non-disclosure will be on notice in the presence of the defendant.

If the material non-disclosure is proved, the court has the discretion either to refuse to extend the freezing order, or to discharge it. In exercising that discretion, the court will balance the overriding objective and the need for proportionality.<sup>251</sup> In assessing the seriousness and consequences of the non-disclosure, the court will look at all the circumstances, such as

- the seriousness of the breach (whether it was intentional);
- the blameworthiness of the plaintiff and its lawyers;
- the harm to the defendant;
- the harm to the applicant if the injunctive relief is lost; and

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248. Supreme Court Act 1981, Section 37 (1) and *CBS United Kingdom Ltd v. Lambert*, [1983] Ch 37.

249. *Searose Ltd v. Seatrain Ltd*, [1981] 1 WLR 894.

250. Civil Procedure Rules, Practice Direction 25, para. 3.3.

251. *Memory Corp Ltd v. Sidhu* (No 1), [2000] 1 WLR, 1443, CA.

- whether the breach could be remedied and, if so, whether it was remedied and how quickly.

Finally, a material non-disclosure may give rise to a claim for compensation under the cross-undertaking in damages. If the court decides to set aside the injunction, it will consider whether a further injunction should be granted.

### *Discharge or Variation of Freezing Order*

If a defendant can show that the plaintiff does not have a good, arguable case on the merits, or that there is insufficient risk of dissipation of assets, the defendant may be successful in discharging the freezing order. A discharge of the freezing order may also be obtained by the defendant providing security for the claim, which can take the form of a payment into a bank account in the joint names of the parties' solicitors, or a payment into court. Alternatively, a charge may be created over the defendant's property.

### *Bank Accounts*

A freezing order will contain an order expressly stating that it does not prevent the bank at which the account is held from exercising any right of set-off<sup>252</sup> it may have with respect to facilities afforded to it by the defendant before the date of the order. Once the order has been served, however, the bank should recall any credit card previously issued to the defendant.<sup>253</sup> A freezing order may cover assets that were acquired by the defendant after the granting of the injunction but before execution of any judgment with respect to the substantive claim. The purpose of this type of order is to cover the situation in which a defendant does not have sufficient assets at the time of the granting of the freezing order with which to meet the plaintiff's claim. In such circumstances, the freezing order does not need to state a maximum sum.<sup>254</sup>

### *Gagging Orders*

The court may make for a limited period a "gagging order"<sup>255</sup> preventing third parties (including banks) from informing the defendant of the existence of a freezing order or other order, such as a disclosure order.

If, for example, a disclosure order has the effect of delivering up bank statements that ultimately reveal further assets or other accounts at other financial institutions or in other

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252. Banking set-off can take place if a customer has two or more accounts with the same bank and one account is in debit and the other is in credit. The bank may, subject to a number of requirements, use the monies in the account in credit to set them against the account in debit.

253. *Z Ltd v. A-Z*, [1982] 1 QB 558 at 591 per Lord Denning MR.

254. *Z Ltd v. A-Z*, [1982] 1 WB 558 at 576, per Lord Denning MR.

255. Supreme Court Act 1981, Section 37 (1).

jurisdictions, the gagging order can be particularly advantageous. This is because it prevents “tipping-off” and limits the risk of dissipation or destruction of vital evidence.

## Disclosure Orders

Disclosure orders<sup>256</sup> obtained against third parties are a powerful tool with which to obtain evidence relating to bank accounts and other assets from financial institutions and professional advisers, through which money may have been laundered or assets acquired. The disclosure order can be particularly powerful when recognized and enforced overseas. English worldwide freezing orders and disclosure orders are ordinarily given recognition in either Commonwealth or former Commonwealth countries. This is of particular assistance if monies are deposited in offshore accounts, or have been laundered through offshore jurisdictions.

Disclosure orders may be granted by the court in which the documents sought are likely to support or adversely affect the case of one of the other parties to the proceedings.<sup>257</sup> A party cannot embark on a “fishing expedition,” thus the applicant will need to specify the document or class of documents for which disclosure is sought. A disclosure order will also require the party against whom it is made to specify any documents no longer in his or her control<sup>258</sup> and to indicate what has happened to documents no longer in his or her control.<sup>259</sup>

The court also has power to order a non-party to disclose the identity of a wrongdoer;<sup>260</sup> this is a particularly powerful litigation tool when exercised in the right circumstances. The principle underlying this type of disclosure order is set out in the statement by Lord Reid in *Norwich Pharmacal Co v. Customs and Excise Commissioners*:<sup>261</sup>

[The authorities] seem to me to point to a very reasonable principle that if, through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up through voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the other person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.

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256. Civil Procedure Rules 1998, Part 31 rule 31.17.

257. Civil Procedure Rules, Part 31 rule 31.17 (3)(a).

258. Civil Procedure Rules, Part 31 rule 31.17 (4)(a).

259. Civil Procedure Rules, Part 31 rule 31.17 (4)(b)(i).

260. *Norwich Pharmacal Co v. Customs and Excise Commissioners*, [1974] AC 133, 175, HL and Civil Procedure Rules, Part 31 rule 31.18.

261. [1974] AC 133, 175, HL.

The purpose, therefore, of a Norwich Pharmacal order, is to find out the identity of an alleged wrongdoer. The order will be made against the person who has facilitated the wrongdoing, regardless of whether it was carried out unwittingly.

A Norwich Pharmacal order can be obtained for the disclosure of information and documents relating to a possible tort, even though it could not be shown (without the information being sought) whether the person actually committed the tort. In addition, the ability to apply for and the making of such an order are not restricted to claims in tort.<sup>262</sup>

A Norwich Pharmacal disclosure order will also not be granted for mere fishing expeditions. There must be a real and unsatisfied claim against the unknown wrongdoer, and the identity of the wrongdoer must be revealed if the claim is to be pursued.<sup>263</sup> The granting of any disclosure order is discretionary. Thus, relief may be refused, even if the conditions for the making of the order have been satisfied, if the order is not in the public interest. Additionally, all other legitimate avenues for discovering the information must have been exhausted before relief will be granted.<sup>264</sup>

In the making of a disclosure order, there is a delicate balance to be struck between someone who is a mere witness (and can be compelled to attend to give evidence and produce documents, by serving a witness summons to attend trial) and someone who has become mixed up in, and facilitated, someone else's wrongdoing.<sup>265</sup> A disclosure order will not, however, be made against a person who is simply aware of the identities of the alleged wrongdoers.

It may be possible for the costs associated with obtaining a disclosure order to be recovered against the wrongdoer, if liability is established. However, the plaintiff will need to demonstrate that it was foreseeable that obtaining the order was necessary to bring the substantive proceedings.<sup>266</sup> If this is not possible, the plaintiffs will normally have to pay not only their own legal costs, but also the legal costs and expenses of the subject or party to the disclosure order.

## Search and Seizure Order

A search order (formerly known as an Anton Piller order)<sup>267</sup> is a draconian measure that will only be granted as a matter of last resort.<sup>268</sup> A search and seizure order<sup>269</sup> per-

262. *Ashworth Hospital Authority v. MGN Ltd*, [2002] 1 WLR 2033.

263. *British Steel Corporation v. Granada Television Ltd*, [1981] AC 1096, HL.

264. *Mitsui & Co Ltd v. Nexen Petroleum Ltd*, [2005] 3, All ER 511.

265. *Ricci v. Chow*, [1987] 1 WLR 1685 CA.

266. *Totalise plc v. Motley Fool Ltd*, [2002] 1 WLR 1233 CA.

267. *Anton Piller KG v. Manufacturing Processes*, [1976] 1 Ch 55, CA, per Ormrod LJ.

268. Where possible, a less draconian interlocutory order should be used, for example, an on-notice application for an order to enter a defendant's premises to inspect property.

269. Civil Procedure Rules, Part 25 rule 25.1(1)(h).

mits a plaintiff's lawyers to attend the premises named in the order for the purpose of preserving evidence that might otherwise be destroyed.

### *Requirements*

Three basic requirements must be satisfied before the court may grant such an order:

- There must be an extremely strong *prima facie* case on the merits;<sup>270</sup>
- The defendant's activities must cause very serious potential or actual harm to the plaintiff's interest; and
- There must be clear evidence that incriminating documents or other things are in the defendant's possession, and that there is a real possibility that such material may be destroyed before any application or notice can be made.

### *Undertakings*

It is important to note that an application for a search and seizure order will have to be accompanied by an undertaking on the part of the plaintiff. That undertaking will provide safeguards for the defendant, and can be divided into two categories: first, undertakings given by the plaintiff personally, and second, undertakings given by the plaintiff's solicitors. Ordinarily, however, undertakings will have to be given by the plaintiff personally.<sup>271</sup> Personal undertakings<sup>272</sup> can include, for example,

- to abide by an order as to damages;
- to swear and file an affidavit in support of an application to the court, the nature of which was so urgent that evidence was provided orally or in unsworn form;
- to serve a search order by a solicitor, together with copies of the evidence in support, together with an application for a return hearing a few days after service;
- where an application was urgent, to swear and file affidavits forthwith and issue a claim form;
- not to use items seized other than for the purposes of the claim, without the permission of the court;
- to insure items removed from the defendant's premises.

The plaintiff's solicitors will normally undertake to keep safe and retain all items and documents seized, and within two working days to deliver the original documents and articles seized to the defendant's solicitors, with the exception of any original documents belonging to the plaintiff.

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270. This is stronger than that of a freezing order.

271. Lawyers will not give undertakings relating to matters over which they have no control.

272. See Practice Direction, Part 25 – Interim Injunctions, Annex – Sample Search Order, Schedule C “Undertakings Given to the Court by the Applicant”: [http://www.justice.gov.uk/civil/procrules\\_fin/contents/practice\\_directions/pd\\_part25.htm#IDAIQY3B](http://www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_part25.htm#IDAIQY3B).

The independent supervising solicitor will give a number of undertakings including, for example, to serve on the defendant a written report on the carrying out of the search order, and to file the same with the court for consideration at the next hearing.

A search order also contains an implied undertaking not to use the items seized for collateral purposes.<sup>273</sup>

### *Draconian Nature*

The draconian nature of the search order is perhaps best illustrated by its subliminal message—that a defendant cannot be trusted. If used, therefore, in relation to a business, particularly if coupled with a freezing order served on the defendant's bankers, it can result in the refusal of credit and have the effect of closing down the defendant's business.<sup>274</sup> The effect of this should be borne in mind when giving the cross-undertaking in damages referred to earlier.

### *Safeguards*

The execution of a search order must be overseen by an independent, named solicitor experienced with the workings of search orders. The supervising solicitor will be named in the terms of the order and in the affidavit in support of the application for the order. The order will also ordinarily contain restrictions on when and how the search order may be executed; for example, if the defendant is a woman living alone, a woman must accompany those executing the order; the number of people who may enter the premises may be restricted; the order must be served on a weekday during ordinary working hours (to allow the defendant time to seek legal advice); and so forth.

To facilitate the execution of the order, the defendant will often be ordered to, for example, print out material held on a computer in legible or computer-readable form, and open any safes or locked drawers on the premises.

Search orders do not permit solicitors or the plaintiff or associates of the plaintiff to use force to gain entry. Often, the police will be informed before a search is executed, in case there is a breach of the peace. Items over which the defendant claims privilege during the search will be excluded by the supervising solicitor, who will retain them pending further order of the court. Also, items seized pursuant to the order are retained by the plaintiff's solicitor and not the plaintiff.

### *Non-compliance*

Non-compliance with the search order by the defendant may amount to contempt of

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273. *Crest Homes plc v. Marks*, [1987] AC 829, HL.

274. *Columbia Pictures Industries Inc v. Robinson*, [1986] Ch 38.

court, with the potential result that the defendant, upon application of the plaintiff to court, will be committed to prison. In addition, the court may draw inferences at court from a defendant's refusal to comply with a search order.<sup>275</sup>

### *Material Changes*

The duty to the court to give full and frank disclosure is both strict and ongoing (including after execution of the order). As with disclosure orders and freezing orders, any material changes that occur between the granting of the search order and its execution must be brought to the attention of the court so that it can reconsider the application in light of the new information.

### *Discharging or Varying a Search Order*

As with freezing orders, a defendant may apply to vary or discharge the search order at short notice. The order may be discharged if there has been a material non-disclosure on the application without notice, or one or more of the conditions has not been satisfied.

### *Ancillary Orders*

Upon application, the English courts can order a defendant to provide a statement of assets and income, the source of wealth, and any dealings involving these assets or income. Defendants will frequently invoke the right against self-incrimination to try to defeat these types of applications and orders. Such ancillary orders can be very effective litigation tactics. These orders can alert a plaintiff to assets of which the plaintiff was previously unaware or be used to discredit a defendant before the court if it can later be shown that the defendant has assets that he or she did not disclose in the statement of assets.

## **Provisional Liquidators**

Corruption often involves the use of corporate entities, the directors of which may be nominees, and the shareholders of which may be either other corporate entities or trusts. Gaining control of the management of those companies to trace, locate, and recover the proceeds of corruption may be a strategic necessity. The appointment of a provisional liquidator over the company can be very effective.

### *Requirements*

To appoint a provisional liquidator in England and Wales, a petition has to be presented to the Companies Court in the High Court, to wind up the company. The basis for ap-

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275. *Anton Piller KG v. Manufacturing Processes Ltd*, [1976] 1 Ch 55, CA.

plying to wind up a company is usually an undisputed debt of at least £750 (approximately \$1,060), or that it is “just and equitable” that the company be wound up.<sup>276</sup> In cases of fraud, the petition is likely to be based upon the just and equitable principle, with the intention that stolen assets should be pursued by the liquidator, but out of caution, it is also recommended that this be coupled with an undisputed debt if possible.

A provisional liquidator is usually appointed if there is a serious risk of dissipation of assets, or of the assets being put further beyond the grasp of creditors. Applications for provisional liquidators are always made on an urgent basis, and in the absence of the defendant (*ex parte*), similar to a freezing order. The grounds for making either application may, in fact, be very similar.

### *Company Incorporated Abroad*

If a company is incorporated or situated abroad, and it can be shown that the company has “sufficient connection” with the jurisdiction, the English court will make an order to wind up the company. The sufficient connection is usually evidenced by the company having assets in England or Wales. Those assets may be in the jurisdiction on a temporary basis, including because funds are passing through a London bank. Sufficient connection can occur if a director is found to have a residence (even a second home) within the jurisdiction, or insurance connected to the company has been placed through the London market.

The powers of a provisional liquidator will include getting in and preserving the company’s assets, extending to the ability to instruct lawyers to pursue assets in England and overseas. Provisional liquidators are independent and are appointed by the court, thus, many jurisdictions will recognize the appointment and powers. Provisional liquidators have formidable powers, not available to a regular plaintiff, to compel the provision of information and the handing over of assets. The provisional liquidator route is therefore often preferred for the purpose of recovering stolen assets.

Provisional liquidators have the rights of the company to call for the company’s banking records. These documents may not be immediately at hand, but banks are now required to keep records for a number of years, stored either on microfiche or digitally. These records can include transfer vouchers in relation to significant movements of funds, account opening, and anti-money laundering information. The ability to call for the company’s records will include disclosure of the files held by the company for whom the nominee director works. If the nominee director is in a different jurisdiction from the country of incorporation of the company in liquidation, the delivery of the books and records can be required relatively quickly and inexpensively, without the need to obtain further disclosure orders or engaging letters of request. Those records

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276. Insolvency Act 1986, Section 122(f) and (g).

should include copies of the instructions to set up the company, which can link a key party to a company where previously it was impossible to show the connection.

## **Civil Proceedings: Advantages and Disadvantages**

The principal disadvantage of litigating in England and Wales, and in particular of the asset tracing tools, is the legal costs, particularly when exporting freezing and disclosure orders abroad. The costs associated with asset tracing are notoriously difficult to predict because of the train of enquiry that arises from disclosed documents. The costs, however, can be a fraction of the value of the assets recovered and the execution of the litigation tools can be extremely speedy. It is possible, therefore, for the litigation to be broken down into component parts using one recovery to fund the next set of proceedings. The costs associated with asset tracing are often seen as prohibitive. However, sophisticated fee arrangements, including the use of commercial third party funders, can be used in appropriate cases.

In addition to the speed with which the litigation tools can be deployed, civil proceedings have the advantage of the lower burden of proof. Cases are decided on the balance of probabilities standard, which is particularly useful in corruption cases in which evidence is incomplete and inferences need to be drawn from the evidence available.

Unlike with mutual legal assistance, a foreign state is the plaintiff in a private civil proceeding and will have much greater control over the proceedings, particularly over strategy.

Finally, English judgments are still widely recognized and enforced by other jurisdictions.

# The United Kingdom's Asset Recovery Strategy

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Organized crime causes social and economic harm estimated at £20 billion<sup>277</sup> (approximately \$28.3 billion) to communities in Britain each year, and finance is the lifeblood of these threats.<sup>278</sup> Criminals, driven by profit, have come to rely on the financial system; thus, the financial system and the information within it now provide a new opportunity to tackle these threats. The ability to deny access to the financial system to criminals presents a new avenue through which to weaken their networks. Just as the financial system and crime are global in reach, so the financial challenge must also be global—it is estimated that £3 billion (approximately \$4.24 billion) of criminal profits are moved out of the United Kingdom annually.<sup>279</sup> In the same way that there must be no hiding place for criminals, so there must be no hiding place for those who profit from their crimes. For it to be successful, however, the financial challenge to crime must involve lawmakers, legitimate businesses in the financial sector, law enforcement agencies, and the international community.

Based on international standards and agreements, as well as specific threats to the United Kingdom, the joint HM Treasury/Home Office document *The Financial Challenge to Crime and Terrorism* (2007) sets out the United Kingdom's over-arching strategy on the use of financial tools and levers in the fight against crime and terrorism. The overall strategy is to use tools to

- deter crime—by increasing the risk and lowering the reward;
- detect crime when it happens; and
- disrupt those responsible and hold them to account for their actions.

This challenge to criminals through the use of the financial system must also avoid imposing disproportionate costs on the rest of the economy and society.<sup>280</sup> The United Kingdom's approach, therefore, is to be

- **effective**, and make maximum impact on the underlying criminal threat;

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277. *The Financial Challenge to Crime and Terrorism* (London: HM Treasury, 2007), p. 3.

278. References contained in this special contribution to the United Kingdom or to the United Kingdom's strategy do not necessarily extend to Scotland.

279. *The Financial Challenge to Crime and Terrorism* (London: HM Treasury, 2007), p. 3.

280. *The Financial Challenge to Crime and Terrorism* (London: HM Treasury, 2007), p. 3.

- **proportionate**, so that the benefits of intervention are justified, and outweigh the costs; and
- **successful at engagement**, so that all stakeholders in the Government and private sector, in the United Kingdom and abroad, work collaboratively in partnership.<sup>281</sup>

## Legal Foundations

The United Kingdom has sought to put in place a framework by which to achieve its objectives and fulfill its international responsibilities, but within its principles of effectiveness, proportionality, and successful engagement. The framework can be summarized as

- a solid legal framework, outlawing money laundering;
- financial safeguards, to be applied by industry, that are backed up by legal supervision and guidance and that help identify and trace illicit funds; and
- measures to maximize the investigative and intelligence value of financial information generated by criminals as they move money through the financial system, and an armory of tools with which to disrupt the flow of criminal assets and hold those responsible to account.<sup>282</sup>

The United Kingdom's anti-money laundering legislation is now contained within the Proceeds of Crime Act 2002 and is applicable to the proceeds of all crimes. Law enforcement agencies, therefore, no longer need to show that illicit monies are derived from one particular kind of crime.<sup>283</sup>

The trail left as money moves through the financial system means that financial information has become a powerful investigative and intelligence tool, enabling the identification of those responsible and the location of proceeds of crime, which can then be recovered.

A number of powerful tools are now available to the investigator of money laundering, criminal confiscation proceedings, and NCB asset forfeiture actions:

- Production Orders, whereby an institution or person (such as a bank or lawyer) holding material is ordered either to produce it or give access to it (such as bank statements and conveyancing files);<sup>284</sup>
- Disclosure Orders (previously only available to the Assets Recovery Agency, but available to the Serious Organised Crime Agency (SOCA) and other law enforcement agencies since April 1, 2008);<sup>285</sup>

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281. *The Financial Challenge to Crime and Terrorism* (London: HM Treasury, 2007), p. 9.

282. *The Financial Challenge to Crime and Terrorism* (London: HM Treasury, 2007), p. 17.

283. *The Financial Challenge to Crime and Terrorism* (London: HM Treasury, 2007), p. 17.

284. See Proceeds of Crime Act 2002 (United Kingdom), Section 345; and *The Financial Challenge to Crime and Terrorism* (London: HM Treasury, 2007), p. 21.

285. See Proceeds of Crime Act 2002 (United Kingdom), Section 357, whereby a person can be required to answer questions, provide information, or produce documents.

- Customer Information Orders;<sup>286</sup> and
- Account Monitoring Orders.<sup>287</sup>

With respect to anti-money laundering, the powers listed above are supported by the private sector identifying and reporting the warning signs of potential criminal activity under the Suspicious Activity Reports regime (SARs). The maintenance of “know your customer” (KYC) records under the anti-money laundering framework supports not just money laundering investigations but also asset recovery investigations, and is a good example of one part of the United Kingdom’s framework feeding and supporting another in the fight against crime.

The United Kingdom’s over-arching strategic proposals include, among other things, “new steps to make financial tools a ‘mainstream’ part of the United Kingdom’s approach to tackling crime and terrorism, including through new powers to increase their impact, a substantial increase in targets for criminal asset recovery, and steps to ensure that Companies House data is fully utilised by law enforcement agencies.”<sup>288</sup> Other proposals reflect the United Kingdom’s more holistic approach to tackling organized crime, and include further data sharing between the public and private sectors, better pooling of intelligence between different public bodies, measures to tackle the abuse of money service businesses, and further steps to extend a risk-based approach to anti-money laundering.

Asset recovery is, therefore, just one of the measures by which the United Kingdom is working toward its objectives. The substantial increase of criminal asset recovery targets (£250 million [approximately \$353.6 million] by 2009–10) demonstrates the United Kingdom’s priority for this issue.<sup>289</sup>

## United Kingdom Asset Recovery

In addition to providing the legislative framework for anti-money laundering, the Proceeds of Crime Act also provides powers to target criminal funds in four important areas:

- NCB asset forfeiture powers (known in the United Kingdom as civil recovery);
- criminal confiscation proceedings;
- cash seizure and forfeiture; and
- taxation.

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286. See Proceeds of Crime Act 2002 (United Kingdom), Section 363, which requires banks or other financial institutions to provide details of any accounts held by a person connected to an investigation.

287. See Proceeds of Crime Act 2002 (United Kingdom), Section 370, which requires a bank or other financial institution to provide account information on a suspect account, or accounts, for a specified period of time.

288. *The Financial Challenge to Crime and Terrorism* (London: HM Treasury, 2007), p. 4.

289. *The Financial Challenge to Crime and Terrorism* (London: HM Treasury, 2007), p. 61.

Each of these asset recovery powers will be touched upon in the context of their role in the United Kingdom asset recovery strategy.

The role of asset recovery in the United Kingdom (and within asset recovery, the use of NCB asset forfeiture) fits comfortably within all three of the United Kingdom's objectives in the fight against crime and terrorism.<sup>290</sup> Asset recovery serves to strip criminals of their funds and property, jeopardizing not just their liberty but their lifelines. Recovered funds are used to fund further action against crime, and to compensate victims.

Asset recovery is just one of the deterrent measures that the United Kingdom is either using or working toward as part of its overall strategy. Another measure is the SARs regime, which forms part of the United Kingdom's anti-money laundering framework and requires any person wishing to avoid committing a money laundering offense<sup>291</sup> to make suspicious activity reports to the SOCA's Financial Intelligence Unit. In addition, the KYC steps taken by financial institutions and others, coupled with the records that they keep as part of the United Kingdom's anti-money laundering framework, enable law enforcement to look backward, sideways (identifying and confirming associations between individuals and activities, both in the United Kingdom and abroad), and forward (identifying the warning signs of criminal activity in preparation).

The asset recovery regime and the anti-money laundering framework both contribute toward creating a hostile environment for criminals, and limit the funds available to them.<sup>292</sup>

One of the key elements of asset recovery, in particular NCB asset forfeiture, is its ability to provide an alternative to the otherwise limited choice between prosecution and no action. The breadth of tools now available to U.K. law enforcement drives downward the expected reward to criminals, and their likely detection up.<sup>293</sup>

Asset recovery powers will, however, only assist the United Kingdom in achieving its objectives if the powers are used effectively, proportionately, and with the full engagement of legitimate interested parties. To be effective, the powers must be used to maximum impact. Accordingly, and to make yet further inroads into the criminal economy, the United Kingdom

- merged the Asset Recovery Agency (ARA) (in which the NCB asset forfeiture power had been centralized and nurtured from 2002 to 2007) into SOCA, and rolled out the powers to other law enforcement agencies as well as SOCA. After

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290. To deter crime and terrorism, detect the criminal or terrorist, and disrupt criminal and terrorist activity.

291. Proceeds of Crime Act 2002 (United Kingdom), Sections 327–329.

292. *The Financial Challenge to Crime and Terrorism* (London: HM Treasury, 2007), p. 10.

293. *The Financial Challenge to Crime and Terrorism* (London: HM Treasury, 2007), p. 11.

five years and numerous legal challenges (including at the European Court of Human Rights), all of which the ARA successfully defended, the legislation and power were considered mature enough to extend for use by other law enforcement agencies; and

- is determining whether to make the consideration of asset recovery<sup>294</sup> by the court mandatory at every criminal trial.

The application of the powers and measures in place to assist the United Kingdom in achieving its objectives must be proportionate, balancing the need to protect citizens' privacy and fundamental rights on the one hand, and to ensure their security on the other. To succeed, however, there must be engagement and close coordination among all stakeholders, whether from the public or private sectors. This requires careful listening, feedback, and information sharing between the Government and the regulated sector, clear roles for stakeholders, and engagement with international partners.<sup>295</sup>

The reliance on finance is one of the greatest vulnerabilities of criminals, and legislation has been put in place to provide new opportunities to arrest and prosecute those involved in crime.

### **NCB Asset Forfeiture**

The Proceeds of Crime Act 2002 introduced NCB asset forfeiture. Under this power, a recovery order made (using the balance of probabilities burden of proof) following proceedings in the High Court enables the law enforcement agency to recover property that is, or that represents, "property obtained through unlawful conduct."<sup>296</sup>

Traditionally, NCB asset forfeiture has only been used if it has not been possible to bring criminal proceedings or where forfeiture proceedings have not been successful after conviction. Its strength, however, is its ability to disrupt illegal activity. NCB asset forfeiture is just one of a number of asset recovery tools available to United Kingdom law enforcement. The disruptive impact of NCB asset forfeiture, along with other available asset recovery tools,<sup>297</sup> operates to cause financial stress by freezing and reclaiming illicit funds; limiting the target's ability to sustain operations, forcing the target to shift activity into areas that may be more vulnerable and which the target would otherwise avoid; and attacking their morale.<sup>298</sup>

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294. The confiscation of assets upon conviction (known in the United Kingdom as criminal confiscation).

295. *The Financial Challenge to Crime and Terrorism* (London: HM Treasury, 2007), p. 13.

296. See Proceeds of Crime Act 2002 (United Kingdom), Section 240; and *The Financial Challenge to Crime and Terrorism* (London: HM Treasury, 2007, p. 24).

297. For example, the restraint and subsequent confiscation of assets upon conviction and cash seizure and forfeiture.

298. *The Financial Challenge to Crime and Terrorism* (London: HM Treasury, 2007), pp. 10–11.

## Taxation

The United Kingdom also has the power to tax the proceeds of crime. The power to tax is used alongside civil recovery proceedings, and may be used “when there are reasonable grounds to suspect that a person has received income or profit from criminal conduct.”<sup>299</sup>

## Criminal Confiscation

Criminal confiscation is the confiscation of moneys following a criminal conviction, whereby an offender is ordered to pay back the value of the benefit from a given crime (the proceeds).<sup>300</sup> It is not necessary to link a particular crime to a particular benefit. The court can, therefore, assume that all of the defendant’s properties held over the previous six years are the proceeds of crime. This is known as the option of “general criminal conduct confiscation.”<sup>301</sup> Before the making of the criminal confiscation order, a restraint order may be obtained from the court to prevent the dissipation of assets that may later need to be sold to satisfy the criminal confiscation order.

## Cash Seizure and Forfeiture

Cash can be seized and detained by a law enforcement officer who may then seek the forfeiture of that cash (£1,000 or above; approximately \$1,400).<sup>302</sup>

Recovering the proceeds of crime is a key priority of the United Kingdom—it deprives criminals of their ability to fund further illegal activity; increases their risk while decreasing the reward to criminals; increases the number of offenses brought to justice through the wider use of the Proceeds of Crime Act powers; and returns money to the taxpayer, or uses that money to serve as an incentive for further asset recovery work.<sup>303</sup>

## Training

Complex financial investigations require specialist skills and, therefore, training. As part of the United Kingdom’s fight against crime and its asset recovery strategy, the ARA had a statutory responsibility under the Proceeds of Crime Act to train and

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299. *The Financial Challenge to Crime and Terrorism* (London: HM Treasury, 2007), p. 24.

300. See Proceeds of Crime Act 2002 (United Kingdom), Section 6; and *The Financial Challenge to Crime and Terrorism* (London: HM Treasury, 2007), p. 24.

301. Proceeds of Crime Act 2002 (United Kingdom), Sections 6 and 10; *The Financial Challenge to Crime and Terrorism* (London: HM Treasury, 2007), p. 24.

302. See Proceeds of Crime Act 2002 (United Kingdom), Section 294; and *The Financial Challenge to Crime and Terrorism* (London: HM Treasury, 2007), p. 24.

303. *The Financial Challenge to Crime and Terrorism* (London: HM Treasury, 2007), p. 29.

accredit financial investigators. The Centre of Excellence within the ARA was absorbed into the National Police Improvement Agency following the ARA's merger with SOCA in 2008. The ARA trained not only its own financial investigators, but also financial investigators throughout the country and internationally. As of March 2006, the number of accredited financial investigators had risen 82 percent since the training program began in 2003.<sup>304</sup> During 2007–08, a further 117 courses were delivered in coordination with ARA's training partners and 8 courses within the international community.<sup>305</sup>

## Strategic Priorities

The United Kingdom's financial challenge to crime includes strategic priorities to

- build knowledge of the problem and the nation's impact on tackling it;
- mainstream financial capabilities (to make the best possible use of the financial tools, including those to recover criminal assets, which is already under way);
- entrench the risk-based approach;
- minimize burdens on business;
- engage partners at home; and
- engage partners internationally to deepen the culture of engagement internationally, and to provide a global solution to a global challenge.<sup>306</sup>

## Summary

The measures with which to fight financial crime and recover the proceeds of crime need to constantly evolve. While the existing powers in the United Kingdom are thought to be sufficient to achieve the challenging £250 million (approximately \$353.6 million) asset recovery target, the country keeps its legislation under review. Further improvements have been identified that may strengthen and improve the system, for example, the extension or abolition of the civil recovery limitation period, which is currently 12 years. There is a strong argument that the public interest demands a different presumption if assets have been secured through crime, and this and other potential changes to the asset recovery regime have been put out for consultation with stakeholders.

Making the best possible use of the financial tools at the disposal of the United Kingdom, and making sure that all stakeholders use the opportunities provided by those financial tools, including those required to recover criminal assets,<sup>307</sup> is the sec-

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304. *The Financial Challenge to Crime and Terrorism* (London: HM Treasury, 2007), p. 23.

305. Assets Recovery Agency, *Assets Recovery Agency Annual Report and Resource Accounts 2007–08* (London: The Stationery Office, 2008), p. 8.

306. *The Financial Challenge to Crime and Terrorism* (London: HM Treasury, 2007), p. 57.

307. *The Financial Challenge to Crime and Terrorism* (London: HM Treasury, 2007), p. 61

ond of two measures to meet the United Kingdom's strategic priority of increasing the effectiveness of action against criminal and terrorist financiers. Effective asset recovery plays an important role as one of a wide and coordinated range of measures to tackle both financial crime and the recovery of the proceeds of crime.

# Avoiding the Pitfalls in Obtaining Mutual Legal Assistance: A Perspective from the Bailiwick of Guernsey

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**Frederic Raffray\***

The Channel Islands are a group of islands located in the English Channel, within the Gulf of St. Malo off the northwest coast of France. Although geographically the Islands form part of the British Isles, politically they are not part of the United Kingdom. The Islands are divided into the Bailiwicks of Guernsey and Jersey. The Bailiwick of Guernsey (“the Bailiwick”) comprises the principal Islands of Guernsey (population 62,000), Alderney (population 2,000), and Sark (population 600), together with other smaller islands.

## The Bailiwick’s Relationship with the United Kingdom

The Bailiwick was part of the Dukedom of Normandy during the time of the Norman conquest of England. Subsequently, when the Dukes of Normandy, who were the monarchs of England, lost most of their possessions in France, the people of the Bailiwick chose to remain loyal to the English Crown. It is therefore evident that the Channel Islands were never conquered by the English Crown nor were they colonies. At no time since the Norman conquest has the evolution of the Island’s constitution involved amalgamation with, or subjection to, the Government of the United Kingdom. The Islands’ link with the United Kingdom is through the English Crown—Her Majesty the Queen is the successor of the Dukes of Normandy.

Under the charters of successive English kings and queens, the Islands secured their own judiciaries and the right to maintain their own criminal law and to have their own tax systems. They have no representatives in the U.K. Parliament.

## Constitutional Relationship with the European Union (EU)

The Islands are not members of the EU nor do they have an associate relationship.

The Islands have a very limited special relationship with the European Commission (EC) as set out in Protocol 3 to the United Kingdom’s Act of Accession to the European

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\* Crown Advocate, Law Officers of the Crown Guernsey, writing in a personal capacity.

Community in 1972. This relationship with the EC cannot be changed without the unanimous agreement of all EU Member States.

Under Protocol 3, the Islands are part of the customs territory of the EU. The Common Customs Tariff, levies, and other agricultural import measures, therefore, apply to trade between the Islands and non-member countries, and there is free movement of goods in trade between the Islands and EU states. However, the Bailiwick of Guernsey is not required to implement criminal law measures promulgated in the EU nor measures promoted by the EU's Justice and Home Affairs directorate.

## **Legal System**

### **Criminal Law System**

The criminal law of the Bailiwick of Guernsey is not identical to English law, but is substantially similar. Many Guernsey laws closely follow those in force in England because it is customary for Guernsey to look to English law when enacting new criminal laws.

### **Criminal Courts**

The judicature of Guernsey is divided into three parts: the Magistrate's Court (which has limited jurisdiction), the Royal Court (which has unlimited criminal jurisdiction), and the Guernsey Court of Appeal. In Alderney there is the Court of Alderney and in Sark the Court of the Seneschal. They have limited jurisdiction. More serious cases from these islands are tried in the Royal Court of Guernsey. Appeals lie from Alderney cases to the Royal Court of Guernsey.

Appeals lie from the Royal Court to the Guernsey Court of Appeal, the majority of the judges of which are English Queen's Counsel. All judges are appointed by the Crown. From the Guernsey Court of Appeal there is an appeal to the Judicial Committee of the Privy Council in London.

Judges in the Bailiwick of Guernsey are independent of the governments in the Islands. The President of the Royal Court of Guernsey is the Bailiff of Guernsey. He and the Deputy Bailiff are appointed by the Crown. The senior judges on the other islands are the Chairman of the Court of Alderney and the Seneschal of the Court of Sark.

### **Law Officers of the Crown**

There are two Law Officers of the Crown in the Bailiwick of Guernsey. They are appointed by the Crown. The senior Law Officer is Her Majesty's Procureur (Her Majesty's Attorney General) and the junior Law Officer, Her Majesty's Comptroller (Her Majesty's Solicitor General).

The Law Officers Chambers are, in effect, a non-political “Department of Justice” for the entire Bailiwick. Their duties embrace work that in England would be carried out by the Home Secretary, the Attorney General, the Director of Public Prosecutions, and the Director of the Serious Fraud Office.

The Law Officers supervise all prosecutions throughout the Bailiwick. In making prosecuting decisions, the Law Officers act as independent officers—independent of the Islands’ parliamentary assemblies and independent of the courts before which they prosecute. All prosecutions in the Bailiwick of Guernsey are brought in the name of Law Officers.

The Law Officers have power under certain pieces of legislation to issue notices or orders requiring the production of information. In cases in which a court order is necessary, they approve the necessary documentation to be presented to the court

The Law Officers also act as the central authority in the Bailiwick dealing with agencies in the United Kingdom and other countries requesting assistance in investigating and prosecuting crime. Such applications will often be made after preliminary contact at an early stage in an investigation and following the advice given by police, Customs and Excise, or the Financial Intelligence Service. Such preliminary contact is encouraged.

Formal requests for assistance that are to be made to the Law Officers should be sent to them directly and not through the United Kingdom Central Authority for Mutual Legal Assistance.

## Overview of Mutual Legal Assistance in the Bailiwick

The Law Officers in Guernsey operate on the basis that mutual legal assistance will be provided by them or the Royal Court to a requesting state, provided the requirements of the Bailiwick’s legislation are met.

The provision of mutual legal assistance in the Bailiwick, within the legal context, can be broken down into a number of main areas:

- provision of evidence for investigation in another jurisdiction,
- provision of evidence for prosecution in another jurisdiction,
- the restraint of assets pending forfeiture proceedings,
- registration and enforcement of foreign forfeiture orders, and
- sharing of forfeited assets.

Each of these areas has the potential to create its own particular difficulties; these difficulties, however, can be explained succinctly without the need for a detailed exposition of Guernsey law. At the heart of each of the main areas lies a Letter of Request or a Form of Request.

## The Legal Framework for the Provision of Mutual Legal Assistance in the Main Areas

At the international level, the European Convention on Mutual Assistance in Criminal Matters 1959 has been extended to Guernsey. Guernsey is now currently awaiting, having requested, extension of a number of other anti-corruption conventions, such as UNCAC, the OECD Convention on Combating Bribery of Foreign Public Officials, and the Council of Europe Convention on Corruption/Protocol to the Council of Europe Convention on Corruption. Guernsey also participates in the Harare Scheme on Mutual Assistance in Criminal Matters. Guernsey does not have an extensive set of mutual legal assistance treaties.

Mutual legal assistance is usually rendered pursuant to a Letter of Request through a number of domestic laws, such as

- the Criminal Justice (Fraud Investigation) (Bailiwick of Guernsey) Law, 1991 as amended,
- the Criminal Justice (International Cooperation) (Bailiwick of Guernsey) Law, 2001, as amended,
- the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999 as amended, and
- the Drug Trafficking (Bailiwick of Guernsey) Law, 2000, as amended

There are also provisions for mutual assistance under The Forfeiture of Money etc in Civil Proceedings (Bailiwick of Guernsey) Law, 2007, which came into force in 2008.

### Letters of Request

The fundamental cause of problems arising on the face of a Letter of Request is usually its poor quality. Poor quality manifests itself in failure to clearly set out the facts, link the facts to the substance of the request, identify and link the grounds for suspicion and the documents sought, and link the evidence sought to the offense under investigation. More often than not, this reflects a lack of consideration or care by the requesting jurisdiction as to what is required to obtain assistance from Guernsey. Poor quality can also result from an inadequate translation.

### Provision of Evidence for an Investigation in a Foreign Jurisdiction

The production of evidence for investigation will either require a judicial action or an order by the Attorney General. Whichever route is taken, certain evidential and procedural thresholds will have to be met.<sup>308</sup>

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308. An electronic guide is available on the Web site of the Law Officers: [www.gov.gg/ccm/navigation/government/law-officers/advice/](http://www.gov.gg/ccm/navigation/government/law-officers/advice/).

Some requests fail to meet the minimum thresholds, even though there is an electronic guide on the Law Officers Web site. Even if the threshold is met, there may be additional constraints if substantial documentation is requested. The documents have to be reviewed and may need to be copied if there is a real possibility of an investigation being carried out in Guernsey (for example, for failure to comply with a production order). As a result, it is usually difficult to transmit substantial amounts of documentation within short timeframes.

The preparation of the documentation for disclosure can range from straightforward to extremely onerous. The extent of the problem can be magnified depending on what resources are actually available to undertake the work. The smaller the jurisdiction, the greater the potential issues in this area.

To overcome these issues, the ambit of the request should be considered and clarified at an early stage (for example, whether there is going to be a need to proceed by way of search warrant, whether specialist expertise will need to be brought in to deal with computers, and so forth). In addition, the requesting jurisdiction should make early contact with Guernsey to explain any difficulties or constraints they may be operating under in their domestic investigation.

## Provision of Evidence for Prosecution in a Foreign Jurisdiction

If evidence is required for a prosecution in another jurisdiction, a number of factors need to be considered, including

- the rules of evidence in the requesting jurisdiction and the rules of evidence in Guernsey;
- the admissibility of documentation, its preparation, and bundles<sup>309</sup> for use by the courts;
- language and transcription issues;
- rights of audience for counsel coming into Guernsey who need to be attended by Guernsey counsel;
- the allocation of adequate court time (because the judiciary is comparatively small), availability of witnesses, as well as the availability of counsel in both jurisdictions; and
- the possibility and logistics of undertaking the hearing by telephone or by live television link.<sup>310</sup>

Complex cases (multihanded or not) that involve substantial evidence gathering and cross-examination in Guernsey can require significant advance preparation. Realistic notice

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309. Packages of the documents, paginated and indexed.

310. The Criminal Justice (International Cooperation) (Bailiwick of Guernsey) Law 2001, as amended, Sections 4A and 4B.

needs to be given about the need for assistance and the scope of the assistance required. In addition, complex cases may have a tactical overlay, for example, a witness may seek to avoid attendance to delay the case. Good communication, cooperation, and preparation are required from both the requested and the requesting state to enable the case to proceed smoothly.

## The Restraint of Assets Pending Forfeiture Proceedings

Identification of accounts and early communication with Guernsey is required, particularly if there is real urgency.

The involvement of sizeable amounts or complex structures leads to particular issues relating to the management of the accounts or structures pending determination of the prosecution and forfeiture proceedings. These issues can include the preservation or enhancement of the value of the assets, as when trading operations are being run under trust umbrellas; or the payment of fees based on instructions given before the restraint. The basis upon which the institution's fees are to be paid going forward also needs to be resolved.<sup>311</sup> There are also particular risks relating to loss of value in a structure or account and the risk of negligence actions that need to be capped off.

Issues also arise relating to the payment of legal fees, in particular, the extent to which sums may be drawn down from restrained funds for legal fees and how that is to be accommodated, reviewed, and sanctioned.

Some of these issues can be resolved by using orders in the requesting jurisdiction to create a *de facto* (as opposed to *de jure*) presumption as to how the court in Guernsey might want to approach the issue in the absence of express statutory provision or precedent on a point.

## Registration and Enforcement of Foreign Forfeiture Orders

The registration and enforcement of foreign orders in Guernsey requires leave to serve out of the jurisdiction; having obtained it, service needs to be effected by the requesting jurisdiction. Before the hearing can proceed, service must be effected and evidenced by the requesting jurisdiction, resulting in a time-consuming procedure.

## Sharing of Forfeited Assets

In drug-trafficking cases, Guernsey retains the assets in the absence of an applicable convention or asset-sharing agreement. In all other cases, Guernsey has historically sought to repatriate any assets toward the victims of the crime. The issue is identifying the victims. There is no reason to suppose that this policy will change.

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311. While no precedent has yet emerged from the Royal Court, there has been a significant amount of litigation skirmishing in this area.

# Foreign NCB Asset Restraint Orders: A Historical Review of Enforcement in Jurisdictions without Reciprocal NCB Asset Forfeiture Legislation

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Frederic Raffray\*

In recent years, England and Wales, Guernsey, and Isle of Man all enacted or introduced non-conviction based (NCB) asset forfeiture legislation, which includes mutual legal assistance provisions relating to the enforcement of NCB asset forfeiture orders (civil or *in rem* orders).<sup>312</sup> Before the introduction of legislation in this area, the issue of the enforcement of a foreign civil or *in rem* order was brought to the courts. Courts in each jurisdiction had to consider whether a restraint order could be made under what were perceived to be “criminal legislative powers” if the relevant foreign order was understood to be a civil or *in rem* judgment. Much of the case law arose in connection with attempts by the United States to enforce its *in rem* restraint and forfeiture orders in these jurisdictions.

The purpose of this special contribution is to demonstrate through case examples that, notwithstanding the absence of dedicated NCB asset forfeiture legislative powers, existing statutory powers may be wide enough in some common law jurisdictions to accommodate and give effect to NCB asset forfeiture judgments and what are perceived to be civil or *in rem* judgments.

## England and Wales

In *In re S-L (Restraint Order: External Confiscation Order)*,<sup>313</sup> the English Court of Appeal considered whether an external confiscation order within the Drug Trafficking Offenses Act 1986 included civil *in rem* proceedings. At that time, the English courts did not have the authority to make a civil *in rem* order.

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\* Crown Advocate, Law Officers of the Crown Guernsey, writing in a personal capacity.

312. Proceeds of Crime Act 2002 Part V (United Kingdom); Forfeiture of Money, etc in Civil Proceedings (Bailiwick of Guernsey) Law, 2007; Proceeds of Crime Act 2008 (Isle of Man) at Part 1; Civil Asset Recovery (International Co-operation) (Jersey) Law 2007 (provides for the recognition of foreign NCB asset forfeiture orders); and Proceeds of Crime (Cash Seizure) (Jersey) Law 2008.

313. [1996] QB 272 Evans, Otton and Pill LJ.

The proceedings had been initiated in the United States and classified as civil *in rem* because they were against the property itself, rather than against a person. In addition, there were no criminal proceedings against the claimant, nor did the United States have the intention to launch criminal proceedings—the claimant had not been arrested and was believed to be outside the reach of the United States.

Before the Court of Appeal, counsel for the appellant did not rely as much on the fact that the proceedings in the United States were civil rather than criminal as upon the distinction between proceedings *in personam* (against a named person) and proceedings *in rem* (against the property).<sup>314</sup>

The Court of Appeal held

- On a true construction of the Drug Trafficking Offenses Act 1986 (Designated Countries and Territories) Order 1990, the High Court had power under Section 8(1) to make a restraint order where an external confiscation order prohibiting dealings in the proceeds of drug trafficking had been made, or was likely to be made, in civil *in rem* proceedings in a designated country where no person was named as a defendant.
- The references to “a person” and the defendant in Section 1(3) did not preclude the possibility of an external confiscation order being made under Section 1(1) without there being “a person” named as a defendant nor was the definition in Section 1(3) an exclusive definition of “defendant.”
- Section 7 identified the stage of the proceedings at which a restraint order might be made and did not require a particular form of proceedings, nor did it use “the defendant” in the limited sense in Section 1(3).
- Considering the purpose of the Order 1990, “defendant” was not to be construed as requiring proceedings *in personam*.
- Accordingly, “proceedings against the defendant” were to be construed as including civil *in rem* proceedings in which the standing of persons with a financial interest in the outcome was recognized.

## Jersey

In *In the Matter of the Representation of Batalla-Esquivel*<sup>315</sup> the representor sought to set aside a *saisie judiciaire* (restraint order) of a property in which he had an interest. The Attorney General had obtained the property under the Drug Trafficking Offenses (Designated Countries & Territories)(Jersey) Regulations 1997 on the grounds that proceedings were to be instituted against the property of the claimant in the United States and an external forfeiture order might be made. Under the law of the United

314. Per Evans LJ at 281 B-C.

315. [2001] JLR 160 Royal Court (Bailhache, Bailiff). See also *In re Garden Trust Royal Court (Samedi Division)* 2 May 2003.

States, the United States court would only have jurisdiction to make an external forfeiture order over the Jersey assets if the assets had first been made subject to a *saisie judiciaire* by the Jersey Court, thereby bringing them within the constructive control of the US court.

The claimant argued that (1) the Court only had jurisdiction where the proceedings were *in personam* as opposed to *in rem* and that *In re S-L* had been wrongly decided on this point; (2) there was no *saisie jurisdiction* in place conferring constructive control over the property to the United States court; and (3) there had been an unreasonable delay.

The Royal Court held that it had jurisdiction to grant a *saisie judiciaire*, whether the foreign proceedings were *in rem* or *in personam*. The Court considered the purpose of the legislation—to reduce drug trafficking—and found it was undesirable to adopt a restrictive view of the legislation. In reaching its decision, the Royal Court found *In re S-L* to be persuasive authority and followed it. Furthermore, the Royal Court found as a matter of construction that the Insular Jersey Regulations contained no requirement that the foreign court should have any particular jurisdiction.

## Isle of Man

In *In the Matter of Poyiadjis*<sup>316</sup> the High Court of Justice of the Isle of Man Staff of Government Division considered whether an external *in rem* forfeiture order could be registered as an external confiscation order under their Criminal Justice Act 1990. The claimant argued that only an *in personam* judgment could be registered at common law and that if the legislature had intended to depart from that approach, it would have specified this. The court of first instance followed *In re S-L* on the grounds that the Isle of Man legislation was similar to the English legislation considered in *In re S-L*. The decision was upheld by the Isle of Man High Court on appeal.

## Bailiwick of Guernsey

There is no reported case on this point in Guernsey law. The authorities in Guernsey have approached this issue on the basis that the Royal Court of Guernsey would adopt the same approach as that taken in the jurisdictions above, given the similarities in the legislative provisions.

## Hong Kong, China

The High Court of the Hong Kong [China] Special Administrative Region Court of First Instance has reached the same conclusion, specifically that United States civil dis-

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316. Unreported 17 February 2005 Tattersall QC JA, Newey QC Acting Deemster at paras. 78–86.

gorgement proceedings were enforceable under Hong Kong's legislative provisions for the recovery of "external confiscation orders."<sup>317</sup>

## Conclusion

The above cases demonstrate how courts in different jurisdictions have focused on substance rather than form in determining whether to recognize NCB asset forfeiture and restraint orders from foreign jurisdictions. The fact that the legislative provisions were perceived to be criminal in nature did not preclude the courts from looking at the substantive effect of the *in rem* order. The courts were not as much concerned with the criminal or civil nature of the proceedings as they were with the substantive question of the effect of *in personam* and *in rem* orders.

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317. *Anson Garment Ltd*, HCAL 187/2002, HKCU LEXIS 625 2003, [2003] 627 HKCU 1; *Re the Link Trading Co Ltd*, HCAL 187/2002, HKCU LEXIS 626 2003, [2003] 628 HKCU 1. See Ian Smith, Tim Owen, and Andrew Bodnar, *Smith, Owen, and Bodnar on Asset Recovery: Criminal Confiscation and Civil Recovery*, 2nd edition (Oxford, UK: Oxford University Press, 2007), at para. 13.43.

# Targeting the Proceeds of Crime: An Irish Perspective

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Francis H. Cassidy\*

Ireland has well-developed legal remedies aimed at the forfeiture of criminal assets. It includes both a criminal forfeiture system and a non-conviction based (NCB) asset forfeiture system. The primary motive for the enactment of the more ambitious remedies (that is, the establishment of a multidisciplinary agency whose sole function was to target such assets and the enactment of an NCB asset forfeiture regime) was as a political response to a sudden increase in organized crime and the murder of a detective and an investigative journalist, Veronica Guerin. Also, it was recognized that some criminals had put themselves beyond the reach of ordinary criminal code by not becoming directly involved in the commission of the offense and by the strict enforcement of codes of secrecy among criminals. To successfully combat such organized crime, steps needed to be taken to deprive those involved of the benefit of their criminal activity.

Ireland introduced criminal forfeiture orders against persons convicted of drug trafficking and other serious crime through its Criminal Justice Act 1994. This Act contained a number of novel provisions and constituted a powerful tool in the deterrence of criminal activity. However, within a year political pressure arose to enact more ambitious measures to deal with drug trafficking and organized crime, following a number of high profile murders. Legislation enacted subsequently included the Criminal Assets Bureau Act 1996 and the Proceeds of Crime Act 1996. This legislative package effected the following:

- the creation of an NCB asset forfeiture model;
- the establishment of an independent agency, using the multidisciplinary concept, charged with the responsibility for targeting and forfeiting the proceeds of criminal conduct;
- the use of the Tax Code in the collection of the proceeds of criminal conduct; and
- specific provisions permitting the sharing of confidential information.

## NCB Asset Forfeiture Model

The Proceeds of Crime Act applies civil law concepts, in effect the old equitable remedy of injunction, to the proceeds of crime. In short, if the Criminal Assets Bureau (“the

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\* Criminal Assets Bureau Legal Officer, writing in a personal capacity.

Bureau”) can satisfy a court on the balance of probabilities that specified property is the proceeds of crime, the court will make an interim order over the property preventing anybody from dealing with it. This order stays in place for 21 days, following which an application is made for an interlocutory hearing, on notice to any person who has an interest in that property. If it appears to the court that such property is the proceeds of crime, despite anything said by any respondent, an interlocutory order is put in place for a period of seven years. In the course of that time any person who can satisfy the court that the property is not the proceeds of crime can move to have the order lifted. If no such order has been granted during those seven years, the Bureau can seek a disposal order effectively extinguishing anybody’s rights to the properties and transferring it to the central exchequer.

Some of the specific features of the Proceeds of Crime Act as they relate to NCB asset forfeiture include the following:

- The Act applies to property having a value of not less than €12,700 (approximately \$16,700) that directly or indirectly constitutes proceeds of crime.
- The Act constitutes a civil law remedy operating under civil law procedures in the High Court. Issues of evidence are determined “on the balance of probabilities.”
- The High Court may grant an *ex parte* interim order against property on application by a member of the National Police Service (An Garda Síochána) not below the rank of Chief Superintendent, once it is satisfied that the property constitutes directly or indirectly the proceeds of crime (Section 2).
- The court may thereafter grant an interlocutory order over property on application within 21 days, if it appears to the court that the property directly or indirectly constitutes the proceeds of crime (Section 3) and notice is provided. There is a distinction between the proof required when seeking a Section 2 order as distinct from a Section 3 order, that is, the latter is done on notice. Any person claiming to have a right to the property can make an application to the court to have this injunction discharged (Section 3(3)).<sup>318</sup> At that stage the burden of proof as to the legitimate ownership of the property shifts to the applicant.
- Once the Section 3 interlocutory order has been in place for seven years the court is empowered to make a disposal order transferring all such property to the benefit of the central exchequer (Section 4).
- The court is further empowered to vary the order for the purpose of releasing funds for essential legal, business, and living expenses (Section 6). However, ap-

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318. While Section 3(3) is primarily designed to allow a respondent to argue that the Bureau’s case is inaccurate and that the property targeted was legitimately sourced, it has been interpreted to allow victims to make a claim over the target property. One example is the case of Matthew Schachter, where proceeds of almost \$5,000,000 were returned from Ireland to the United States for the benefit of victims of an extensive insurance fraud.

plications made under Section 6 proved difficult to establish because the applicant had to satisfy the court that the variation was “essential.” As a result, the Department of Justice established a legal aid scheme on an ad hoc basis, which ensured that all respondents, even if their assets were frozen, had access to legal aid. Effectively this meant that Section 6 applications for the release of funds for essential legal expenses have rarely been required.

- The Act also provides for the appointment of a receiver to either manage the property or, as is more usual, to sell the property and deposit the proceeds in an interest-bearing bank account pending further order of the court (Section 7). The bureau legal officer, a lawyer, is always appointed receiver. Objects with diminishing value, such as motor vehicles or livestock, are sold. Real property is usually sold, although such sales depend on the market. Occasionally, the bureau legal officer acts as a landlord, receiving rents.
- The Act provides that the belief of a member of the National Police Service not below the rank of Chief Superintendent shall be “evidence” (Section 8). The nature of this hearsay evidence has received criticism; however, it has been accepted by courts, which must determine the weight to be given to the evidence.
- The court can make an order directing a respondent to furnish details of the respondent’s earnings over the previous six years and to outline his or her assets (Section 9).<sup>319</sup>
- The court is empowered to make an order compensating any respondent should any order made under the Act be shown to have been unjust (Section 16). For this reason, it is unnecessary for the Government to give an undertaking as to damages as would ordinarily be required by an applicant for an injunction.

### **Distinctions between Criminal Forfeiture and NCB Asset Forfeiture in Ireland**

- The former requires a conviction.
- The former acts *in personam* against a convicted person while the latter acts *in rem*, acting on property that constitutes the proceeds of crime.
- The former operates on benefit or profit while the latter operates on property.
- The remedy granted to the former constitutes a judgment debt in favor of the Director of Public Prosecutions, which can be executed immediately, while the latter only grants an injunction, which must remain in place for seven years before the grant of a disposal order.
- The former arises from criminal proceedings while the latter operates independently of such proceedings.

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319. In *M v. D* (February 1997), Mr. Justice Moriarty considered whether such an order could breach the respondent’s right against self-incrimination in the related criminal matter. The Court held that the order requires an indemnity from the Director of Public Prosecutions that a resulting disclosure would not be used in the course of a criminal trial. A subsequent statutory amendment decreed that a statement prepared under a Section 9 direction cannot be used as evidence in a criminal trial.

## Strengths of an NCB Asset Forfeiture Model

- There is no evidence of selectivity.
- All proceeds go to the central fund.
- Because its operation is funded by the central fund there is no “agency profit motive.”
- Legal aid is available, where appropriate.
- No order can be made if the court is satisfied that there would be a serious injustice.
- Compensation is available if court orders are proved to be incorrect in the granting of initial freezing orders.
- It does not impinge on valid existing property rights.
- It constitutes a proportional response to a serious social malaise.

## Challenges to NCB Asset Forfeiture in Ireland

In the course of applications made under the Proceeds of Crime Act, a number of respondents have challenged the Act’s constitutional validity. Many of the constitutional arguments reflect arguments that could have been raised under the European Convention for the Protection of Human Rights and Fundamental Freedoms had the Convention been part of Irish domestic legislation (as it is now).

Almost all relevant points were addressed by the Supreme Court in the cases of *Gilligan v. Ireland, Attorney General, Criminal Assets Bureau and Others* and *Murphy v. GM, PB, PC Ltd., and GH*, appealed to the Supreme Court and heard together.<sup>320</sup> The following are some of the arguments advanced and the courts’ determination.

1. The Act is in breach of Article 38 of the Constitution because it constitutes a criminal procedure by another name (ersatz civil law) and the civil procedure applied does not ensure the protections required “in due course of law” such as the presumption of innocence, the criminal standard of proof “beyond reasonable doubt,” and a right to a trial by jury.<sup>321</sup>

Held: These forfeiture proceedings are civil, not criminal, in nature. “There is no provision for the arrest or detention of any person, the admission of persons to bail, for the imprisonment of a person for the non-payment of a penalty, for a form of Criminal Trial initiated by summons or indictment, for the recording of a conviction of any form or the entering of a *nolle prosequi* at any stage, all elements which would indicate that the Act creates a criminal offense.” “In general such forfeiture is not a punishment and its operation does not require criminal

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320. [2001] IESC 92 (Supreme Court of Ireland). For the text of the decision, see CD-ROM appendix H.  
321. A similar argument has been raised in the context of a “right to a fair trial” under Article 6 of the ECHR in *Walsh v. Director of the Assets Recovery Agency*, [2005] NICA 6 (Court of Appeal in Northern Ireland). For the text of the decision, see CD-ROM appendix H. See also Key Concept 14 in part B.

procedures.” Protections under Article 38(1) are not applicable as the forfeiture proceedings are civil, not criminal.

2. The Act constitutes a reversal of the (standard) burden of proof.

Held: The reversal only operates after the Court is satisfied that certain issues have been established. Furthermore, there is a right to cross-examine. Finally, there is no constitutional infirmity in requiring the person seeking property to negate the inference that a criminal offense has been committed.

3. The Act infringes a right against self-incrimination under Article 38 of the Constitution (fair procedures).<sup>322</sup>

Held: The court agreed with Moriarty J. in *M v. D* (February 1997). Before an order is made under Section 9 of the Act, an indemnity is required from the Director of Public Prosecutions that disclosures resulting from the order will not be used in the course of a criminal trial. Section 11 of the Proceeds of Crime Amendment Act 2005 gives statutory effect to this judgment.

4. The Act by its operation of Section 6 restricts a Defendant’s right of access to the Court.

Held: The structure of Section 6 is no different from any application for legal aid. Even under judgment of Gannon J. in *State (Healy) v. Donoghue* [1976 IR 325], no one is automatically entitled to legal aid; they have to show both necessity and lack of means.

5. The Act in its operation breaches rights to private property.<sup>323</sup>

Held: The Proceeds of Crime Act 1996 does provide onerous and far-reaching penalties and forfeitures but these are directly connected with the establishment to the satisfaction of the court that the property concerned is either directly or indirectly the proceeds of crime. The state has a legitimate interest in the forfeiture of the proceeds of crime. The right to private ownership cannot hold a place so high in the hierarchy of rights that it protects the position of assets illegally acquired or held.

6. The Act is in breach of Article 15(5) of the Constitution in that it is retrospective in its effect.<sup>324</sup>

Held: The acquisition of assets derived from crime was an illegal activity before the passing of the Act and did not become an illegal activity because of the Act.

7. A worldwide freezing order breaches the “comity of esteem” between states, namely that one state will not act in a manner clearly in violation of the sovereignty of another.

322. A similar argument has been raised in the context of a “right to a fair trial” under Article 6 of the ECHR in *Saunders v. United Kingdom*, [1996] 23 EHRR 313. See also Key Concept 2 in part B.

323. A similar argument has been raised in the context of property rights under Protocol 1 of the ECHR in *Philips v. United Kingdom*, Eur.Ct.H.R. No. 41087/98 (5 July 2001).

324. A similar argument has been raised in the context of Article 7 of the ECHR and in *Dassa Foundation v. Liechtenstein*, Eur.Ct.H.R., Application no. 696/05 (July 10, 2007). For the text of the decision, see CD-ROM appendix H. See also Key Concept 8 in part B.

Held: There was no breach on the concept of comity of esteem because the order operates *in personam*: *Darby v. Weldon* (No. 2).<sup>325</sup>

In *DPP v. Karl Dempsey*, the claimant argued that NCB asset forfeiture constituted an abuse of process because there were existing proceedings under the Proceeds of Crime Act for the same property. The Court held it was not an abuse of process, focusing on Section 3(7) of the Proceeds of Crime Act, which provides that where a forfeiture order relates to property frozen under that Act, such injunction shall stand lapsed.

Finally, in *McK v. D*,<sup>326</sup> the Supreme Court addressed a statutory interpretation issue of whether the words “proceeds of crime” could include criminal offenses committed abroad without an express provision on foreign criminality. The court compared the Proceeds of Crime Act with a number of other acts of Parliament and held the Proceeds of Crime Act did not apply to offenses committed abroad. This gap has since been remedied by statutory amendment.

## The Criminal Assets Bureau

The Criminal Assets Bureau is a multiagency body consisting of members of the national police, officials of the Revenue Commissioners (both taxes and customs), officials of the Department of Social, Community and Family Affairs (Social Welfare), together with a Bureau Legal Officer, and administrative and technical staff (see figure). The Bureau’s greatest strength is its ability to exchange information and cooperate and, accordingly, avoid the usual bureaucratic difficulties that affect most large government agencies. This cooperation is accomplished through legislation that allows for disclosure of certain information and material between bureau officers, as well as between the Bureau and members of the National Police Service, Revenue Commissioners, and other government agencies in pursuance of its statutory objectives. In addition, all Bureau Officers and staff (lawyers and accountants) work together in one building, which also facilitates cooperation and in-house legal and forensic accountancy advice.

The Bureau is a statutory body and is required to submit an annual report of its activities, through the Commissioner of the National Police Service, to the Minister for Justice, Equality, and Law Reform, who then brings the report before Parliament. The Bureau is funded exclusively by the exchequer, has no preconceived financial targets to meet, and returns all funds generated to the exchequer.

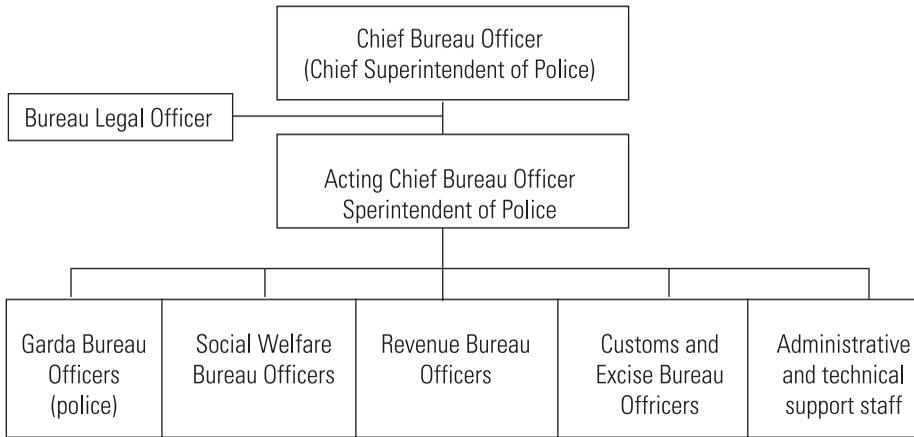
The objectives and functions of the Bureau are set out in Sections 4 and 5 of the Criminal Assets Bureau Act (see box 41). The primary function of the Bureau is to use all legal remedies available to the state in pursuance of targeted serious criminals. The

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325. [1989] All E.R. 1002/1011 (United Kingdom). See also box 14.

326. [2004] 2 ILRM 419, [2004] IESC 31 (May 17, 2004) (Supreme Court of Ireland). See also box 10.

**Structure of Ireland’s Criminal Assets Bureau**



Source: Author.

primary tool used in pursuing this goal is the Proceeds of Crime Act 1996;<sup>327</sup> however, the Bureau also uses the Criminal Code, the Tax Code, and the Social Welfare Code. The Tax Code in particular has proven to be a valuable tool because of the effectiveness of the legislation and development of the Criminal Assets Bureau. By law, profits made from criminal conduct can be taxed and the Revenue Commissioners have wide powers of investigation, search, and collection. Before the establishment of the Bureau, Revenue Commissioners were less willing to pursue criminal cases for fear for their safety. However, the establishment of the Bureau increased the security of the process, with additional protections for bureau officers, anonymity, and access to police information. The same applies to Social Welfare Bureau officers who have demonstrated little hesitation in stopping Social Welfare entitlements and pursuing overpayments.

Officers are not limited by these provisions because they retain their powers as officers of their parent agencies.<sup>328</sup> For example, members of the National Police Service who are bureau officers continue to investigate, give evidence, and where necessary, prosecute criminal offenses. This was upheld upon judicial review.<sup>329</sup>

**Provisional Measures**

Section 14 of the Criminal Assets Bureau Act provides the Bureau with the ability to obtain a search warrant, a provision that has been very effective.

327. While the Proceeds of Crime Act is generally operated by the Criminal Assets Bureau, it is also available to any member of the National Police Service not below the rank of Chief Superintendent.

328. Criminal Assets Bureau Act (Ireland), Section 8(2).

329. *Criminal Assets Bureau v. James Gantley* (officer’s powers, which he held with the Department of Social Welfare, as a social welfare officer, were still exercisable by him on his assignment to the Bureau).

**BOX 41**

**Powers and Functions of the Criminal Assets Bureau (Ireland)**

**Objectives of Bureau**

4. Subject to the provisions of this Act, the objectives of the Bureau shall be—
- (a) the identification of the assets, wherever situated, of persons which derive or are suspected to derive, directly or indirectly, from criminal activity,
  - (b) the taking of appropriate action under the law to deprive or to deny those persons of the assets or the benefit of such assets, in whole or in part, as may be appropriate, and
  - (c) the pursuit of any investigation or the doing of any other preparatory work in relation to any proceedings arising from the objectives mentioned in paragraphs (a) and (b).

**Functions of Bureau**

5. (1) Without prejudice to the generality of section 4, the functions of the Bureau, operating through its bureau officers, shall be the taking of all necessary actions—

- (a) in accordance with Garda functions, for the purposes of the confiscation, restraint of use, freezing, preservation or seizure of assets identified as deriving, or suspected to derive, directly or indirectly, from criminal activity
- (b) under the Revenue Acts or any provision of any other enactment, whether passed before or after the passing of this Act, which relates to revenue, to ensure that the proceeds of criminal activity or suspected criminal activity are subjected to tax and that the Revenue Acts, where appropriate, are fully applied in relation to such proceeds or activities, as the case may be,
- (c) under the Social Welfare Acts for the investigation and determination, as appropriate, of any claim for or in respect of benefit (within the meaning of section 204 of the Social Welfare (Consolidation) Act, 1993) by any person engaged in criminal activity, and
- (d) at the request of the Minister for Social Welfare, to investigate and determine, as appropriate, any claim for or in respect of a benefit, within the meaning of section 204 of the Social Welfare (Consolidation) Act, 1993, where the Minister for Social Welfare certifies that there are reasonable grounds for believing that, in the case of a particular investigation, officers of the Minister for Social Welfare may be subject to threats or other forms of intimidation,

and such actions include, where appropriate, subject to any international agreement, cooperation with any police force, or any authority, being a tax authority or social security authority, of a territory or state other than the State.

- (2) In relation to the matters referred to in subsection (1), nothing in this Act shall be construed as affecting or restricting in any way—

- (a) the powers or duties of the Garda Síochána, the Revenue Commissioners or the Minister for Social Welfare, or
- (b) the functions of the Attorney General, the Director of Public Prosecutions or the Chief State Solicitor.

14. (1) A judge of the District court, on hearing information on oath given by a bureau officer who is a member of the Garda Síochána [national police], may, if he or she is satisfied that there are reasonable grounds for suspecting that evidence of or relating to assets or proceeds deriving from criminal activities, or to their identity or whereabouts, is to be found in any place, issue a warrant for the search of that place and any person found at that place.

In emergency situations, a bureau officer who is a member of the national police, not below the rank of Superintendent, may issue a search warrant if he or she is satisfied that the circumstances warrant the immediate issue of a search warrant and the circumstances render it impractical to apply to a judge of the District Court.<sup>330</sup> The warrant issued by a district judge is valid for seven days, and the warrant issued by a Superintendent is valid for 24 hours.

Furthermore, the Bureau also has its own Production Order. On application to a District Court, an order can be made directing a person to provide specific materials. Such orders usually apply to banking institutions and, on occasion, offices of accountants or lawyers.

### **Anonymity**

Because of the anticipated security aspect of the Bureau's functions, the Act contains provisions designed to protect the anonymity of certain bureau officers. It does not apply to the Chief Bureau Officer, the Bureau Legal Officer, any member of the national police, or the Solicitor to the Bureau. The provision states

All reasonable care must be taken to ensure that the identity of a bureau officer who is an officer of the Revenue Commissioners, or an officer of the Minister for Social, Community and Family Affairs, or a member of the staff of the Bureau, shall not be revealed.<sup>331</sup>

The Act further provides that when such officers are exercising powers or duties, they are to be accompanied by a bureau officer who is a member of the national police, and will not be required to identify themselves. Furthermore, when exercising any power or duty in writing, the exercise will be in the name of the Bureau. In court proceedings, the identity of such officers is not to be revealed. If they have to give evidence, the judge may, on application by the Chief Bureau Officer, give directions as to the preservation of anonymity. While there is a provision for taking evidence behind screens, it has never been sought or granted. Generally such evidence is given in open court, only the name and address of the bureau officer are not revealed.

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330. Criminal Assets Bureau Act (Ireland), Section 14.

331. Criminal Assets Bureau Act (Ireland), Section 14.

Any violation of these provisions is a criminal offense. There are further offenses for the assault, obstruction, or intimidation of bureau officers.

## **Results**

Since 1996, assets in excess of €70,000,000 (approximately \$92.3 million) have been frozen and tax funds in excess of €100,000,000 (approximately \$131.8 million) have been collected. There is little doubt that these efforts have had an impact on criminality within the jurisdiction. Asset recovery is seen as a deterrent for those hoping to profit from their crime, thereby reducing the number of indictable offenses. It is also effective in removing the funds required for criminal operations, thereby undermining the influence of certain criminals.

The success of the NCB asset forfeiture model initially tended to overshadow the criminal model, leading to the criminal model being underutilized; however, this has been addressed. While different state agencies operate the different models, information pathways and protocols are in place to facilitate mutual cooperation between those agencies, ensuring the most effective use of both remedies.

The effectiveness of the Irish model is recognized internationally. As a result, the Bureau has welcomed visits from counterpart agencies from other jurisdictions and will continue to assist jurisdictions that may be interested in developing similar remedies in the interests of effectively targeting the fruits of criminal activity.

# Stolen Asset Recovery: A Case from Kuwait

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**Dr. Mohammad A. A. Al Moqatei\***

During a period of four years between 1989 and 1992, the Kuwaiti Government was the victim of stolen, misappropriated, and embezzled money. The Kuwaiti Investment Office (KIO), a part of the Kuwait Investment Authority (a reputable Governmental investment organization), lost \$5 billion from its investments in Spain through the KIO's London offices. The Kuwaiti Investment Office reported losses of \$3.8 billion as a result of a criminal conspiracy, including, but not limited to, bad investments; redemption of share prices as a result of the issuing of new shares; and the misappropriation or mis-handling of such investments by some of the top management officials.

Unaccounted monies totaling \$1.2 billion were considered missing (that is, stolen, embezzled, or misappropriated). The majority of the disclosed losses occurred during the Iraqi invasion of Kuwait (August 1990 through February 1991). It was suspected that missing monies had been stolen or embezzled by some of the top KIO management officials, including members of the Royal Family managing the office. Banks, accountants, and lawyers were also considered defendants in the conspiracy or embezzlement cases of the missing \$1.2 billion.

In April through August of 1991, a new KIO management team took over and discovered the losses incurred by the previous administration and, as a result of their discovery, launched an investigation into the missing assets. Legal counsel was appointed to provide legal advice and to lead the development of a legal process to mediate the issue.

## Proposed Action

The legal action against the suspected defendants was considered a critical step to safeguarding the state's money and maintaining its image. This legal action was realized to be a crucial step to prevent crimes of stealing money from the state. It was important to establish necessary requirements in dealing with the situation because matters of political sensitivity and national image were at stake.

The following agreements were made to secure the success of the initiative:

- the formation of a national team with the necessary capabilities to develop, understand, and create effective policies to mediate the issues at hand;

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\* Professor of Law, Kuwait Law School, and former Kuwait Investment Authority legal counsel/coordinator of Kuwait Legal Team, writing in a personal capacity.

- the gaining and securing of political will and national support for the legal action to be maintained throughout the legal process;
- an assurance that the Government, Parliament, and the National Team would resist all pressures and interference in the process;
- an admission that such efforts would be costly and time consuming, but would affect the image of the state if such action were abandoned at an early stage; and
- a strategy to deal with the media and issues of public embarrassment arising from the legal actions and investigations.

## **National Team: Task Priorities**

A National Team was created and was composed of four Kuwaitis, all with extensive experience and senior legal qualifications. Team members were required to be fluent in both Arabic and English and three of them were stationed full-time in London (at KIO offices) to do the following:

- Set up a structural vision for running the case worldwide and for managing international law firms and accountancy firms engaged in the case.
- Develop and implement the following steps in the legal process:
  - Initiate offensive actions, rather than being in defensive positions. This required limiting any defensive action to pressing situations.
  - Determine the nature of legal actions to be launched in dealing with embezzlement or conspiracy and recovery actions, including criminal, civil, interlocutory, and settlements.
  - Identify the jurisdictions for legal actions.
  - Distribute and allocate legal team tasks and responsibilities.
  - Define the role of legal firms in handling the cases and initiating litigation.
  - Acquire technical assistance (financial and legal) as deemed required.
  - Determine key legal issues to be addressed or faced, including
    - waiver of state immunity,
    - statutes of limitation,
    - choosing defendants,
    - building witnesses lists, particularly among potential defendants, and
    - dealing with discovery threats, including political pressures and public embarrassment that might result from the disclosure of sensitive documents.
  - Collaborate in judicial processes (technical legal assistance).

## **Scope of Legal Actions**

Because of the complexity of the case, the rapid movement of money, and the need for imminent tracing of assets, the National Team initiated legal actions in 19 countries

and jurisdictions, among them The Bahamas, Bahrain, the Cayman Islands, Italy, Jersey, Kuwait, Singapore, Spain, Switzerland, the United Kingdom, and the United States.

Legal actions varied from NCB asset forfeiture or compensatory action (or both), to criminal and interlocutory actions, namely freezing and disclosure orders.

Private civil actions were filed against both institutions and individuals. Issues of asset recovery, compensatory action, receivership and bankruptcy, and trust disclosure were initiated in these cases.

Criminal cases encompassed issues of embezzlement, conspiracy, fiduciary trusts, and the falsification of documents. These cases targeted individual defendants.

Interlocutory action was also taken and adapted, including worldwide freezing orders and summary judgments (foreign endorsement orders). Various tracing tools and discovery actions were launched, such as disclosure orders (known as a Norwich Pharmacal Order).

Through the National Team's efforts, more than 30 convictions were obtained and nearly 46 orders, most of which were NCB asset forfeiture orders, were achieved. These actions awarded recovery judgments of \$1,011 billion as of January 2008. The Team was able to recover \$548 million out of the \$1,011 billion total, in addition to winning 12 compensation orders against institutions such as banks and accounting firms. More than 180 orders were placed with respect to money-tracing and money-freezing initiatives. Several mutual settlements were also reached in some of these cases, or parts thereof.

## How Private Law Actions Can Work to Achieve Recovery

In the Kuwaiti case, the Team agreed to launch private civil litigation or actions before the concerned courts in the proper jurisdictions. This strategy was approved by the KIO, the Kuwait Investment Authority, and the Kuwaiti Government, with acknowledgment of the high cost, time frame, political embarrassment and pressure, and media publicity that would be associated with the strategy and prescribed actions. The chief aim of the strategy was to achieve asset recovery, mainly through private civil litigation and private forfeiture actions, although not excluding criminal or civil legal assistance from a requested state. Private civil action within the U.K. legal process was the Team's choice for maintaining control of the litigation, rather than initiating criminal action, which would involve the Serious Fraud Office in the United Kingdom.

## Lessons Learned

Private civil actions can be successful; however, they cannot achieve success without national political will and support. With the support of political powers, a competent

and specialized National Team must be chosen and given the necessary discretion and power to handle the legal action by implementing policies and investigations dealing with stolen assets. Countries must expect that efforts to fight corruption will be costly and time consuming and result in heavy publicity and embarrassment. Despite these issues, the asset recovery actions are well worth saving the image of the state.

The following items were critical to the success of asset recovery in the Kuwaiti case.

- The establishment of a dedicated and competent National Team was critical to the success of the initiative.
- Political will was secured to ensure the success of asset recovery.
- The elimination of pressures helped to achieve breakthrough successes for stolen assets recovery efforts.
- Processes were initiated against individuals, rather than institutions, resulting in less resistance and fewer legal battles.
- Private law actions, for several reasons, were a well-established route for asset recovery.

# Asset Management Measures in Thailand

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**Police Major General Peeraphan Premabhuti\***

## The Role of the Asset Management Bureau in the Anti-Money Laundering Office (AMLO)

Money laundering has been a major problem for the Thai Government for decades. The Government, concerned that the rise of transnational organized crime was threatening the stability and prosperity of the country, enacted the Anti-Money Laundering Act 1999 (AMLA),<sup>332</sup> which established the Anti-Money Laundering Office (AMLO) to take effective countermeasures against money laundering. AMLO is an independent law enforcement and regulatory agency under the supervision of the Ministry of Justice and operates under the direction of the Anti-Money Laundering Board (AMLB),<sup>333</sup> which is chaired by the Prime Minister or his delegate.

AMLO is responsible for investigating money laundering cases for NCB asset forfeiture. Under the provisions of AMLA 1999, nine money laundering predicate offenses (see figure) are enforced relating to narcotics, trafficking in women and children, human trafficking, public fraud, embezzlement of financial institutions, malfeasance in office, extortion and blackmail, tax evasion, election law violations, terrorism, and illegal gambling.<sup>334</sup> AMLO has broad powers to identify, trace, search, restrain, and seize illegal proceeds involved in money laundering. With court approval, AMLO is empowered to conduct electronic surveillance to obtain evidence of money laundering. AMLO also serves as Thailand's financial intelligence unit. In addition, AMLO has responsibility for the custody, management, and disposal of seized and forfeited property.

Pursuant to Sections 48 and 49 of AMLA 1999, without a court order but upon order of AMLO's Transaction Committee, if there is probable cause to believe that an

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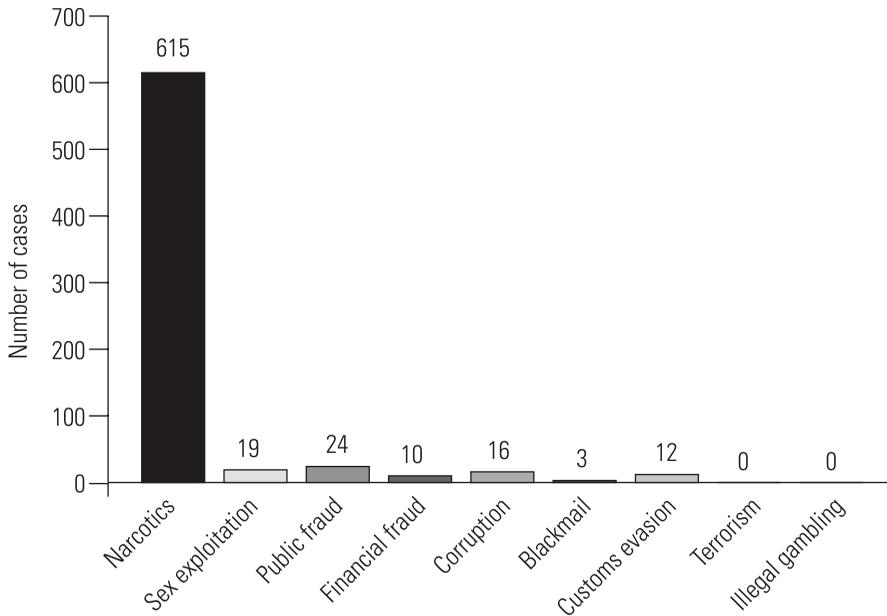
\* Advisor to the Prime Minister, writing in a personal capacity.

332. The National Assembly enacted the law on March 19, 2542. Published in the Royal Gazette Volume 116, Part 29 Gor. on the 21st Day of April of B.E. 2542. Effective on August 19, 1999. (B.E. = Buddhist Era. Subtract 543 from B.E. to convert to A.D.)

333. Section 24 of AMLA 1999 was replaced by Section 10 of AMLA (No. 2), B.E. 2551 (2008).

334. Section 3 of AMLA 1999 and the Penal Code were amended on August 5, 2003, to criminalize terrorism to comply with UN Resolution 1373 and create the offense of terrorist financing. Illegal gambling recently passed Parliament and became the ninth predicate offense under AMLA, as of March 2, 2008.

**Seized and Attached Property under AMLA, Classified by Predicate Offense, October 27, 2000, through March 31, 2008**



Source: Author.

Note: Total of 699 cases, with value of 4,124.61 million baht (\$117,800,000).

asset<sup>335</sup> is related to a predicate offense or money laundering, investigators may seize that asset temporarily for a period not exceeding 90 days. During that time, AMLO can continue to gather evidence to submit the matter to the prosecutor for the initiation of forfeiture proceedings.

Once an asset has been seized by AMLO, it falls upon AMLO's Asset Management Bureau to take care of it, to preserve it until it has been forfeited, and to dispose of it. The Asset Management Bureau is one among five bureaus and two divisions in AMLO. In March 2008, AMLA was amended to, among other things, expand AMLO's role in

335. Under Section 3 of AMLA, forfeitable property comprises

- (1) Money or assets obtained from a money laundering act in one or more predicate offenses or the aiding and abetting of such act;
- (2) Money or property obtained from the distribution by all means of the aforementioned money or property in (1);
- (3) Fruits of either of (1) or (2); or
- (4) Money or assets that were used to commit a predicate offense or to facilitate the commission of a predicate offense.

asset management,<sup>336</sup> to create a forfeiture fund, to impose strong controls over the handling of seized assets, to ensure transparency, and to ensure that no single person has plenary authority over all aspects of asset management. According to the Ministerial Regulation on AMLO's Organization of Work, December 2007, the Asset Management Bureau is responsible for the following duties:

- to draw up the accounting system on seized or attached property, to store and maintain seized or attached property, to forward confiscated property to the Ministry of Finance, to return seized or attached property that has been released to the property's owner, and to appraise assets in accordance with AMLA;
- to establish the asset management system, to handle the issues on use of seized or attached property by claimants, property rental, appointment of manager, and property survey, for the purpose of asset management under AMLA;
- to administer work on laws and regulations relating to asset management, including executing and enforcing the law against any person who violates the asset management rules;
- to oversee auctions in accordance with AMLA or with an assignment from the Ministry of Finance or court;
- to work as the Secretary to the Auction Committee, the Appraisal Committee on Damages and Depreciation, and to the Appraisal Committee on Property's Value; and
- to cooperate with or support the performance of other agencies concerned, or to perform the assigned work.

See figure for the way in which the Asset Management Bureau is structured to accomplish these objectives.

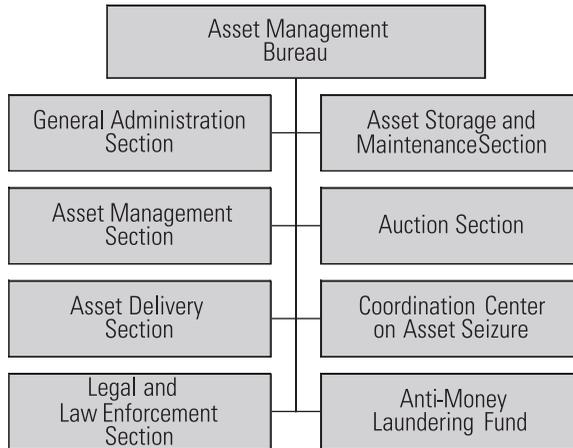
The success of a forfeiture program depends on good asset management practices. To ensure that assets are preserved in their condition at seizure so that assets with economic value can be recovered for the benefit of the Government at the end of the case requires first that they be effectively maintained while they are in AMLO's care to minimize damage and depreciation. Once seized, the asset must be appraised by qualified third parties to establish its market value.<sup>337</sup>

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336. Articles 2 and 3 of the Ministerial Regulation on Organization of Work Units under AMLO 2002 authorize the establishment of the Asset Management Division (now Asset Management Bureau) to maintain assets in custody, to audit, and to dispose of seized or forfeited assets under the virtue of Anti-Money Laundering Board Rules and Regulations prescribed in AMLA 1999, Section 25 (3).

337. Ministerial Regulation No. 10, Chapter 2: Property Appraisal; Clause 16: "Upon the seizure or attachment of any property, the assigned competent official shall promptly undertake to appraise the said property."

### Internal Structure of AMLO's Asset Management Bureau



Source: Author.

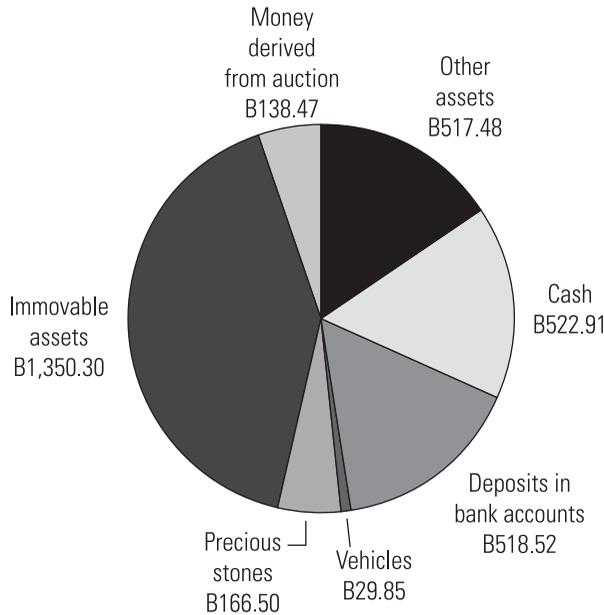
### Management of Seized Assets

Before law enforcement officers designated as competent officials under AMLA execute a search and seizure operation, they (1) must have an understanding of the goal and targets of the law enforcement operation; (2) will have, to the extent possible, assessed the assets to be seized; and (3) will have made preparations for the handling of assets that may not be convenient to seize or must be moved from the current location. Assets with no economic value are not seized. Wild animals, poisonous animals, and large animals are not seized unless there is a need to do so, and then qualified experts will assist in the seizure. Furthermore, the Civil Code prohibits the seizure of specific equipment necessary for professional practice, such as equipment for medical treatment and mechanic's tools.

The officer who seizes the assets will deliver that property, along with relevant documents, such as Vehicle Register Book, Land Title Deeds, and the like, to the Asset Management Bureau, which inspects and counts all seized assets before taking control of them. The seized assets are classified as either movable or immovable. Cards or marks are attached to each item to display details relevant to the property, for example, name, category, quantity, size, weight, and condition of the property, and date of seizure. The property is then secured in appropriate places.

If the property to be kept in custody is cash, it is deposited in financial institutions without delay as prescribed by the Transaction Committee. If the cash is foreign currency it is exchanged for Thai currency and deposited in financial institutions. If the property is gemstones, gold, jewelry, or precious metals, it is kept in AMLO's safe box in the tight security strong room. Other valuable assets are kept in a warehouse that has strict 24-hour security. If it would be difficult for AMLO to maintain the seized

**Asset Management on Seized or Attached Property under AMLA, Classified by Type of Asset, December 13, 2000, through March 31, 2008**



Source: Author.

Note: B = Thai baht. Total seized and attached property valued at B3,244.01 million (\$93,000,000).

property, it can hire a contractor to manage and safeguard that property. See figure for a breakdown of the property under asset management.

If the asset seized is unsuitable or burdensome to keep in custody, Article 57 of AMLA<sup>338</sup> authorizes AMLO’s Secretary-General to do the following:

- permit the property owner to maintain and provisionally use the asset upon conditions and with bail or security;
- issue an order for a sale by auction and place the funds in escrow pending conclusion of the forfeiture proceedings; or
- issue an order to permit law enforcement or other government agencies to provisionally use such asset for official purposes.

**AMLO’s Consolidated Asset Tracking System (AMCATS)**

AMLO’s Asset Management Bureau makes full use of its information technology systems for asset management. It has developed the AMCATS software system to enable

338. Section 57, para. 2, provides that, “...in case that the asset under paragraph one is unsuitable to keep in custody, or there will be more burden to the Government rather than utilization thereof for other purposes, the Secretary-general may order those who have a vested interest in the asset to maintain and utilize the asset and may require any collateral or security assurance. There will be a report to the Board if such asset is ordered to be sold by auction or used for official purposes.”

it to operate in an accountable and transparent manner by recording and tracking all data relevant to the seizure of each asset. The AMCATS captures details about the seizure, asset name, asset value, case name, seizure order, court orders, asset storage location, income generated by the asset and expenses incurred in maintaining it, auction details (names of bidders, proposed price, selling price), and, where applicable, relevant information concerning the placement of the asset into official use by the Government. By recording and tracking this data, AMLO is better able to perform its asset management function—it can easily generate reports, produce statistics, account for its inventory, and forecast and control asset management expenses.

## **AMLO's Auction Process**

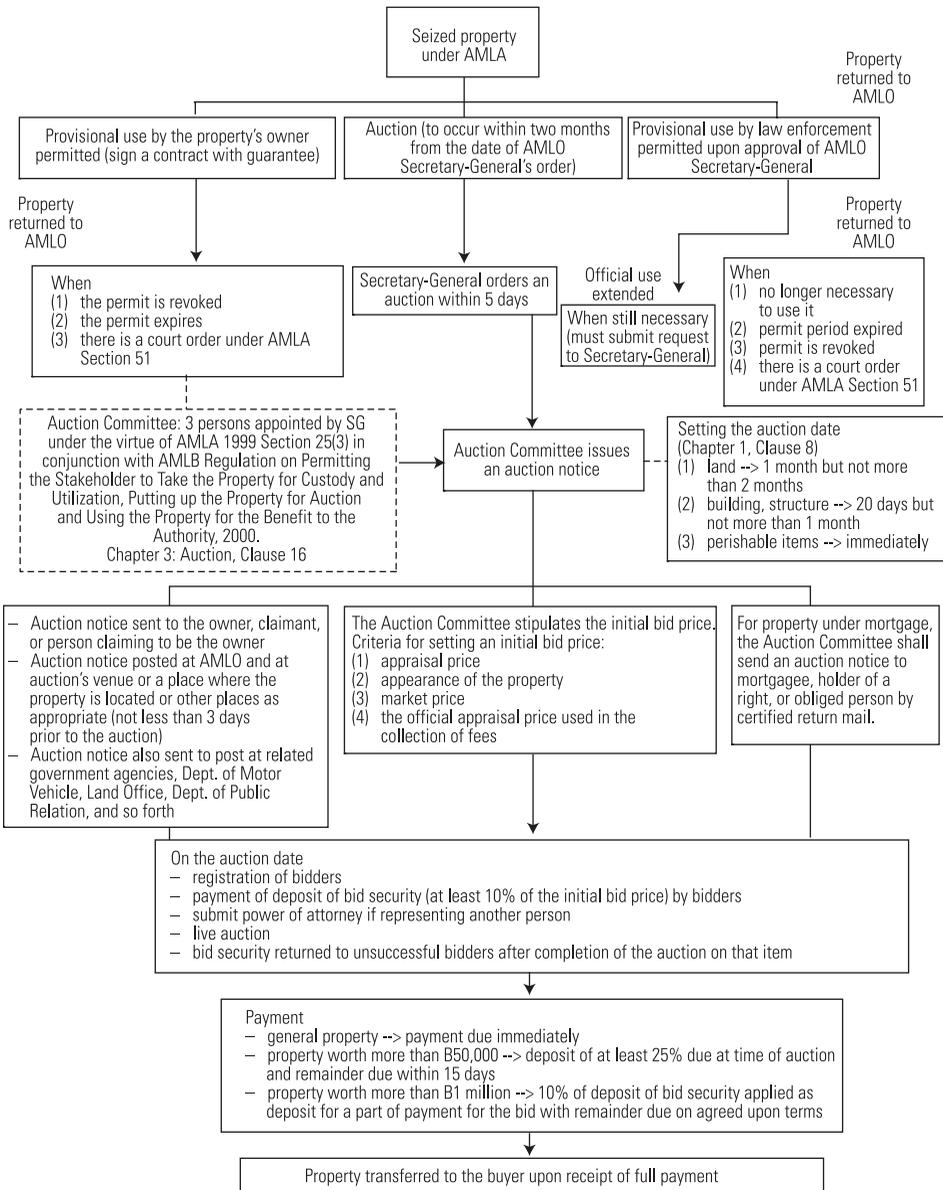
AMLO's auction process occurs preforfeiture and during the 90 days in which AMLO is authorized to hold an asset before turning the matter over to the prosecutor for the filing of a forfeiture case. Typically, AMLO will seek to sell the property in an auction if the property is expensive to maintain, perishable, or depreciating in value. The property is sold to preserve its value and the proceeds are substituted for the forfeitable property when the case is filed with the court. The interests of the property owner are taken into consideration and, in most cases, she or he stipulates to the auction. The property owner knows that the forfeiture action may take a long time to adjudicate, and if the property at issue is perishable or depreciating and is not promptly disposed of, the property owner, should he or she prevail, may have a worthless asset at the end of the case. However, by agreeing to the auction, the property owner can reduce the damages so that if the forfeiture action is defeated, the sales proceeds, interest, and possible damages will be paid to him or her.

The Auction Committee comprises a minimum of three qualified experts appointed by the Secretary-General, and includes a civil servant holding the position at the same level or lower than the Director of Division or equivalent. The Auction Committee determines the minimum bid price for the item and oversees the sale. AMLO is responsible for keeping auction proceeds pursuant to Anti-Money Laundering Board regulations until the conclusion of the forfeiture action. Between 2003 and March 31, 2008, AMLO conducted 83 auctions, which generated proceeds of 275.46 million baht (approximately \$8.4 million). The figure depicts the flow chart of AMLO's auction process.

## **AMLO's Asset Forfeiture Fund**

The March 2, 2008, amendments to AMLA required the establishment of the Anti-Money Laundering Fund to facilitate an efficient and cost-effective mechanism for the administration of seized assets, to provide resources for forfeiture programs, and to allow for asset sharing. Once assets have been forfeited upon a final order from the Civil Court, a portion of the forfeited money or assets is forwarded to the Ministry of Finance for the benefit of the national treasury. The remainder is deposited in the

## Auction Process for Seized Property under the Anti-Money Laundering Act of Thailand



Source: Author.

Note:

- (1) A member of the Auction Committee is prohibited from bidding in the auction either directly or indirectly.
- (2) Property may be withdrawn from the auction or the auction may be postponed or cancelled if the Auction Committee deems that there are no bidders or if the bid is less than the minimum reserve or if the bid has been placed in bad faith.

Anti-Money Laundering Fund. Similarly, proceeds from abandoned and donated assets as well as assets shared by other Thai or foreign governments are deposited into the fund and the national treasury. The fund may be used for a broad range of purposes to achieve the objectives of AMLA, including providing resources to support investigations, prosecutions, and asset management; increasing public awareness; conducting training; supporting international cooperation; and retaining experts on business, real estate, and finance issues. Pursuant to Section 59 of AMLA, administration of the fund will be pursuant to regulations being drafted as of early 2009.

## **Obstacles Experienced by AMLO Impeding Effective Asset Management**

The following are some of the difficulties encountered by AMLO in carrying out its asset management responsibilities.

- *Insufficient collateral.* Pursuant to Section 57 of AMLA, a property owner may be allowed to retain seized property upon the deposit of appropriate security or collateral. However, when the asset involved is immovable (such as real estate) and the property owner is unable to furnish appropriate security, as a practical matter AMLO is not able to dispossess the person and attach the property.
- *Inadequate venues for auctions.* The space arranged for the auction venue has not been big enough to accommodate the public interested in bidding on the items for sale.
- *Insufficient auction notice.* The advertisements for auctions have not been circulated widely enough to reach sufficient numbers of people in the area.
- *Lack of human resources.* The auctions have not been properly staffed by AMLO personnel, in part because the officers have other duties.
- *Low bids.* When there have not been many items listed for auction and insufficient effort has been made to provide notice of the auction, turnout has been poor and the bid prices have been low.
- *Anxiety and lack of trust.* Persons who have had their property seized generally do not trust AMLO to protect and guard their property with the same care as if the property remained in the person's custody.
- *Stolen or damaged property.* When components of assets (for example, car parts) have been lost, stolen, or damaged while in official custody, the loss has been reflected in the price generated at the auction.
- *Depreciation of movable property.* Despite careful asset management, some assets, such as cars, electrical appliances, electronics, and computers, rapidly become obsolete. If a preforfeiture sale does not occur, there is generally little value to be realized by AMLO at the conclusion of the forfeiture case.
- *Literal versus sensible mindset.* The law enforcement objective is to strip criminals of all ill-gotten gains. However, some of those ill-gotten gains (live animals, wild animals, poisonous animals, chemical products, and large industrial machines,

for instance) have nominal economic value and when seized result in expenses to the Government that far exceed their value. Effective asset management requires that thresholds and standards be established for seizing assets.

- *Insufficient training and reluctant officials.* Officers often lack skills for discerning what is a smart seizure; they need training not only on whether an asset can be seized under the law, but also whether an asset should be seized and whether it will pose management and disposition problems for AMLO. Officers need to be taught to anticipate problems they will encounter in the field and to make an appropriate seizure plan in advance. Additionally, because of inadequate immunity protections under Thai law, officers performing their official duties can be sued and exposed to personal liability for property damage and mistakes in the seizure and management process, even when acting in the scope of their employment. This lack of protection can thwart their willingness to fully enforce the law.

## Conclusion

In addition to having a law authorizing the seizure and forfeiture of criminal assets, it is critical for jurisdictions to have an organizational and administrative infrastructure to preserve, manage, and dispose of seized and forfeited property in a secure and accountable manner. A successful forfeiture program requires planning and capacity, because the implementing agency will be confronted on a daily basis with problems in the storage, safekeeping, and selling of seized and forfeited property. Luxury vehicles, tour buses, a crocodile farm, large amounts of cash, a jewelry store, television sets, and land are some of the assets that AMLO has been responsible for, and each has had its own unique management considerations.

The implementing agency must have clear procedures to identify and inventory all assets under seizure and to record their status in the investigation and litigation process so that the agency, prosecutors, the property owner, and the court will have current information at any given time. Clear procedures must also be in place to regulate the use and disposition of seized and forfeited property. The law enforcement impact of forfeiture to punish a wrongdoer and to eliminate the incentive to commit crimes must remain paramount; however, with careful attention to effective asset management procedures, a government can derive an economic benefit from forfeiture to enable it to better protect and serve its citizenry.



# Administrative Procedures in Colombia: Good Practices in Delegation to the Executive Branch

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Clara Garrido\*

NCB asset forfeiture is a lengthy, complicated, multistep process, and administrative procedures can play an important role in regulating and managing issues efficiently and effectively. While certain aspects of the NCB asset forfeiture process must remain in the courts (for example, issues impacting fundamental rights of due process or right to counsel), other areas are best delegated to a more flexible and efficient administrative authority. The administration of seized property, for example, must be continually evaluated and requires an ability to respond quickly to issues that arise throughout the process.

## Areas for Delegation

The following are areas of the NCB asset forfeiture process for which administrative procedures could be used, as well as some of the responsibilities that the designated administrative authority should hold:

### Conduct Property Registrations

The detailed registration procedures for certain categories of goods (for example, real estate, aircraft, vehicles) can be an obstacle in implementing general seizures and the sale of seized goods. Delegating the registration procedures to an administrative authority can improve efficiency.

### Dispute Resolution with Non-Title Holders

If property is subject to seizure or forfeiture, the administrative authority can assist in resolving disputes with tenants, occupants, or other interested parties that do not hold title to the property. In some jurisdictions, the process for seizure and return of leased property can take several years because of such disputes. An administrative body with special powers to resolve these issues can increase effectiveness of the seizure and disposition of the property.

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\* National Director's Adviser, National Anti-Narcotics Agency, writing in a personal capacity.

## Establish Pre-Seizure Planning Guidelines

Guidelines and checklists can assist in anticipating and making informed decisions about what property is being seized, the timing and method of seizure, personnel requirements (for example, experts for any special category of assets), and the cost and benefit of seizure.

## Administration of Seized Assets

A specialized administrative authority can be designated to have the responsibility for the administration of seized assets until the final court order is issued. The authority should be responsible for maintaining an updated inventory of assets and taking action to ensure the productivity and reasonable preservation of economic value. In addition, the authority must have the necessary financial resources, expert personnel, and technological support to fulfill the obligations that the law imposes in an efficient and effective manner. The following are the authorities that the administrative authority should hold in managing the assets:

- appoint or hire third parties for asset administration to ensure the maintenance of any agreements or contracts necessary to reasonably preserve the economic value of the assets, as well as their profits or other benefits;
- order the liquidation of any kind of assets, including assets that are perishable, unproductive, or difficult to maintain;
- invest proceeds from the sale, yield, revenue, or other benefit produced from the seized assets; and
- use a percentage of any profits generated from the seized assets to pay expenses, such as maintenance fees, taxes, mortgage fees, and the like.

## Regulate Provisional or Temporary Use of Seized Assets

Administrative authorities should *not* be permitted to use seized assets, because of the potential loss of economic value from their use or misuse. At the same time, the state may decide that exceptional assets may be used temporarily or provisionally. For these situations, there should be a legislative or administrative framework to ensure preservation of the assets before the final order. This framework should establish the

- nature of the seized assets subject to temporary use;
- specific purposes for permitted use;
- institutions (official or nonprofit organizations) entitled to benefit from the use;
- responsibilities of the institution for protecting and adequately maintaining the assets; and
- proper control mechanisms for avoiding situations that could generate liability for the responsible institution.

## **Forfeited Assets**

While the final destination for the forfeited assets must be legally determined, it is appropriate that the order grant some remedy to the administrative authority to cover the costs of administering the assets.

## **Drafting Administrative Procedures**

The language in draft legislation to enable administrative procedures should be sufficiently precise to avoid incorrect or diverse interpretations of court orders and reduce the need for intervention by the executive or judicial branches. Such clarity is particularly important in situations in which corruption has infiltrated the public sectors involved in the administration of justice. Defining the burden of proof, setting timelines for filing applications and responses, and elaborating on the grounds for an application will ensure that applications proceed in an efficient manner, without the risk of being misinterpreted or set aside.

In addition, it is important to designate an administrative authority and to define the authority's duties and powers. Given that the authority must be flexible to respond to the diverse problems in seizing a large sum of money or assets, including foreign money or assets, the authority should have sufficiently broad powers to govern this process.



# Asset Management in Colombia

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Clara Garrido\*

In Colombia, the National Anti-Narcotics Agency Special Administration Unit, or Dirección Nacional de Estupeficientes (DNE), is the specialized administrative authority responsible for the administration of seized assets from the time of seizure until a court makes a final order for forfeiture or return and for managing the Fund for Rehabilitation, Social Investment and Fight against Organized Crime (FRISCO), the fund of forfeited assets. DNE is responsible for the reasonable preservation of the economic value of the assets and maintaining the inventory.

Assets Subdivision Management is responsible for administering seized and forfeited assets and authorizing entities to use assets on a temporary basis. Assets Subdivision Management has seven groups that provide technical and administrative support, depending on the nature or type of property, as follows: Urban Property Group; Rural Property Group; Companies and Corporations Group; Vehicles Group; Boats and Aircraft Group; Money, Art, and Miscellaneous Group; and Substances Group.

## Phases of Asset Administration

### **Phase 1: Official Seizure under the Responsibility of the Attorney General's Office with Support from the DNE**

When the Attorney General's office asks for DNE accompaniment to an official seizure, the DNE sends one or more officers to verify the status of the property and receive and sign the minutes of seizure. In addition, the DNE takes different measures depending on the property, as follows:

- *Urban properties.* If there is a local real estate organization that has been previously designated by the DNE as an interim depositary, the organization will be asked to select a member company to attend the official seizure. An official of the DNE will assign the property to the company. In the absence of a previously delegated organization, an individual is appointed to administer the property until the DNE adopts an appropriate administration system.
- *Rural properties.* An official of the DNE receives the property and checks the documentary and physical inventory, designating one person to be in charge of the property and to continue its administration until the DNE adopts an appropriate administration system.

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\* National Director's Adviser, National Anti-Narcotics Agency, writing in a personal capacity.

- *Corporations and business establishments.* An official of the DNE receives the documents of seizure from the Attorney General's Office, checks the inventory, and temporarily appoints an individual (preferably an individual who provides services to the subject company) to continue the administration until the DNE adopts an appropriate administration system.
- *Motor vehicles, water vessels, and aircraft.* An official of the DNE receives the documents of seizure from the Attorney General's Office, checks the inventory, and temporarily appoints an individual (preferably an individual that is at or near the asset's location) to ensure safekeeping of the asset until the DNE adopts an appropriate administration system.
- *Money.* An official of the DNE asks the Attorney General's Office or a bank<sup>339</sup> for permission to endorse the title or money in favor of the DNE, until the DNE adopts an appropriate administration system.
- *Controlled substances.* Competent bodies are appointed to identify and administer controlled substances.
- *Miscellaneous movable property (for example, art).* An official of the DNE verifies the documentary and physical inventory and temporarily appoints an individual or entity as depositary until the DNE adopts an appropriate administration system. For paintings or assets with artistic value, the Attorney General's Office must have adequate staff for inspection, verification, and valuation, or it must make an appointment to the DNE.

The assets are entered into the administration system based on the minutes of seizure. The Assets Subdivision Management will take administrative measures and adopt an appropriate administration system depending on the nature of the asset.

## **Phase 2: Adoption of the Administration System Depending on the Nature of the Property**

Property seized and made available to the DNE must be administered in accordance with management regulations outlined in Act 785 of 2002 (for example, interim destination, temporary deposit, leasing, trust, or disposition), the provisions of Law 793 of 2002 on the Extinction of the Right of Property, applicable decrees,<sup>340</sup> and other complementary standards.

### *Hiring Third Parties for Assets Administration*

The selection of contractors or leasing of property is conducted in accordance with Act 785 of 2002 through public invitation through the Web site of the DNE, according to the Procedural Manual.

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339. A bank in which the DNE has an account, but not the violator's bank. In the case of foreign funds, the DNE will contact the Central Bank.

340. Decree 306 of 1998, Decree 1461 of 2000, Law 1151 of 2007, Decree 4320 of 2007.

### *Designation of Temporary Depositaries*

When asset management is required, the Director of the National Narcotics Office or his delegate appoints interim custodians or administrators of assets, based on the legal authority provided for in Article 20 of Decree 1461 of 2000.

### *Sale of Movable Property, or Consumable Supplies Threatening Deterioration*

As provided in Act 785 of 2002, Article 2, once incorporated into the inventory, consumable, perishable, deteriorating, or depreciating assets may be sold. According to Law 1151 of 2007 and Decree 4320 of 2007, any unproductive assets or those that are not possible to administer may be sold, upon inspection, verification, and appraisal by an expert.

## **Phase 3: Administration of Assets**

Depending on the type of property, preference will be given to the management systems described below.

### *Urban Properties*

To ensure proper monitoring of urban property, it must be assigned to a real estate organization as temporary bailee. These organizations, through their real estate affiliates, manage the assets and lease them at market prices. They must monitor the productivity of the property, timeliness of payments, and compliance with property obligations (for example, taxes and utilities).

Parameters for the designation of interim bailees include the following:

- The invitation will be by departments or regions to facilitate asset management.
- The DNE will monitor the results of operations and administration of property through committees that survey real estate in each of the departments with real estate affiliates, at appropriate intervals, depending on the number of assets.
- Each bailee or depositary must submit to the DNE properly supported monthly management reports.
- The commission is calculated in accordance with typical commercial fees; it may not exceed 10 percent of the value actually collected as rental fee.
- The rental fees may be discussed in the real estate committee, if necessary.
- The costs of required maintenance and repairs are deducted from rental fees and approved by the committee if the cost does not exceed twice the minimum monthly wage of the interim bailees. If the cost is greater than that amount, permission from the DNE must be requested to assess the relevance of the cost and the need for the work.

### *Rural Properties*

Rural properties are administered through provisional depositaries, and there is a proposed law permitting the sale or lease of rural property.<sup>341</sup> Interim depositaries are designated through a procedure involving public invitation, requesting the submission of resumes from natural or juridical persons with experience in the sector. Livestock can be sold through agreements with cattle associations or other private or governmental entities that have as their object the development of farming or livestock.

### *Corporations and Business Establishments*

The selection of interim bailees or depositaries is carried out through invitation on the Web site of the DNE, requesting resumes from natural or legal persons that meet the terms of reference. Professionals with experience in corporate governance or administration of the particular assets are preferred. With respect to leasing hotels, an invitation is published on the DNE Web site and a widely circulated national newspaper, and a feasibility study is conducted to determine the lease fee and term.

### *Vehicles*

There are different procedures for the two subsets of vehicles, public service vehicles and passenger cars. For passenger cars, a call for proposals is published on the Web site of the DNE. The Destinations Committee evaluates the proposals and selects an entity, preferably territorial entities (pursuant to Act 785 of 2002) or private nonprofit entities that meet all the requirements. Regarding public service vehicles, a call for proposals is published on the Web site of the DNE, including the lease terms and the terms of reference.

### *Water Vessels and Aircraft*

Further to a call for proposals on the Web site of the DNE, provisional use may be given to governmental, private, or nonprofit entities that meet all the requirements set out in the invitation to make a proposal. Preference is given to requests by the Armed Forces of Colombia and the Colombian Navy.

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341. Until 2007, rural property was administered by the Colombian Institute of Rural Development (INCODER). To determine whether the property would be designated as agriculture, farming, or fisheries assets, the DNE would report to INCODER the list of sites. This was done on a monthly basis to ensure that a decision would be made within three months. After the INCODER visited the sites and provided written notice to the DNE, an interim INCODER official would be appointed as beneficiary.

## *Substances*

Seized chemicals, controlled and uncontrolled, must be fully identified using the expert opinion of the Institute of Forensic Medicine, Administrative Security Department, scientific areas of Public Prosecutions, Criminal Laboratory of the National Police, or laboratory analysis of the National Income and Customs Agency. Once identified, the chemicals may be sold directly or through invitation on the DNE Web site at fixed prices set by resolution of the DNE.<sup>342</sup> There are a number of general terms and conditions:

- The substances being sold must be published on the DNE's Web site.
- Offers to purchase controlled substances may be submitted by those with a certificate as consumer and/or buyer.
- The amount of substance in the offer to purchase must correspond to the monthly or annual quota allowed in the certificate.
- A certificate is not required for non-controlled substances, but the applicant must verify his or her need for the substance.
- Offers to purchase certain substances (for example, urea, gasoline, and kerosene) must include the conditions stipulated in resolutions of the National Drug Council.
- When substances represent a serious danger to the community, or have lost their properties and are therefore impossible to sell or use, they can be destroyed.<sup>343</sup>

The DNE may authorize the use of these chemicals if the request comes with proper justification, and the chemicals will be used for academic, industrial, or scientific processes.

## *Money, Art, and Miscellaneous*

- *Money.* To make foreign exchange resources profitable, for deposits in other than US dollars and Colombian pesos and greater than the equivalent of \$10,000,000, the DNE must sign an agreement with the Bank of the Republic to convert all the deposits into US dollars. For US dollar deposits, the Bank should make the transfer to the U.S. Federal Reserve Bank for verification of authenticity, through an intermediary, and then proceed to invest in securities issued by the Colombian Government. For Colombian peso deposits, the money seized and forfeited may be invested only in securities issued by the Colombian Government.
- *Art.* Movable property with artistic value is provisionally allocated to the Ministry of Culture, or the National Museum of Colombia, according to the applicable

342. The DNE sets the sale prices of chemicals by resolution, with a discount of up to 30 percent compared with market prices, unless it is known to be a high-quality product, in which case the discount rate can be less.

343. Decree 2271 of 1991.

regulations. Movable property without artistic value, as determined by an expert or competent entity, will be provisionally designated to official entities or non-profit organizations after publication on the Web site of the DNE.

- *Miscellaneous items in good condition.* Items that can be designated for interim or provisional use will be published on the DNE's Web site. In the case of assets, an appraisal will be conducted by an expert and items will be sold at a public auction, which may be conducted by the DNE or by a third party selected through a public process. Productive movable property will be leased, with a call for proposals published on the Web site of the DNE.

### *Perishable Assets*

To prevent the loss or impairment of perishable assets, the Attorney General's Office has the authority to assign them to the person or entity who claims to have a lawful right over them, after issuance of a bond in favor of the DNE equal to market value of the assets.

### *Armaments*

These assets are allocated to the Ministry of Defense.

## **Success in Colombia's Asset Management System**

Among the success stories in the administration of assets in Colombia is the establishment of provisional assignment to private real estate entities for real estate services and the leasing of hotels through specialized hotel operators. These measures have produced real income and preserved the economic value of most of the assets in the respective categories. In addition, the sale of forfeited urban properties in 2007 amounted to \$100 million pesos (approximately \$55 million).

Another accomplishment was the establishment of Pre-Seizure Planning Guidelines, adopted by the Attorney General in October 2007, in cooperation with the United States Department of Justice and the DNE.<sup>344</sup> The guidelines establish uniform procedures for daily administration and are designed to prevent crucial financial and administrative problems related to the seizure of real estate, commercial companies, and other types of assets that could pose maintenance or disposition problems. The purpose of the guidelines is to encourage certain practices that will prevent or minimize problems in the management and disposition of seized assets, and to prevent lawsuits against the Attorney General's Office and the DNE resulting from irregular asset seizure and management. Of particular note, the guidelines permit and assist with the consideration of

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344. For the text of the Pre-Seizure Guidelines, see CD-ROM appendix L.

the costs and benefits of a seizure. The guidelines are expected to bring greater organization to the seizure and the administration of property by the DNE.

## Issues and Lessons Learned in Colombia's Asset Management System

### Inventory System

An asset inventory system that allows both quantitative and qualitative updating is essential for an administrative authority to be effective. Despite best efforts, DNE does not have a system that effectively updates inventory. For example, without a national warehousing system for seized vehicles, it is difficult to organize their storage and management. In addition, the system has difficulties assessing certain types of companies and commercial establishments; this task is further complicated by the large number of assets accumulated.

### Excessive Accumulation of Assets, Lack of Liquidity, and Lack of Discretion

There are a few circumstances that impact liquidity and result in the excessive accumulation of assets.

*Lengthy procedures and delay.* It often takes years for the court to make a final decision on extinction of assets or their return to the owner. Law 793 of 2002 has taken steps to remedy this issue by setting timelines for case management; however, there needs to be a corresponding increase in personnel to manage this new system.

*Lack of legislation permitting liquidation of depreciable assets.* The inability to liquidate depreciable assets is a major problem, particularly with assets that have lost their economic value, such as vehicles, boats, and aircraft. Many vehicles are now old and in poor condition. Fortunately, proposed legislation before Congress as of early 2009 will allow the sale or repair of vehicles and a third party has been updating the vehicle inventory lists in preparation for its launch.

*Debt.* High indebtedness, debts to partners without supporting documents, debts to providers, and debts to workers encountered during administration of companies also impact the liquidity of the assets.

*Lack of discretion.* Legislation does not permit discretion in determining which items to seize, resulting in seizure of *all* assets no matter their condition or value. This negatively impacts the asset administration system, which becomes occupied with cataloguing worthless items such as destroyed aircraft and water vessels or bankrupt companies. Real estate in poor neighborhoods or inaccessible rural areas can also be a burden because the local real estate companies are reluctant to agree to their administration. In recognition of this difficulty, some of the asset seizure operations have avoided seizing these miscellaneous items.

### **Lack of Resources**

The DNE has had difficulty attracting and keeping qualified staff, as well as acquiring sufficient resources for conducting audits, either directly or through third parties, to ensure the effective management of assets and resources from companies. Currently, the DNE is attempting an organizational restructuring.

### **Delays in Reporting**

Once a seizure is ordered, there is often a delay in reporting the inventory or precautionary measures to the appropriate authorities. This has improved, however, in cases where DNE personnel have accompanied prosecutors to the seizure.

# Illicit Enrichment: Theory and Practice in Colombia

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Clara Garrido\*

Forfeiture of assets acquired through illicit enrichment is a powerful deterrent for those who seek to take advantage of their positions to enrich themselves without just cause.

## Legal Basis for Asset Forfeiture Based on Illicit Enrichment

In Colombia, the concept of illicit enrichment is codified in the Non-Conviction Based Forfeiture Law (Law 793 of 2002).<sup>345</sup> Article 2 of Law 793 of 2002 includes “illegal enrichment offenses” in the definition of “illegal activities” and further codifies the concept of illicit enrichment, stating that the court shall order forfeiture

- when there has been an unjustified increase in personal assets, at any time, and no explanation of the licit origins thereof is offered, or
- when the legal origin of property sought during trial cannot be demonstrated.

In addition, illicit enrichment is an issue of constitutional importance and demonstrates the tension between the public interest and private interests and rights. On the one hand, the Constitution of Colombia protects individuals from forfeiture of their property (Article 34) and guarantees private property rights (Article 58); on the other hand, the court may nullify ownership of property acquired by illicit enrichment, when it is injurious to the public treasury or seriously deteriorates social morality. In forfeiture, if there is a conflict between private and public interests or rights, case law has shown that the private interest must yield to the public.

According to the Constitutional Court, asset forfeiture is by nature a constitutional issue to be regulated by the Constitution and related property law because of a number of factors, including the following:<sup>346</sup>

- *Origins.* The concept was not designed by legislation, but by the constituent power originating as the first juridical level of Colombia’s democratic system.

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\* National Director’s Adviser, National Anti-Narcotics Agency, writing in a personal capacity.

345. This was an initiative of the Ministries of Interior and Justice, supported by the National General Prosecutor’s Office and the National Anti-Narcotics Agency. The purpose was to attack organized crime and, more specifically, to forfeit economic benefits obtained from illegal drug trade and illicit enrichment.

346. Constitutional Court, Sentence C-740-03, Judge Dr. Jaime Córdoba Triviño.

- *Public nature.* Forfeiture of assets acquired illegitimately reassures public confidence in the system of public property, the Public Treasury, and the concept that “honest work” will be protected.
- *Judicial and legal nature.* Asset forfeiture is reserved for an impartial, autonomous court to decide, especially given the various constitutional rights and public interests involved in termination of property.
- *Autonomous nature.* Asset forfeiture is independent of *jus puniendi* (criminal proceedings); it is a civil law proceeding, regardless of any judicial determination of guilt or innocence.
- *Nature of interest.* Asset forfeiture is not motivated by economic interests, rather the public interest represented by the state.
- *Procedure.* Forfeiture of assets is ordered upon demonstration of one of the requirements enshrined in the Constitution: illicit enrichment, injury to the Treasury, or serious damage to social morality.
- *Relation to property rights.* Forfeiture of assets is closely related to the constitutional system of property rights.

In the same decision, the Constitutional Court noted that the law only protects the rights of those who acquire property by licit means. Those who acquire property unlawfully cannot claim the protection provided by the legal system.

In addition to the domestic laws of Colombia, there is a legal basis for illicit enrichment in international law, specifically the United Nations Convention against Transnational Organized Crime (UNTOC). Article 12(7) provides, “States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to forfeiture, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings.”

## Scope, Procedural and Evidentiary Issues, Benefits

The scope of illicit enrichment is considered much broader than the scope of a criminal offense, going beyond the punitive powers of criminal law into the realm of property law. It attempts to capture the results of the illegal activity and the violator’s failure to comply with the social order of property.<sup>347</sup> In this regard, the purpose is not only the sentencing of the offender, but depriving the violator of legal ownership of assets obtained through crime or illegal means, misuse of public funds, and so forth. Given the diverse scope and objectives, the forfeiture of property is separated from proceedings related to the commission of a criminal offense.

Some argue that asset forfeiture in cases of illicit enrichment does not respect the prin-

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347. Constitutional Court, Sentence C-374-97, Judge Dr. José Gregorio Hernández Galindo.

principle of causation, as in criminal law, by establishing a link between the illegal activity and the offender. In forfeiture law, however, the concept of establishing a connection is much broader and extends to economic, work, and social relationships. As a result, it is not necessary for the owner of an asset subject to forfeiture to be directly linked to an unlawful activity.

The procedure for establishing illicit enrichment in Colombia preserves the offender's right to a defense. Effectively, it is a rebuttable presumption and the violator can overcome the presumption by producing evidence that explains the circumstances for the accumulation of money outside his or her office. The Colombia Constitutional Court described this as a "dynamic burden of proof" requiring the one who is better able to prove a fact to be the one to prove it.<sup>348</sup> In the case of forfeiture, the owner is in a better position to prove the lawful origin of the property and undermine the prosecution's attempt to prove the illicit origin of the assets. This dynamic burden of proof has been deemed appropriate given that NCB asset forfeiture is independent from the criminal process and is not meant to be punitive or impose penalties.

## Required Evidence in Cases Involving Unjustified Increase in Personal Assets

To initiate a forfeiture proceeding, the investigation must establish the

- existence, identity, and ownership (title) of property;
- origin of the resources with which the property or assets were acquired, their value, profits, and yields;
- causal relationship between the origin of the resources with which the property or assets were acquired and the owners' outside-office activities, including activities that allow a disproportionate asset increase or explanation for loans under unusual terms (for example, lack of guarantees, interest, or specific date for payment);
- financial capability (or lack thereof) to acquire the assets;
- transfer; and
- absence of malice or fault.

Good faith is presumed and the violator has the right to provide new evidence to challenge decisions made within the process. Usually the person with a lawful income has no trouble proving the origin of the proceeds.

## Mechanisms to Obtain Evidence

Law enforcement will gather evidence through intelligence, informants, and any other mechanisms and provide this to the Office of the Attorney General. Information can

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348. Constitutional Court, Sentence C-740-03, Judge Dr. Jaime Córdoba Triviño.

also be provided by other entities, such as the DNE, the army, or an individual. The following possible mechanisms can be used:

- prior judgments or court decisions, including criminal, administrative, customs, disciplinary, and so forth;
- public deeds and real estate records or other records;
- certifications issued by transit, aviation, or maritime offices;
- proof obtained abroad;
- corroboration of existing sources;
- operations reports covering buying, selling, money transfers, travel, and the like, and comparisons with similar businesses in the same economic condition;
- income tax declarations and statements for previous years and similar brackets;
- outside experts in accounting, finance, and property valuation;
- certificates issued by the Chamber of Commerce on corporations and businesses;
- corroboration of account books and records with different sources, both public and private, such as the tax office and banks;
- verification of the reasonableness of liabilities.

# Glossary

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**assets.** See **property**.

**circumstantial evidence.** One or more facts that can be used to infer another fact. Also referred to as “inferences based on objective circumstances.”

**civil forfeiture.** A legal action directed solely against the property based on a legal finding that the property itself is the proceeds or instrumentalities of unlawful activity. It is not an action against the violator, but an action against the property, and is separate from any criminal action against the wrongdoer. The term is used interchangeably with **in rem forfeiture** and both are included in the definition of **non-conviction based asset forfeiture**.

**claimant.** The person contesting the forfeiture. Includes a third party, the **wrongdoer**, or the **violator**. In the context of criminal forfeiture or private litigation, the term is used interchangeably with **defendant** and “respondent.”

**confiscation.** See **forfeiture**.

**defendant.** Any party who is required to answer the complaint of a plaintiff in a civil lawsuit before a court, or any party who has been formally charged or accused of violating a criminal statute.

**documents.** All information recorded in any form, visual or aural, and by any means, whether in handmade form (including, but not limited to, writings, drawings, painting); photographic form (including, but not limited to, microfilm, microfiche, prints, slides, negatives, videotapes, motion pictures, photocopies); mechanical form (including, but not limited to, phonograph records, printing, typing); or electrical, electronic, or magnetic form (including, but not limited to, tape recordings, cassettes, compact discs, electronic or magnetic storage devices such as floppy diskettes, hard discs, CD-ROMs, digital video discs (DVDs), Personal Digital Assistants (PDAs), Multi Media Cards (MMCs), memory sticks, optical disks, printer buffers, smart cards, memory calculators, electronic dialers, or electronic notebooks, as well as digital data files and printouts or readouts from any magnetic, electrical, or electronic storage device). The term is used interchangeably with **records** and **materials**.

**ex parte proceedings.** Legal proceedings brought by one person in the absence of, and without representation or notification of, other parties.

**financial intelligence unit (FIU).** “A central, national agency responsible for receiving, (and as permitted, requesting), analyzing and disseminating to the competent authorities, disclosures of financial information: (i) concerning suspected proceeds of crime and potential financing of terrorism, or (ii) required by national legislation or regulation, in order to combat money laundering and terrorism financing.”<sup>1</sup>

**forfeiture.** The permanent deprivation of property by order of a court or other competent authority.<sup>2</sup> The term is used interchangeably with **confiscation**. Forfeiture takes place through a judicial or administrative procedure that transfers the ownership of specified funds or other assets to the state. The persons or entities that held an interest in the specified funds or other assets at the time of the confiscation or forfeiture lose all rights, in principle, to the confiscated or forfeited funds or other assets.<sup>3</sup>

**freezing.** Temporarily prohibiting the transfer, conversion, disposition, or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority.<sup>4</sup> The term is used interchangeably with **seizure** and **restraining**. In some jurisdictions, the term used is “blocking.”

**hearsay.** An out-of-court statement that is offered in court as evidence to prove the truth of the matter asserted. While civil law jurisdictions do not usually exclude hearsay from proceedings, in common law hearsay is inadmissible, with a number of exceptions. If hearsay is admitted, the court must also consider the appropriate weight to give the evidence.

**in personam.** Latin for “directed toward a particular person.” In the context of forfeiture or a lawsuit, it is a legal action against a specific person.

**in rem.** Latin for “against a thing.” In the context of forfeiture, it is a legal action against a specific thing or property. See also **civil forfeiture**.

**instrumentality, instrumentalities.** The assets used to facilitate crime, such as a car or boat used to transport narcotics.

**Know Your Customer.** The due diligence and bank regulation that financial institutions and other regulated entities must perform to identify their clients and ascertain relevant information pertinent to doing financial business with them.

**materials.** See **documents**.

**non-conviction based asset forfeiture (NCB asset forfeiture).** Asset forfeiture in the

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1. Definition adopted at the plenary meeting of the Egmont Group in Rome in November 1996, as amended at the Egmont Plenary Meeting in Guernsey in June 2004.

2. UNCAC, Article 2(g).

3. FATF Interpretive Note to Special Recommendation III: Freezing and Confiscating Terrorist Assets, para. 7(c). <http://www.fatf-gafi.org/dataoecd/53/32/34262136.pdf>.

4. UNCAC, Article 2(d).

absence of the conviction of the wrongdoer. The term is used interchangeably with **civil forfeiture**, **in rem forfeiture**, and “objective forfeiture.”

**politically exposed persons (PEPs)**. “Individuals who are or have been entrusted with prominent public functions in a foreign country, for example, Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials. Business relationships with family members or close associates of PEPs involve reputational risks similar to those with PEPs themselves. The definition is not intended to cover middle ranking or more junior individuals in the foregoing categories.”<sup>5</sup>

**property**. Assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets.<sup>6</sup> The term is used interchangeably with **assets**.

**seizure**. See **freezing**.

**suspicious activity report**. See **suspicious transaction report**.

**suspicious transaction report**. A report filed by a financial institution about a suspicious or potentially suspicious transaction or activities. The report is filed with the country’s FIU. The term is used interchangeably with **suspicious activity report**.

**records**. See **documents**.

**requested country** or **requested jurisdiction**. A country or jurisdiction that is asked to provide assistance to another country or jurisdiction for the purpose of assisting an investigation or prosecution, or enforcing a judgment.

**requesting country** or **requesting jurisdiction**. A country or jurisdiction that asks for the assistance of another country or jurisdiction for the purpose of assisting with their own investigation or prosecution, or enforcement of a judgment.

**restraining**. See **freezing**.

**violator**. The person, known or unknown, who committed the unlawful activity upon which the NCB asset forfeiture is based. The term is used interchangeably with **wrongdoer**. See also **claimant**.

**wrongdoer**. See **violator**.

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5. FATF Forty Recommendations, Glossary. [http://www.fatf-gafi.org/glossary/0,3414,en\\_32250379\\_32236889\\_35433764\\_1\\_1\\_1\\_1,00.html#34285860](http://www.fatf-gafi.org/glossary/0,3414,en_32250379_32236889_35433764_1_1_1_1,00.html#34285860).

6. UNCAC, Article 2(d).



# **APPENDIXES**

# Appendix I: Matrix of Forfeiture Systems in Selected Jurisdictions

	Australia	Colombia	Guernsey	Haiti	Ireland
<b>Defining Assets and Offenses</b>					
Forfeiture applies to wide range of offenses	•	• <sup>1</sup>	• <sup>2</sup>	•	•
Forfeiture applies to specific offenses					
Both proceeds and instrumentalities are subject to forfeiture	• <sup>7</sup>	• <sup>8</sup>		•	•
Only proceeds are subject to forfeiture			• <sup>11</sup>		
Substitute assets can be subject to forfeiture	• <sup>14</sup>	• <sup>15</sup>		•	•
<b>Measures for Investigation and Preservation of Assets</b>					
Mechanisms to obtain evidence	• <sup>22</sup>		• <sup>23</sup>	• <sup>24</sup>	•
Pretrial restraint permitted	•	• <sup>30</sup>	• <sup>31</sup>	•	•
<b>General Procedural and Evidentiary Concepts</b>					
An NCB asset forfeiture action can proceed when there is a pending criminal investigation or prosecution and the violator is available for prosecution	• <sup>36</sup>	• <sup>37</sup>	• <sup>38</sup>		—
An NCB asset forfeiture action can only take place once the criminal investigation or prosecution has concluded, or it is established that the violator is unavailable for prosecution				•	—
Proof of guilt is not required for forfeiture	• <sup>44</sup>	•	• <sup>45</sup>	•	•
Standard of Proof for forfeiture = Balance of probabilities or preponderance of the evidence	•		• <sup>52</sup>		• <sup>53</sup>
Standard of Proof for forfeiture = Beyond a reasonable doubt or intimate conviction		•		•	
Statute of limitations (prescription) period is generally limited to ___ years	6 yrs <sup>58</sup>			10 yrs <sup>59</sup>	—
Statute of limitations (prescription) period is unlimited		• <sup>62</sup>	• <sup>63</sup>		—
Rebuttable presumptions are outlined in forfeiture statutes	• <sup>66</sup>			•	—
Assets may be used to pay counsel or for living expenses	•		• <sup>72</sup>	• <sup>73</sup>	•
<b>International Cooperation and Asset Repatriation</b>					
Legislation includes specific grant of extraterritorial jurisdiction	•	• <sup>77</sup>	•	—	•
Dual criminality is required to assist	• <sup>79</sup>	80	• <sup>81</sup>	•	•
Will restrain assets at the request of a foreign jurisdiction	• <sup>83</sup>	• <sup>84</sup>	• <sup>85</sup>	•	•
Can enforce a foreign court order	• <sup>91</sup>	• <sup>92</sup>	• <sup>93</sup>	•	•
Can institute domestic forfeiture case based on foreign violation	• <sup>100</sup>	• <sup>101</sup>	• <sup>102</sup>	• <sup>103</sup>	•
Possible that proceeds and assets are returned to the requesting state	• <sup>108</sup>	• <sup>109</sup>	• <sup>110</sup>	• <sup>111</sup>	•
Possible that portions of the proceeds are to be retained by the requested state	•	• <sup>115</sup>	• <sup>116</sup>	• <sup>117</sup>	•

*Note:*

— Indicates that the answer was not available at the time of publication.

• Indicates that the specified practice is a feature of the regime, with exceptions or explanations outlined in footnote.

Appendix I: Matrix of Forfeiture Systems in Selected Jurisdictions

Israel	Kuwait	Liechtenstein	Philippines	South Africa	Switzerland	Thailand	United Kingdom	United States
● <sup>4</sup>	●	●	● <sup>5</sup>	●	● <sup>3</sup>	● <sup>6</sup>	●	●
● <sup>12</sup>	●	●	●	● <sup>9</sup>	● <sup>13</sup>	● <sup>10</sup>	●	●
● <sup>16</sup>	● <sup>17</sup>	● <sup>18</sup>	● <sup>19</sup>	●	● <sup>20</sup>		● <sup>21</sup>	●
● <sup>25</sup>	●	●	● <sup>26</sup>	●	● <sup>27</sup>	● <sup>28</sup>	● <sup>29</sup>	●
● <sup>32</sup>	●	●	● <sup>33</sup>	●	●	● <sup>34</sup>	● <sup>35</sup>	●
—			● <sup>39</sup>	● <sup>40</sup>		● <sup>41</sup>		●
—	● <sup>46</sup>	● <sup>47</sup>	●	● <sup>48</sup>	● <sup>42</sup>		● <sup>43</sup>	
—			● <sup>54</sup>	● <sup>55</sup>	● <sup>49</sup>	● <sup>50</sup>	● <sup>51</sup>	●
●	● <sup>56</sup>	●				● <sup>57</sup>		●
—	●	●	● <sup>64</sup>	—	7 yrs <sup>60</sup>	20 yrs	12 yrs <sup>61</sup>	—
—	—	● <sup>67</sup>	● <sup>68</sup>	—	● <sup>65</sup>			—
● <sup>74</sup>	●	●	● <sup>75</sup>	●	● <sup>69</sup>	● <sup>70</sup>		● <sup>71</sup>
					● <sup>76</sup>		●	
—	—	●	●	●	●	● <sup>78</sup>	●	●
● <sup>82</sup>	●	●	●	●	●	●	●	●
● <sup>86</sup>	●	●	● <sup>87</sup>	●	● <sup>88</sup>	● <sup>89</sup>	● <sup>90</sup>	●
● <sup>94</sup>	● <sup>95</sup>	●	● <sup>96</sup>	●	● <sup>97</sup>	● <sup>98</sup>	● <sup>99</sup>	●
—	● <sup>104</sup>	●	● <sup>105</sup>	●	106	●	● <sup>107</sup>	●
● <sup>112</sup>	●	●	●	●	●	● <sup>113</sup>	● <sup>114</sup>	●
● <sup>118</sup>	●	●	● <sup>119</sup>	●	● <sup>120</sup>	● <sup>121</sup>	● <sup>122</sup>	●

## Footnotes to Matrix

1. Law 793 of 2002 on the Extinction of the Right of Property (Colombia), Article 2, para. 2.
2. The Forfeiture of Money, etc in Civil Proceedings (Bailiwick of Guernsey) Law 2007, Sections 6, 10, 13, and 61.
3. Crimes, misdemeanors, contraventions.
4. Section 22, Prohibition on Money Laundering Law 2001 (Israel) provides for NCB asset forfeiture where the court is satisfied that (1) the property was obtained, directly or indirectly, by an offense according to the Prohibition on Money Laundering Law or as remuneration for such an offense, or (2) an offense was committed on such property. According to Section 2 of the Prohibition on Money Laundering Law, predicate offenses for money laundering are included in Schedule 1 of the law. These are serious offenses from which offenders generally derive high gains.
5. Applicable to proceeds of specific “unlawful activities” or “predicate” crimes as provided under Republic Act No. 9160, as amended (Philippines). Section 3(i) of R.A. 9160, as amended, enumerates the predicate crimes as follows:

“Unlawful activity” refers to any act or omission or series or combination thereof involving or having direct relation to the following:

  - (1) Kidnapping for ransom under Article 267 of R.A. 3815, otherwise known as the Revised Penal Code, as amended;
  - (2) Sections 4, 5, 6, 8, 9, 10, 12, 13, 14, 15, and 16 of R.A. 9165, otherwise known as the Comprehensive Dangerous Drugs Act of 2002;
  - (3) Section 3, paras. B, C, E, G, H, and I of R.A. 3019, as amended, otherwise known as the Anti-Graft and Corrupt Practices Act;
  - (4) Plunder under R.A. 7080, as amended;
  - (5) Robbery and extortion under Articles 294, 295, 296, 299, 300, 301, and 302 of the Revised Penal Code, as amended;
  - (6) Jueteng and Masiao punished as illegal gambling under Presidential Decree No. 1602;
  - (7) Piracy on the high seas under the Revised Penal Code, as amended, and Presidential Decree No. 532;
  - (8) Qualified theft under Article 310 of the Revised Penal Code, as amended;
  - (9) Swindling under Article 315 of the Revised Penal Code, as amended;
  - (10) Smuggling under R.A. 455 and 1937;
  - (11) Violations under R.A. 8792, otherwise known as the Electronic Commerce Act of 2000;
  - (12) Hijacking and other violations under R.A. 6235; destructive arson and murder, as defined under the Revised Penal Code, as amended, including those perpetrated by terrorists against non-combatant persons and similar targets;
  - (13) Fraudulent practices and other violations under R.A. 8799, otherwise known as the Securities Regulation Code of 2000;
  - (14) Felonies or offenses of a similar nature that are punishable under the penal laws of other countries.”

Of note is Section 3(i)(14), which includes other crimes of a similar nature that are punishable under the penal laws of other countries.
6. Under the Anti-Money Laundering Act 1999 (Thailand), Section 3, nine money laundering predicate offenses relating to narcotics, trafficking in women and children, human trafficking, public fraud, embezzlement of financial institutions, malfeasance in office, extortion and blackmail, tax evasion, election law violations, terrorism, and illegal gambling are enforced.
7. Proceeds of Crime Act (Australia), Section 329. Also reaches literary proceeds.
8. Law 793 of 2002 on the Extinction of the Right of Property (Colombia), Article 2: “Forfeiture shall be ordered . . . under the following circumstances . . . (2) The property or properties were derived, directly or indirectly, from illegal activity. (3) The property has been used as a means or instrument to carry out an illegal activity, whether the said property was to be used to carry out said activity or was part of the object of the offense. (4) The property or resources involved are derived from the transfer or exchange of other goods or resources obtained directly or indirectly from illegal activity, which were to be used to carry out illegal activities, or which were the product, result, instrument or object of the offense.”
9. Prevention of Organised Crime Act (Am) 1998 (South Africa), Sections 38(2), 48(1).
10. Anti-Money Laundering Act 1999 (Thailand), Section 3, defines “asset involved in an offense” as
  - (1) money or property derived from a commission of a predicate offense, or from aiding or abetting in the commission of a predicate offense;
  - (2) money or property derived from the sale, distribution, or transfer in any manner of the money or asset in (1); or
  - (3) fruits of the money and property in (1) or (2).
11. Forfeiture is restricted to cash. The Forfeiture of Money, etc in Civil Proceedings (Bailiwick of Guernsey) Law 2007, Sections 3 and 13. Section 3 states:
  - (1) In this Law “**cash**” means—
    - (a) notes and coins in any currency,
    - (b) postal orders,
    - (c) cheques of any kind, including traveller’s cheques,
    - (d) banker’s drafts,

## Appendix I: Matrix of Forfeiture Systems in Selected Jurisdictions

- (e) bearer bonds and bearer shares, and
- (f) postage stamps from any jurisdiction, found at any place in the Bailiwick.

(2) **“Cash”** also includes any kind of monetary instrument which—

- (a) is found at any place in the Bailiwick, and
  - (b) is of a class or description specified by regulations of the Home Department made after consultation with the Policy and Finance Committee of the States of Alderney and the General Purposes and Advisory Committee of the Chief Pleas of Sark.
12. According to the Prohibition on Money Laundering Law (Israel), Section 22, the court may order the confiscation of property in civil proceedings, where it is satisfied that the property was obtained, directly or indirectly, by an offense according to the Prohibition on Money Laundering Law or as remuneration for such an offense, or an offense was committed on such property. The Prohibition on Money Laundering Law does not cover the NCB asset forfeiture of instrumentalities of crime.
13. Criminal Code (Switzerland), Article 70, para. 1, forfeits “the assets resulting from an offense or which were intended to induce or to reward the offender” but also the replacement assets (assets bought with proceeds of the offense), as long as they can be traced.
14. Proceeds of Crime Act (Australia), Section 55.
15. Law 793 of 2002 (Colombia), Article 3: “If it is not possible to locate or execute the seizure of the property declared subject to forfeiture at the time of ruling, the Judge may order the forfeiture of substitute property or goods owned by the same person and of equal value. This article shall not be interpreted to prejudice the rights of innocent third parties acting in good faith.”
16. The Prohibition on Money Laundering Law (2000), Section 23, applies the substitute asset sections from the Dangerous Drugs Ordinance (Section 36G) (Israel).
17. Except for the principal residence.
18. Forfeiture of substitute assets is permitted, but in limited circumstances.
19. R.A. 9160, as amended (Philippines), Section 12(c): “Where the court has issued an order of forfeiture of the monetary instrument or property subject of a money laundering offense defined under Section 4, and said order cannot be enforced because any particular monetary instrument or property cannot, with due diligence, be located, or it has been substantially altered, destroyed, diminished in value or otherwise rendered worthless by any act or omission, directly or indirectly, attributable to the offender, or it has been concealed, removed, converted or otherwise transferred to prevent the same from being found or to avoid forfeiture thereof, or it is located outside the Philippines or has been placed or brought outside the jurisdiction of the court, or it has been commingled with other monetary instruments or property belonging to either the offender himself or a third person or entity, thereby rendering the same difficult to identify or be segregated for purposes of forfeiture, the court may, instead of enforcing the order of forfeiture of the monetary instrument or property or part thereof or interest therein, accordingly order the convicted offender to pay an amount equal to the value of said monetary instrument or property. This provision shall apply in both civil and criminal forfeiture.”
20. When assets are no longer available, the Criminal Code (Switzerland), Article 71, para. 1, permits the court to replace them with a compensatory claim. However, substitute assets cannot be forfeited. The asset concerned can be restrained during the investigation, but when the judge has ordered a compensatory claim (a money judgment), it must be enforced through the procedure of enforcement of a judgment based on the Swiss Federal Debt Collection and Bankruptcy Law and, if necessary, validated by a civil action based on civil law and in enforcement of the Swiss law of civil procedure, as any other private creditor.
21. Proceeds of Crime Act 2002 (United Kingdom), Section 305(1): “Where property obtained through unlawful conduct (‘the original property’) is or has been recoverable, property which represents the original property is also recoverable property.”
22. Examinations, production orders, monitoring orders, search and seizure, notice to financial organizations (Proceeds of Crime Act (Australia), Part 3).
23. Production orders, customer information orders, account monitoring orders, disclosure orders. See The Forfeiture of Money, etc in Civil Proceedings (Bailiwick of Guernsey) Law 2007, Part IV.
24. Any mechanism available to the investigative judge or prosecutor under the criminal investigation procedures.
25. Under the Criminal Procedure Ordinance (Arrest and Search) 1969, (Israel), Section 43, any individual or institution (financial or otherwise) may be compelled by judicial order to produce documents, records, or any other evidence to a court, and under Section 32 police may seize articles including documents and records in the course of legal searches. Under the Prohibition on Money Laundering Law (Israel), Section 26, the powers of search and seizure under the Criminal Procedure Ordinance (Arrest and Search) apply with respect to property in relation to which a confiscation order may be granted under the Prohibition on Money Laundering Law. To enforce the Prohibition on Money Laundering Law, police officials and customs officers have the power of search provided in the Dangerous Drugs Ordinance, Section 28(b)(4).
26. R.A. 9160, as amended (Philippines), Section 11, provides the authority to inquire into bank deposits: “Notwithstanding the provisions of Republic Act No. 1405, as amended, Republic Act No. 6426, as amended, Republic Act No. 8791, and other laws, the AMLC may inquire into or examine any particular deposit or investment with any banking institution or non-bank financial institution upon order of any competent court in cases of violation of this Act, when it has been established that there is probable cause that the deposits or investments are related to an unlawful activity as defined in Section 3(i) hereof or a money laundering offense under Section 4 hereof, except that no court order shall be required in cases involving unlawful activities defined in Sections 3(i)(1), (2) and (12).” The Financial Intelligence Unit may itself conduct a bank inquiry, upon probable cause in certain cases, that is, kidnapping for ransom, violation of the Dangerous Drugs Act, murder, and acts perpetrated by terrorists against noncombatants.

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27. Any mechanisms the investigating magistrate or the prosecutor is entitled to take in a criminal procedure (among them search and seizure warrants).
28. The Act on Mutual Legal Assistance in Criminal Matters, B.E. 2535 (1992)(Thailand).
29. Production orders, disclosure orders, account monitoring orders, customer information orders, and also potentially search and seizure warrants.
30. Law 793 of 2002 (Colombia), Article 12: "The prosecutor may order preventive measures or request the same of the judge assigned to the case, as appropriate. Such measures may include the suspension of rights to dispose of the property, the seizure or freeze of the property, money on deposit in the financial system, asset titles, and the fruits thereof, as well as the order to not pay for said property when their physical seizure is impossible. The National Drug Enforcement Directorate shall act as the guardian or the depository for the property involved or frozen in any case."
31. The Forfeiture of Money, etc in Civil Proceedings (Bailiwick of Guernsey) Law 2007, Section 10.
32. Prohibition on Money Laundering Law (2000) (Israel), Section 23, applies restraint sections from the Dangerous Drugs Ordinance (Sections 36F(a) and (b)).
33. Pursuant to R.A. 9160, as amended (Philippines), Section 10, the Court of Appeals may issue an *ex parte* freeze order, effective for 20 days, which may be extended:

Section 10. Freezing of Monetary Instrument or Property. The Court of Appeals, upon application *ex parte* by the AMLC and after determination that probable cause exists that any monetary instrument or property is in any way related to an unlawful activity as defined in Section 3(i) hereof, may issue a freeze order which shall be effective immediately. The freeze order shall be for a period of twenty (20) days unless extended by the court.

Section 53(b) of the Rules on Civil Forfeiture (Philippines) prescribes a 6-month limit for the freeze order: "On motion of the petitioner filed before the expiration of twenty days from issuance of a freeze order, the court may for good cause extend its effectivity for a period not exceeding six (6) months."
34. See Anti-Money Laundering Act 1999 (Thailand), Sections 34, 35, 36, 48.
35. Property freezing order, property freezing order and management receiver, interim receiving order.
36. Proceeds of Crime Act (Australia), Section 319.
37. Law 793 of 2002 (Colombia), Article 7: "The forfeiture action shall be conducted exclusively in accordance with this law and, only in the cases not set forth in this statute, the Code of Criminal Procedure or the Code of Civil Procedure, in that order. Under no circumstances may a lateral decision be made to impede the ruling, nor may the grouping of cases be demanded. Once the case file has been considered by the court, that case shall have primacy over any other cases underway in the matter, with the exception of those cases involving the resolution of the legal status of an individual under arrest."
38. Arguably yes, but it is likely to raise very serious practical and legal problems because of the evidential requirements in a criminal prosecution.
39. The Rule of Procedure in Cases of Civil Forfeiture (A.M. No. 05-11-04-SC) (Philippines), Sections 27 and 28, provide
  27. *No prior charge, pendency or conviction necessary.* No prior criminal charge, pendency of or conviction for an unlawful activity or money laundering offense is necessary for the commencement or the resolution of a petition for civil forfeiture.
  28. *Precedence of proceedings.* Any criminal case relating to an unlawful activity shall be given precedence over the prosecution of any offense or violation under Republic Act No. 9160, as amended, without prejudice to the filing of a separate petition for civil forfeiture or the issuance of an asset preservation order or a freeze order. Such civil action shall proceed independently of the criminal prosecution.
40. Prevention of Organised Crime Act (Am) 1998 (South Africa), Section 50.
41. Anti-Money Laundering Act 1999 (Thailand), Section 58, provides, "Where the asset involved in the commission of an offense is subject to another legal process which has not yet commenced or is pending or if it would be more effective to proceed under this Act, then the Government shall proceed as provided in this Act."
42. Any NCB asset forfeiture application proceeds together with the criminal investigation and proceedings. If assets linked to the offense are discovered during an investigation, they will be restrained. If criminal proceedings do not proceed (for example, the offender has fled the jurisdiction), there will be an NCB asset forfeiture once it is established that there has been an offense and that the assets are linked to the offense.
43. Currently non-conviction based asset forfeiture may not run in parallel to criminal proceedings where they relate substantively to the same assets or criminality. The circumstances in which criminal and NCB asset forfeiture proceedings and investigations may run in parallel are beyond the scope of this guide. Interested foreign jurisdictions should contact the relevant U.K. law enforcement agency or the U.K. Home Office.
44. Proceeds of Crime Act (Australia), Section 80, 14(a).
45. The Forfeiture of Money, etc in Civil Proceedings (Bailiwick of Guernsey) Law 2007, Part V, Section 49.
46. This applies to most cases, although there are exceptions where a conviction is required.
47. Code of Criminal Procedure (Liechtenstein), Section 356: "If there are sufficient grounds for the assumption that the preconditions for absorption of enrichment (Section 20 StGB [Strafgesetzbuch, or Penal Code]), forfeiture (Section 20b StGB), or confiscation (§ 26 StGB) are given, without the possibility of deciding thereon in criminal proceedings or in proceedings aimed at placement in one of the institutions referred to in Sections 21 to 23 StGB, then the public prosecutor shall file a separate application for the issue of such a financial order."

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## Appendix I: Matrix of Forfeiture Systems in Selected Jurisdictions

48. Prevention of Organised Crime Act (Am) 1998 (South Africa), Section 50.
49. In a domestic proceeding there is no need for proof of guilt, rather the need to prove the existence of the offense and the link between the asset and the offense. If requested by a foreign state and the offender was prosecuted and not found guilty, it will depend on the reason.
50. Unless challenged by the defendant.
51. Where a request is made to the United Kingdom by a foreign state consequent on a criminal conviction for the confiscation of the assets, the procedure is effectively one involving registration of the foreign order, provided that, for example, the criminal conduct is conduct that constitutes an offense in any part of the United Kingdom, or would constitute an offense in any part of the United Kingdom if it occurred there, there is a criminal conviction and no appeal is outstanding, the external order is in force and is not under appeal, and it does not infringe the European Convention on Human Rights. Where an external order is to be given effect by means of NCB asset forfeiture (civil recovery), there is no requirement for the external order to arise out of a criminal conviction. However, for the Court to accede to request to register the external order, it will have to be satisfied that certain conditions set out in the Proceeds of Crime Act 2002 (United Kingdom) or the Order in Council (2005/3181) have been met. These do not look at the question of proof of guilt. However, the property or money must have been found by the overseas court to have been obtained as a result of or in connection with criminal conduct, and is for the recovery of specified property or a specified sum of money. "Criminal conduct" is conduct that constitutes an offense in any part of the United Kingdom, or would constitute an offense in any part of the United Kingdom if it occurred there.
52. The Forfeiture of Money, etc in Civil Proceedings (Bailiwick of Guernsey) Law 2007, Section 13(2).
53. Proceeds of Crime Act 1996 (Ireland), Section 8(2).
54. Rule of Procedure in Cases of Civil Forfeiture (Philippines), Section 32, provides, "The court shall render judgment within thirty days from submission of the case for resolution. It shall grant the petition if there is a preponderance of evidence in favor of the petitioner and declare the monetary instrument, property, or proceeds forfeited to the State or, in appropriate cases, order the respondent to pay an amount equal to the value of the monetary instrument or property and adjudge such reliefs as may be warranted."
55. Prevention of Organised Crime Act (Am) 1998 (South Africa), Section 50.
56. Standard is less than beyond a reasonable doubt.
57. One does not need to prove the guilt of a person, only the fact that there has been an offense and that the asset is linked to this offense.
58. Proceeds of Crime Act (Australia), Sections 18, 19, 47, and 49.
59. Limitation period ranges from 10 to 20 years. It is 20 years for government officials found guilty of illicit enrichment (Constitution of Haiti, Article 243).
60. General limitation period is 7 years (Criminal Code (Switzerland), Article 70 para. 3) unless the statute of limitation for the offense that generated the proceeds is longer. These limitation periods are provided in the Criminal Code, Article 97, including 30 years if the offense is punishable with life custodial sentence, 15 years if the offense is punishable with custodial sentence for more than 3 years, and 7 years if the offense is punishable with any other penalty.
- The limitation shall not run any longer if, before expiry, a judgment was entered by a court of first instance.
61. Proceeds of Crime Act 2002 (United Kingdom), Section 288(1).
62. Law 793 of 2002 (Colombia), Article 24: "Forfeiture may be ordered regardless of when the acquisition or illegal use of the property occurred. At all times it is to be understood that the illegal acquisition of the property does not constitute a just title, is seriously detrimental to the social welfare of the country, and is an activity that bears permanent effects."
63. Customary law applies.
64. The crime of plunder where the right to recover assets related thereto is not "barred by prescription, laches, or estoppel" (R.A. 7080 [An Act Defining and Penalizing the Crime of Plunder, the Philippines], Section 6).
65. There is no statute of limitations for a few specific crimes (Criminal Code, Article 101) (Switzerland).
66. Proceeds of Crime Act 2002 (Australia), Section 54, presumes property is an instrument of an offense once certain criteria are met.
67. Presumptions are applied in limited circumstances.
68. Rule of Procedure in Cases of Civil Forfeiture (Philippines), Section 31: "In rendering judgment, the court may consider the following factors to determine where lies the preponderance of evidence:
- (a) That the monetary instrument, property, or proceeds are represented, involved, or related to an unlawful activity or a money laundering offense:
    - (1) If the value or amount involved is not commensurate with the business, financial or earning capacity of the person;
    - (2) If any transaction indicates a clear deviation from the profile or previous transactions of the person;
    - (3) If a person opens, maintains or controls an account with a covered institution not in his own name or registered business name unless authorized under existing law;
    - (4) If a person has structured transactions in order to avoid being the subject of reporting requirements under Republic Act No. 9160, as amended; or
    - (5) If any transaction exists that has no apparent underlying legal or trade obligation, purpose or economic justification;

Or

- (b) That the monetary instrument, property, or proceeds, the sources of which originated from or are materially linked to monetary instruments, properties, or proceeds used in the commission of an unlawful activity or money laundering offense, are related to the said unlawful activity or money laundering offense.”
69. Where the prosecution proves the existence of the criminal organization, any funds proved to be held by that criminal organization are presumed to be of criminal origin unless the holders prove the contrary.
70. See Anti-Money Laundering Act 1999 (Thailand), Sections 51 and 52.
- Section 51: “If the claimant in section 50, paragraph one is related to or used to be related to any person who committed the predicate offense or the offense of money laundering, the presumption shall be that the money or asset related to an offense or has been transferred dishonestly, whichever the case may be.”
- Section 52: “If the claimant in being a recipient in section 50 paragraph two is related to or used to be related to any person who committed the predicate offense or the offense of money laundering, the presumption shall be that the claimant has acquired his vested interest in possession dishonestly.”
71. Title 21 United States Code, Section 853(a): Person convicted of a felony is subject for forfeiture if the Government establishes property was acquired during the period of the violation and there was no likely source for the property other than the violation.
72. Subject to an application to the court under Section 54 and Schedule 1 Legal Expenses in The Forfeiture of Money, etc in Civil Proceedings (Bailiwick of Guernsey) Law 2007.
73. Living expenses only, as specified in the Code of Civil Procedure.
74. The Prohibition on Money Laundering Law (Israel) applies the provisions of Sections 36C–J of the Dangerous Drugs Ordinance to the confiscation of property. Section 36C of the Dangerous Drugs Ordinance provides, “(b) The court shall not order the forfeiture of any property under section 36A or 36B unless it is satisfied that the owner of the property and the members of his family living with him will have reasonable means of support and reasonable housing.”
75. Unsettled issue but appears permissible.
76. Not by the law, but some court decisions allow it. It is a matter of proportionality.
77. Law 793 of 2002 (Colombia), Article 2: “Forfeiture orders under this law are of a jurisdictional nature, real and with value, and shall be executed on any real principle or accessory right, regardless of whose control they are under or by whom they were obtained, and upon shared property.”
78. The Anti-Money Laundering Act 1999 (Thailand), Section 6, provides, “Whoever commits a money laundering offense, even if the offense is committed outside the Kingdom, shall receive the penalty in the Kingdom, as provided in this Act, if:
- (1) either the offender or co-offender is a Thai national or resides in the Kingdom;
  - (2) the offender is an alien and has taken action to commit an offense in the Kingdom or is intended to have the consequence resulting therefrom in the Kingdom, or the Royal Thai Government is an injured party; or
  - (3) the offender is an alien whose action is considered an offense in the State where the offense is committed under its jurisdiction, and if that individual appears in the Kingdom and is not extradited under the Extradition Act, Section 10 of the Penal Code shall apply *mutatis mutandis*.”
79. Proceeds of Crime Act (Australia), Section 337A.
80. Law 906 of 2004 (Code of Criminal Procedure, Colombia), Article 489: Legal assistance in criminal matters may be provided, even if the conduct which is sought is not defined by law, unless contrary to the values and principles enshrined in the Constitution of Colombia.
81. The Forfeiture of Money, etc in Civil Proceedings (Bailiwick of Guernsey) Law 2007, Section 61.
82. International Legal Assistance Law (Israel), Section 33A(1).
83. Proceeds of Crime Act (Australia), Section 337A.
84. Law 793 of 2002 (Colombia), Article 21: “The mutual legal assistance agreements and treaties that have been signed, approved, and duly ratified by Colombia shall be fully applicable in order to seek cooperation in asset sharing when their content is compatible with forfeiture proceedings.” And pursuant to Law 906 of 2004 (Code of Criminal Procedure, Colombia), Article 489, “Limit assistance. It may provide legal assistance in criminal matters, even if the conduct which is sought is not defined by law, unless contrary to the values and principles enshrined in the Constitution of Colombia.... The extinction of ownership or any other measure involving the loss or suspension of power device on goods, declared by order of a competent foreign authority, may run in Colombia.”
85. Only by or with authority of the Attorney General. The Forfeiture of Money, etc in Civil Proceedings (Bailiwick of Guernsey) Law 2007, Section 10.
86. The International Legal Assistance Law (1998) (Israel), Article 6, Chapter 3, permits assistance for criminal matters only. “Criminal matters” are defined as including “a forfeiture of property in a criminal proceeding and a forfeiture of property in a civil proceeding.”
87. R.A. 9160 (Philippines), Section 13(b), permits the Anti-Money Laundering Council (AMLC) to restrain at the request of a foreign government: “The AMLC may execute a request for assistance from a foreign State by: (1) tracking down, freezing, restraining and seizing assets alleged to be proceeds of any unlawful activity under the procedures laid down in this Act; (2) giving information needed by the foreign State within the procedures laid down in this Act; and (3) applying for an order of forfeiture of any monetary instrument or property in the court: Provided, That the court shall not issue such an order unless the application is accompanied by an authenticated copy of the order of a court in the requesting State ordering the forfeiture of said monetary instrument or property of a person who has been convicted of a money laundering offense in the requesting State, and a certification or an affidavit of a competent officer of the requesting State stating that the conviction and the order of forfeiture are final and that no further appeal lies in respect of either.”

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However, the request may be refused in some instances as provided under R.A. 9160, Section 13(d): “The AMLC may refuse to comply with any request for assistance where the action sought by the request contravenes any provision of the Constitution or the execution of a request is likely to prejudice the national interest of the Philippines unless there is a treaty between the Philippines and the requesting State relating to the provision of assistance in relation to money laundering offenses.”

88. International Mutual Legal Assistance in Criminal Matters (Switzerland), Article 64.

89. Through mutual legal assistance channels.

90. Where an enforcement authority may initiate proceedings for a recovery order pursuant to the registration of an external order, it may apply to the court for a property freezing order. Where there is an external order made by an overseas court where property is found or believed to have been obtained as a result of or in connection with criminal conduct, and is for the recovery of specified property or a specified sum of money (Proceeds of Crime Act 2002 (United Kingdom), Section 447(2)), a property freezing order or an interim receiving order may be obtained in England and Wales or Northern Ireland. It does not matter if the external order was made in criminal or civil proceedings or some other court proceedings. The ability to freeze property applies regardless of whether proceedings have been brought in the country from which the external order originates for criminal conduct, and in relation to the property (Order in Council [2005/3181] [“Proceeds of Crime Act Order”], Article 142(3)). The external order may be an *in personam* or *in rem* order. By definition, the external order is for the recovery of a specified property or a specified sum of money. “Property” is defined as “all property wherever situated and includes (a) money; (b) all forms of property, real or personal, heritable or moveable; (c) things in action and other intangible property” (Proceeds of Crime Act 2002 (United Kingdom), Section 447(4)).

91. Proceeds of Crime Act (Australia), Section 337A.

92. Law 793 of 2002 (Colombia), Article 21 (see footnote 8), and pursuant to Law 906 of 2004 (Code of Criminal Procedure), Article 489.

93. The Forfeiture of Money, etc in Civil Proceedings (Bailiwick of Guernsey) Law 2007, Part V Section 13. Country must be designated under Section 53 of this Law.

94. The specific provision for assistance to other countries on civil forfeiture cases is the International Legal Assistance Law (Israel), Article 6 of Chapter 3, which was promulgated and went into effect in 1998.

95. In summary judgment proceedings.

96. R.A. 9160 (Philippines), Section 13(b), the AMLC may apply for an order of forfeiture with the court at the request of a foreign government: “The AMLC may execute a request for assistance from a foreign State by: (1) tracking down, freezing, restraining and seizing assets alleged to be proceeds of any unlawful activity under the procedures laid down in this Act; (2) giving information needed by the foreign State within the procedures laid down in this Act; and (3) applying for an order of forfeiture of any monetary instrument or property in the court.”

97. Order will be enforced once the court is satisfied that there has been an offense; the asset is the proceeds of an offense that is prosecuted in Switzerland too (dual criminality); the requesting state would be competent to prosecute the offender (*ratione loci*); statute of limitations is respected; fair trial has been conducted; the offense has been proven; the link between the asset and the offense has been proven. If the foreign jurisdiction has not initiated criminal proceedings against the violator, an explanation is required. If the foreign jurisdiction proceeded by way of an NCB asset forfeiture order because it was easier, the foreign order will not be enforced.

98. Through mutual legal assistance channels.

99. Where a request is made to England and Wales by a foreign state consequent on a criminal conviction for the confiscation of the assets, the procedure is effectively one involving registration of the foreign order, provided that, for example, the criminal conduct is conduct that constitutes an offense in any part of the United Kingdom, or would constitute an offense in any part of the United Kingdom if it occurred there, there is a criminal conviction and no appeal is outstanding, the external order is in force and is not under appeal, and it does not infringe the European Convention on Human Rights.

If an external order is to be given effect by means of NCB asset forfeiture (civil recovery), there is no requirement for the external order to arise out of a criminal conviction. However, for the court to accede to the request to register the external order, it will have to be satisfied that certain conditions set out in the Proceeds of Crime Act 2002 (United Kingdom) or the Order in Council (2005/3181) have been met. These do not look at the question of proof of guilt. However, the property or money must have been found by the overseas court to have been obtained as a result of or in connection with criminal conduct, and is for the recovery of specified property or a specified sum of money. “Criminal conduct” is conduct that constitutes an offense in any part of the United Kingdom, or would constitute an offense in any part of the United Kingdom if it occurred there.

100. Proceeds of Crime Act (Australia), Section 49.

101. Law 906 of 2004 (Code of Criminal Procedure, Colombia), Article 489; Vienna Convention, Article 5; cases of Ignacio Gaitan Cendales, Nasser Arana Family, and Eduardo Dávila Armenta.

102. The Forfeiture of Money, etc in Civil Proceedings (Bailiwick of Guernsey) Law 2007, Sections 13 and 61.

103. Predicate offense subject to double incrimination.

104. Upon special request.

105. R.A. 9160, as amended (Philippines), Section 3(i)(14), considers “felonies or offenses of a similar nature that are punishable under the penal laws of other countries” to be predicate offenses.

106. As a rule, this is not possible. Swiss law requires competent *ratione loci* to prosecute the offense; namely the offense is committed in whole or in part on its territory (Articles 3–7 Criminal Code), the offender is a Swiss citizen, or the victim is a Swiss citizen. There is one exception under Article 24 of the federal law on narcotics, which permits forfeiture of assets located in Switzerland even though the offense took place in a foreign country. In practice, Switzerland can almost always initiate a domestic proceeding based on

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a money laundering offense, knowing that the money that has been laundered and deposited in a Swiss bank account is the proceeds of money laundering, and that one offender can be charged for laundering the proceeds of his own crime.

107. A U.K. law enforcement agency may adopt a case for civil recovery if the case satisfies the necessary requirements, for example, there is sufficient evidence of criminality, and the dual criminality test is satisfied. Recently, a French judgment of a criminal conviction was used together with other evidence of criminality to secure a recovery order.

108. Proceeds of Crime Act (Australia), Section 297(1)(c).

109. According to repeated jurisprudence of the Constitutional Court of Colombia, when considering international cooperation in criminal matters, a domestic law authorizing the sharing of assets under state ownership is required, specifying the procedure and allocating the necessary skills and powers: Sentence C-404-99 Judge Dr. Alejandro Martínez Caballero; Sentence C-280-01, Judge Dr. Marco Gerardo Monroy Cabra; Sentence C-288-02, Judge Dr. Rodrigo Escobar Gil.

110. Providing the State can establish that it is a victim under Section 16 of the Forfeiture of Money, etc in Civil Proceedings (Bailiwick of Guernsey) Law 2007 or under an asset sharing agreement after enforcement of a confiscation order.

111. Where there is an existing agreement.

112. According to the International Legal Assistance Law (Israel), Section 42, the Minister of Justice has the authority to prescribe that the property forfeited, or part of it, or its equivalent, be transferred to the state, where the foreign forfeiture order was made.

113. In situations of corruption and embezzlement.

114. There is no automatic transmission to a foreign enforcement authority, or state, of assets recovered in the United Kingdom pursuant to a foreign order. The property or its money equivalent is placed in the U.K. Government's consolidated funds. There is no legal power or discretion that enables the U.K. court to remit the property to a foreign state or other recipient. However, the United Kingdom has entered into agreements with some foreign states that permit it to share property confiscated in the United Kingdom (net of the costs of recovery) with the foreign state. Here the confiscation of property arises out of a request made consequent on criminal conviction. However, these agreements are not thought to apply to civil recovery proceedings. The United Kingdom, therefore, is considering asset sharing agreements with foreign states with respect to civil recovery proceedings. It is also possible to reach asset sharing agreements on a case-by-case basis. The United Kingdom will seek to honor UNCAC in respect of corruption cases and as such remit the recovered proceeds and assets to the requesting jurisdiction.

115. There has to be an international cooperation agreement or a memorandum of understanding.

116. Subject to the return of assets to victims and any asset sharing agreements that may be entered. The Forfeiture of Money, etc in Civil Proceedings (Bailiwick of Guernsey) Law 2007, Section 16.

117. Where there is an existing agreement.

118. According to the International Legal Assistance Law (Israel), Section 42, the Minister of Justice has the authority to prescribe that the property forfeited, or part of it, or its equivalent, be transferred to the state where the foreign forfeiture order was made.

119. If prosecuted on behalf of the Philippines, everything forfeited belongs to the Philippines. If prosecuted on behalf of a foreign jurisdiction, it is an unsettled issue—no provision exists.

120. If the assets are to be returned directly to the victims, Switzerland will not seek to retain a portion. However, if the assets are to be returned to the requesting state, there will be a sharing arrangement.

121. Retain portion, if expense to third party.

122. Separate to the issue of transmission to the requesting state of recovered proceeds and assets, the United Kingdom will seek to honor UNCAC. It will consider the issue of retaining monies to cover its reasonable expenses on a case-by-case basis.

# Appendix II: Key Concepts— Quick Reference Sheet

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## Prime Imperatives

1. Non-conviction based (NCB) asset forfeiture should never be a substitute for criminal prosecution.
2. The relationship between an NCB asset forfeiture case and any criminal proceedings, including a pending investigation, should be defined.
3. NCB asset forfeiture should be available when criminal prosecution is unavailable or unsuccessful.
4. Applicable evidentiary and procedural rules should be as specific as possible.

## Defining Assets and Offenses Subject to NCB Asset Forfeiture

5. Assets derived from the widest range of criminal offenses should be subject to NCB asset forfeiture.
6. The broadest categories of assets should be subject to forfeiture.
7. The definition of assets subject to forfeiture should be broad enough to encompass new forms of value.
8. Tainted assets acquired prior to the enactment of an NCB asset forfeiture law should be subject to forfeiture.
9. The government should have discretion to set appropriate thresholds and policy guidelines for forfeiture.

## Measures for Investigation and Preservation of Assets

10. The specific measures the government may employ to investigate and preserve assets pending forfeiture should be designated.
11. Preservation and investigative measures taken without notice to the asset holder should be authorized when notice could prejudice the ability of the jurisdiction to prosecute the forfeiture case.
12. There should be a mechanism to modify orders for preservation, monitoring, and production of evidence and to obtain a stay of any ruling adverse to the government pending reconsideration or appeal of any order that could place forfeitable property beyond the reach of the court.

## Procedural and Evidentiary Concepts

13. The procedural and content requirements for both the government's application and the claimant's response should be specified.
14. Fundamental concepts such as the standard (burden) of proof and use of rebuttable presumptions should be delineated by statute.
15. Where affirmative defenses are used, defenses to forfeiture should be specified, along with the elements of those defenses and the burden of proof.
16. The government should be authorized to offer proof by circumstantial evidence and hearsay.
17. Applicable statutes of limitations (prescription) should be drafted to permit maximum enforceability of NCB asset forfeiture.

## Parties to Proceedings and Notice Requirements

18. Those with a potential legal interest in the property subject to forfeiture are entitled to notice of the proceedings.
19. A prosecutor or government agency should be authorized to recognize secured creditors without requiring them to file a formal claim.
20. A fugitive who refuses to return to the jurisdiction to face outstanding criminal charges should not be permitted to contest NCB asset forfeiture proceedings.
21. The government should be authorized to void transfers if property has been transferred to insiders or to anyone with knowledge of the underlying illegal conduct.
22. The extent to which a claimant to forfeitable assets may use those assets for purposes of contesting the forfeiture action or for living expenses should be specified.

## Judgment Proceedings

23. Consider authorizing default judgment proceedings when proper notice has been given and the assets remain unclaimed.
24. Consider permitting the parties to consent to forfeiture without a trial and authorizing the court to enter a stipulated judgment of forfeiture when the parties agree to such procedure.
25. Specify any remedies that are available to the claimant in the event the government fails to secure a judgment of forfeiture.
26. The final judgment of NCB asset forfeiture should be in writing.

## Organizational Considerations and Asset Management

27. Specify which agencies have jurisdiction to investigate and prosecute forfeiture matters.

28. Consider the assignment of judges and prosecutors with special expertise or training in forfeiture to handle NCB asset forfeitures.
29. There should be a system for pre-seizure planning, maintaining, and disposing of assets in a prompt and efficient manner.
30. Establish mechanisms to ensure predictable, continued, and adequate financing for the operation of an effective forfeiture program and limit political interference in asset forfeiture activities.

### International Cooperation and Asset Recovery

31. Correct terminology should be used, particularly when international cooperation is involved.
32. Extraterritorial jurisdiction should be granted to the courts.
33. Countries should have the authority to enforce foreign provisional orders.
34. Countries should have the authority to enforce foreign forfeiture orders and should enact legislation that maximizes the enforceability of their judgments in foreign jurisdictions.
35. NCB asset forfeiture should be used to restore property to victims.
36. The government should be authorized to share assets with or return assets to cooperating jurisdictions.



# Appendix III: StAR Focal Point Contact List

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On September 17, 2007, the World Bank (WB) and the United Nations announced a broad new effort called the StAR Initiative to help developing nations build capacity to recover billions of dollars of looted funds. In announcing the initiative, Secretary General of the United Nations Ban Ki-moon, World Bank President Robert B. Zoellick, and Executive Director of the UN Office on Drugs and Crime (UNODC) Antonio Maria Costa, said a truly international effort is needed to ensure looted assets are returned to their rightful owners.

The StAR Initiative will help

- develop capacity to respond to and file international mutual legal assistance requests;
- adopt and implement effective confiscation measures, including non-conviction based confiscation legislation;
- enhance transparency and accountability of public financial management systems;
- create and strengthen national anticorruption agencies; and
- help monitor the recovered funds if requested by the countries.

An important objective to the success of the StAR initiative is to build a global network of both developed and developing countries to work collectively to recover stolen assets.

Currently, there is no worldwide list to use in contacting designated national officials who can act as government focal points to help countries with stolen asset cases, especially those involving politically exposed persons (PEPs), and those who bribed public officials. Thus, the UNODC, INTERPOL, and the WB will work together to establish a 24-hour, seven-day StAR Focal Point List of officials in countries who can respond to emergency requests for assistance. INTERPOL will put the information on its Web site.

To help identify a focal point in your country, we kindly request that you answer the questions below and send your responses by May 2, 2008, to both Mr. Arnaud Tasciyan, with INTERPOL, via email: [A.Tasciyan@interpol.int](mailto:A.Tasciyan@interpol.int) and Mr. Ted Greenberg, with the Financial Market Integrity Unit of the WB, via email: [tgreenberg@worldbank.org](mailto:tgreenberg@worldbank.org) or via fax on (202) 522-2433.

## **Questionnaire for Designating Focal Points to Help to Identify, Trace, and Seize Corruption Proceeds**

1. Please identify a government-wide (individual or office) Focal Point that foreign governments can contact on a 24-hour, 7-day basis for technical and legal assistance in stolen asset matters. Include telephone and fax numbers as well as e-mail addresses.\*
2. Please identify the key offices within your government that may become involved in criminal or non-conviction based asset forfeiture actions relating to stolen foreign assets.
3. What type of information does your government need from a requesting government in order to successfully assist in the identification, tracing, or seizure of stolen assets?
4. What evidence is necessary for your government to open its own criminal investigation or initiate a civil action regarding stolen or embezzled assets?
5. Does your country have the authority to enforce foreign forfeiture judgments?

**\*Please indicate whether the information can be put on Interpol's public Web site.**

# Appendix IV: Financial Profile Form

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## Financial Profile Form

A central element of any financial investigation is the development of a full financial profile on an individual. This can be the key to establishing the level of criminality and building evidence to support a criminal prosecution NCB asset forfeiture case. It is also essential in criminal forfeiture when making submissions to the court as to the benefit from criminal conduct and the assets held.

The following form is adapted from a financial profile form currently used within the United Kingdom. It contains sufficient information to produce an effective profile. It can be continually updated and can generate further lines of inquiry as the profile develops. Having identified bank and other financial accounts, court production orders may be sought to obtain the necessary documentary evidence. Analysis of this evidence will identify any disparity between income compared with expenditure and assets. In addition, it will provide clues as to the money laundering typologies being used, for example, by means of a business to cover the source of funds. An assessment can be made of the scale of criminality and the duration over which it has occurred.

It can be useful to complete the form during any interview of the individual under investigation. Limited disclosure by a suspect may be useful evidence per se. There may be an element of concealment, an attempt to distance themselves from an account or asset.

Examination of financial evidence in the context of link analysis will also provide valuable evidence of the transfer of funds between individuals or business entities. These analytical products can be integrated with communications data and surveillance records to produce an evidential package that will assist in making a judgment as to what charges should be brought.

Evaluation of a financial profile can provide useful cash seizure opportunities. This may be particularly important if a criminal prosecution is impractical for any reason. It is widely recognized that the criminal economy is much more cash-intensive than the legitimate economy. An important element of money laundering can be the movement of cash across borders. This was acknowledged by the Financial Action Task Force and addressed in the ninth Special Recommendation concerning cash couriers. Cash seizure disrupts criminal activity and subsequent forfeiture provides an opportunity, particularly in corruption cases, to return funds to the legitimate owner.

## Use of Production Orders in the United Kingdom

Production orders are court orders issued by a judge that allow financial investigators to obtain information about a suspect's financial affairs. A production order requires the person in possession or control of the material sought to produce it to be copied or taken away. This is usually to be done within seven days unless the judge decides that a longer or shorter period is appropriate.

The use of production orders can be broadly divided to cover two sets of circumstances. In the majority of cases, production orders relate to those with a duty of confidentiality, that is, those holding material in the course of a business who are cooperative but require the protection of a production order to avoid litigation. This group generally includes financial institutions, solicitors, and accountants.

The second group includes those unwilling to provide material; although not formal suspects in a case, they may be reluctant to assist an investigation. It is common in the early stages of an investigation for individuals to be identified as holding material, but it is not possible to establish the level of their involvement in the criminality. A priority is to secure evidence, and these are the circumstances when it may be appropriate to request an order for immediate production of material to prevent falsification, concealment, or destruction.

Any failure to comply with a production order is dealt with as a contempt of court. It may also justify the issue of a search warrant to enter, if need be by force, and seize material likely to be of substantial value to the investigation.

Having been served with a production order, an individual is under a legal obligation not to prejudice an investigation by making a disclosure about it or by tampering with evidence relevant to the investigation.

It is important that financial investigation be recognized by law enforcement as a tool that extends beyond the limits of financial crime and terrorism. Production orders are also used in major crime investigations as a valuable source of evidence, for example, for plotting suspect and victim movements. Financial inquiries can lead to the identification of witnesses to a crime and identify further evidence, such as closed-circuit television footage.

## Account Monitoring Orders

An account monitoring order allows for real-time financial surveillance. The order is available for money laundering, criminal forfeiture, and cash seizure investigations and enables the investigator to observe the transactions in an account. Analysis of the product can establish typologies being used and present opportunities for cash seizure, for example, targeting the locations of frequent large cash withdrawals.

## Financial Profile

Surname	URN
Last names	
Alias	Date of Birth
Address	

Commercial

Drugs

Criminal Case Officer .....

Team/Branch .....

Tel .....

Financial Investigator .....

Team/Branch .....

Tel .....

Criminal Case Solicitor .....

Tel ..... Fax .....

Criminal Case Counsel .....

Tel ..... Fax .....

Financial Solicitor .....

Tel ..... Fax .....

Financial Counsel .....

Tel ..... Fax .....

Forensic Accountant .....

Tel ..... Fax .....

## Financial Profile — Index & Check Sheet

### Part 1: Personal Financial Profile

ASSETS	Cash/valuables seized	
	Bank accounts	
	Other bank/building society accounts	
	National savings	
	Premium bonds	
	Shares	
	Unit trusts	
	Life policies/endowments	
	Motor vehicles	
	Boats/caravans etc.	
	Other	
	Value of gifts to third parties	
LIABILITIES	Credit cards	
	Store cards	
	Credit agreements	
	Maintenance/CSA payment	
	Court judgments/fines/previous forfeiture orders	
	Other liabilities/debts	
	Overdraft current	
	Personal solvency	
DECLARED INCOME	Employment	
	Previous employment	
	Income tax details	
	Other sources of income in property	
PROPERTY	Property details	
	Occupiers	
	Rented property	
	Owned property	
	Value	
	Mortgage	
	Other property charges	
	Ground rent (leasehold)	
	Third party interest	
	House contents	

UTILITIES (Property Liabilities)	Community charge	
	Water rates	
	Electricity	
	Gas	
	Telephone	
	Mobile telephone	
	Property insurance	

**Part 2: Business Financial Profile**

BUSINESS ASSETS	Bank accounts	
	Motor vehicles	
	Plant/machinery etc.	
	Office/trade fixtures and fittings	
	Other valuable property	
	Stock in trade	
	Work in progress	
	Fully secured debtors	
	Partly secured debtors	
BUSINESS LIABILITIES	Employees	
	Fully secured creditors	
	Partly secured creditors	
	Credit cards	
	Debit cards	
	Credit agreements	
	Direct debit/standing orders	
	Court judgments	
	Winding-up order/voluntary liquidation	
	Other contractual liabilities	
	Corporation tax/income tax	
	Value added tax	
BUSINESS INTEREST	Preliminary assessment	
	Trading partnership/company	
	Company directors/partners	
	Company's documentation	
	Interest in business	
	Realizable property held by business	

BUSINESS PREMISES	Assets	
	Other occupiers	
	Liabilities	
	Mortgage (business)	
	Other charges on property	
	Rates/business expenses	
	Water rates (business)	
	Electricity (business)	
	Gas (business)	
	Telephone (business)	
	Premises insurance (business)	
	Contents insurance (business)	
	Company insurance claims	

**Part 1: Personal Financial Profile of .....**

**DECLARED INCOME**

**Employment**

	Current Employment	Previous Employment
Name of employer or self-employed:		
Occupation:		
Net income:		
Weekly/monthly or annually:		
Commencement date:		
Leaving date:		
Notes:		

**Income Tax Details**

Period covered:	
Tax reference number:	
Tax paid:	
Tax office:	
Notes:	

**Other Sources of Income**

Source of income:	
Notes:	

**PROPERTY****Property Details**

	Current Property	Previous Address
Full address and postcode:		
Date of purchase:		
Purchase price:		
Current value:		
Date last value:		
Valuer's name and address:		
Name in which property held:		
Mortgage/charges:		
Land registry office copy, attached (Y/N), and date:		
Notes:		

**Mortgage**

Name of mortgagee:	
Address of mortgagee:	
Account name(s):	
Account number:	
Amount borrowed:	
Date commenced:	
Balance of account:	
Payment week/month:	
Method of payment:	
Arrears:	
Notes:	

**Other Charges on Property**

Charge holder:	
Address:	
Amount of charge:	
Date of charge:	
Reason for charge:	
Notes:	

**Ground Rent (leasehold property)**

Name of landlord:	
Address of landlord:	
Payable month/year:	
When due:	
Method of payment:	
Notes:	

**Third Party Interest in Property**

Status:	
Name:	
Amount:	
Contribution mortgage:	
Contribution expenses:	
Notes:	

**House Contents (significant value only, antiques, paintings, jewelry, etc. and videos/photos)**

Description	Value
Notes:	

**UTILITIES (Property Liabilities) (include mortgage payments from above)**

**Community Charge**

	Community Charge	Water Rates	Electricity	Gas
Authority paid:				
Payable annually:				
When and how paid:				
Current arrears:				
Notes:				

**Telephone**

	Telephone	Mobile Telephone
Telephone number:		
Authority paid:		
Payable annually:		
When and how paid:		
Current arrears:		
Itemized billing attached (Y/N):		
Notes:		

**Property Insurance**

Insurance company:	
Amount insured:	
Risks covered:	
Amount paid week/year:	
When paid:	
How paid:	
Any special risks:	
Notes:	

**ASSETS**

**Cash/Valuables Seized by Police/Customs**

Amount/value:	
Where deposited:	
Date of deposit:	
Deposit reference:	
From where seized:	
Restrained (Y/N):	
Notes:	

**Bank/Building Society Accounts**

Bank name:	
Bank address:	
Sort code:	
Account number:	
Type of account:	
Full name of account holder:	

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**Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture**

Current balance:	
Annual credit turnover:	
Annual debit turnover:	
Notes:	

**National Savings**

Certificate numbers:	
Value:	
Where held:	
Amount held and dates of acquisition:	
Notes:	

**Premium Bonds**

Certificate numbers:	
Value:	
Where held:	
Amount held and dates of acquisition:	
Notes:	

**Shares**

	Quoted Shares	Nonquoted Shares
Name of company:		
Amount of holding:		
Location of certificates:		
Value of holding:		
Share transfer office:		
Notes:		

**Unit Trusts**

Description of trusts:	
Number of units held:	
Value:	
Name and address of holder:	
Notes:	

**Life Policies/Endowments**

Insurance company:	
Branch address:	
Policy details:	
Surrender value:	
Beneficiary:	
Premium amount week/month/year:	
How and when paid:	
Mortgage linked (Y/N):	
Notes:	

**Motor Vehicles, Boats/Caravans etc.**

	Motor Vehicles	Boats/Caravans etc.
Make and model:		
Location:		
Registration mark (if applicable):		
Dealer's details (motor vehicles):		
Purchase price:		
Current value:		
(Registered) keeper:		
Hire purchase (Y/N):		
Name of company:		
Address of company:		
Date of agreement:		
Balance of agreement:		
Notes:		

**Other Personal Property**

Description	Holder	Location	Purchase Price	Value
Notes:				

**Gifts to Third Parties**

Description	Holder	Location	Purchase Price	Value

**LIABILITIES**

**Credit Cards**

Name of card, i.e., access:	
Amount owed or credit:	
Average payments:	
Name of holder:	
Notes:	

**Store Cards**

Name of card:	
Amount owed or credit:	
Average payments:	
Name of holder:	
Notes:	

**Credit Agreements**

Name of company:	
Branch:	
Purpose of loan:	
Amount borrowed:	
Amount owed:	
Monthly payments:	
Arrears:	
Notes:	

**Maintenance Payment**

Court/office:	
Date of order:	
Beneficiary:	
Amount of payment:	
When payable:	
Method of payment:	
Notes:	

**Court Judgments/Fines/Previous Forfeiture Orders**

Court:	
Date of order:	
Beneficiary:	
Amount of payment:	
When payable:	
Method of payment:	
Notes:	

**Other Liabilities/Debts**

Creditor:	
Creditor address:	
Amount of debt/liability:	
Particulars of debt:	
Notes:	

**Actual Overdrafts**

Bank:	
Address and telephone no.:	
Sort code/Account no.:	
Amount:-	
Notes:	

**Personal Solvency**

Bankruptcy order (Y/N):	
Date of order:	
Trustee/official receiver:	
Address:	
Contact and telephone no.:	
Notes:	

Part 2: Business Financial Profile of .....

**BUSINESS INTEREST**

**Preliminary Assessment**

Sole trader and business premises are realizable property (Y/N):	
Substantial interest in partnership/limited company and interest is in itself realizable property (Y/N):	
Partnership/company holds realizable property (Y/N):	
Notes:	

**Trading Partnership/Company**

Name:	
Date commenced:	
Company registration no. (if applicable):	
VAT registration no.:	
Trading address:	
Registered address:	
Notes:	

**Company Directors/Partners**

Name:	
Address:	
Position:	
Notes:	

**Company's Documentation**

Company details (Y/N):		Dated:	
Financial accounts (Y/N):		Dated:	
Annual returns:		Dated:	
Notes:			

**Subject's Interest in Business**

Details	Value
Notes:	

**Realizable Property Held by Business**

Details	Value
Notes:	

**BUSINESS PREMISES**

**Assets**

Trading name:	
Business address:	
Freehold/leasehold/rented (if rented, see below):	
Registered land (Y/N):	
Title number:	
Purchase price:	
Date of purchase:	
Amount outstanding:	
Current arrears:	
Current value:	
Date last valued:	
Name of valuer:	
Address of valuer:	
Notes:	

**Other Occupiers**

Part of premises sublet (Y/N):	
Details of area 1 sublet:	
Name of lessee:	
Address of lessee:	
Amount paid:	
To whom paid:	
Details of area 2 sublet:	
Name of lessee:	
Address of lessee:	
Amount paid:	
To whom paid:	

**Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture**

Details of any third party interest:	
Notes:	

**Rented Premises**

Landlord's name:	
Landlord's address:	
Rental week/month:	
How paid/by whom:	
Notes:	

**Mortgage**

Name of mortgagee:	
Address of mortgagee:	
Account number:	
Account name(s):	
Amount of loan:	
Payment week/month:	
How paid/by whom:	
Notes:	

**Other Charges on Property**

Name of charge holder:	
Address of charge holder:	
Amount of charge:	
Date of registration:	
Notes:	

**Business Expenses**

	Rates/Business Charge	Water	Electricity	Gas	Telephone
Authority paid:					
Amount week/month:					
Method of payment:					
Current arrears:					
Notes:					

**Business Insurance**

	Premises	Contents
Name of insurer:		
Address of insurer:		
Amount insured:		
Risks covered:		
Payment week/month:		
How/by whom paid:		
Notes:		

**Company Insurance Claims**

Insurance company:	
Date claimed:	
Claim type:	
Amount claimed:	
Amount paid :	
When paid:	
How paid:	
Copy of claim attached (Y/N):	
Notes:	

**BUSINESS ASSETS**

**Business Bank Accounts**

Name of Bank:	
Branch address:	
Sort code:	
Account number:	
Account name(s):	
Current balance:	
Date of balance:	
Credit turnover:	
Debit turnover:	
Account signatories:	
Name:	
Notes:	

**Motor Vehicles, Plant/Machinery, etc.**

	Motor Vehicles	Plant/Machinery etc.
Make and model:		
Registration mark if applicable:		
Dealers details (motor vehicles):		
Purchase price:		
Current value:		
(Registered) keeper:		
Hire purchase (Y/N):		
Name of company:		
Address of company:		
Date of agreement:		
Balance of agreement:		
Notes:		

**Office/Trade Fixtures and Fittings**

Make and model:	
Serial number:	
Purchase price:	
Current value:	
Lease purchase (Y/N):	
Name of lease company:	
Address of company:	
Date of agreement:	
Notes:	

**Other Valuable Property**

Details:	
Registration details if applicable:	
Purchase price:	
Current value:	
Keeper/location:	
Hire/lease purchase (Y/N):	
Name of company:	
Address of company:	
Date of agreement:	
Balance of agreement:	
Notes:	

**Stock in Trade**

Details	Value	Date of Value
Notes:		

**Work in Progress**

Details	Value	Date of Value
Notes:		

**Fully Secured Debtors (Business)**

Name	Address	Amount	Security
Notes:			

**Partly Secured Debtors (Business)**

Name	Address	Amount	Security
Notes:			

**BUSINESS LIABILITIES**

**Employees**

Full time:	
Part time:	
Outstanding wages:	
Notes:	

**Fully Secured Creditors**

Name	Address	Amount	Security
Notes:			

**Partly Secured Creditors**

Name	Address	Amount	Security
Notes:			

**Credit Cards, Debit Cards**

	Credit Cards	Debit Cards
Name of card:		
Amount owed or credit:		
Average payments:		
Name of holder:		
Notes:		

**Credit Agreements (Business)**

Name of company:	
Branch:	
Purpose of loan:	
Amount borrowed:	
Amount owed:	
Monthly payments:	
Arrears:	
Notes:	

**Direct Debit/Standing Orders**

Bank name:	
Branch details:	
Account number:	
Account name(s):	
Amount week/month:	
When due:	
Payable to:	
Notes:	

**Court Judgments**

Court:	
Date of order:	
Amount of order:	
Method of payment:	
Notes:	

**Winding-Up Order/Voluntary Liquidation**

Winding up (Y/N):	
Liquidation (Y/N):	
Date of order:	
Resolution:	
Notes:	

**Other Contractual Liabilities**

Details	Amount	When Payable
Notes:		

**Corporation Tax/Income Tax**

Tax inspector name:	
Tax inspector address:	
District:	
Reference number:	
Amount due:	
Notes:	

**Value Added Tax**

VAT office:	
Address:	
VAT registration no.:	
Amount due:	
Prosecutions pending (Y/N):	
Notes:	

**Articles on Premises Controlled by Subject but Not Belonging to Subject (such as goods on hire, on loan, for repair, or otherwise claimed by some other person) (Supporting evidence of claim should be sought.)**

Article	Value	Third Party Interest
Notes:		



# Appendix V: A Sample Order to Produce Corporate and Other Documents in a Corruption Investigation

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## I. Definitions and Instructions

### A. Definitions

- 1) The terms “Company” shall mean the business entity to which this Order is addressed and shall include all of its affiliates, joint ventures, subsidiaries, subdivisions and successors in interest as well as all of its present and former directors, officers, partners, employees, agents and all other persons purporting to act on behalf of any of the foregoing.
- 2) The term “document(s)” means all written or printed matter of any kind, formal or informal, including the originals and all non-identical copies thereof, whether different from the original by reason of any notation made on such copies or otherwise, in the possession, custody or control of the Company, wherever located, including, without limitation, papers, correspondence, memoranda, notes, diaries, statistical materials, letters, telegrams, minutes, contracts, reports, studies, checks, statements, receipts, returns, summaries, pamphlets, books, inter-office and intra-office communications, offers, notations of any sort of conversations, telephone calls, meetings or other communications, bulletins, credit matter, computer printouts, hard discs, flash drives, removable hard drives, floppy discs, main frame and personal computer databases, teletypes, telex materials, invoices, worksheets, and all drafts, alterations, modifications, changes and amendments of any nature or kind of the foregoing, and all graphic and aural records or representatives of any kind, videotapes, sound recordings, motion pictures and any electronic, mechanical or electrical recordings, motion pictures or representatives of any kind, including without limitation tapes, cassettes, discs, recording and films.
- 3) The term “document(s)” also means any container, file folder or other enclosure bearing any marking or identification in which other “documents” are kept, but does not include file cabinets. In all cases where any original or non-identical copy of any original is not in the possession, custody or control of the Company, the term “document” shall include any copy of the original and any non-identical copy thereof.
- 4) The word “and” should be interpreted as including “or,” and vice versa.
- 5) The term “person” shall mean any natural person, proprietorship, corporation, partnership, joint venture, unincorporated association, governmental

agency, or any subdivision, affiliate, officer, director, employee, agent or any other representative thereof.

- 6) The term “identity” shall mean the full name, including middle name, date of birth, place of birth, social security number, all positions held during employment with the Company, dates of service, responsibilities and duties in each position, termination date, if any, and the reasons for such termination, business address and telephone number for each position held, residence addresses and telephone numbers during employment with the Company and last known business and residence addresses and telephone numbers, if different from those previously listed.
- 7) The term “sworn statement” shall mean a sworn statement of an officer, partner or managing agent of the Company, accompanied by a certificate of acknowledgment executed by a notary.
- 8) The term “agreement” shall mean all current, past or prospective agreements.
- 9) The term “public official” means Member of Legislature either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the Government, or any department, agency or branch of Government thereof, in any official function under or by authority of any such department, agency or branch of Government.
- 10) The term “person who has been selected to be a public official” means any person who has been nominated to be a public official, or has been officially informed that such person will be so nominated or appointed.

**B. Period Covered**

Unless otherwise specified in a particular paragraph, this Order shall cover the time period from [date] to [date], beginning the date this Order is received by the Company or by you personally.

**C. Claim of Privilege**

If any document is withheld by the Company or by you personally, under claim of privilege, including the attorney-client privilege, the Company or you shall furnish a schedule setting forth the date, the name and title of the author, addressee, and recipient, and the subject matter of each such document, the nature of the privilege claimed, the basis upon which it is claimed, and the paragraph of this Order to which each such document is responsive.

**D. Identifying Documents**

In order to facilitate the handling of documents submitted pursuant to this Order, to preserve their identity and to ensure their accurate and expeditious return, it is requested that each document be marked with an identifying number and that the documents be numbered consecutively. Only the first page of multi-page bound documents should be numbered, and the total number of pages in a document should be noted. Documents should also remain within the file folders in which they were located at the time of the service of this Order. Such file fold-

ers should also be numbered as if they were another document. Within each file folder, documents should remain in the same Order as they were at the time of the service of this Order. Multi-page documents should remain intact.

E. Production

The person appearing before the Court/Prosecutor in response to this Order must be a person who is fully knowledgeable concerning the Company's search for the documents responsive to this Order as well as one who can authenticate the document as business records. Should the same person not be competent to perform both requirements, the Company should designate such additional persons as may be necessary to appear on the same time and date.

F. Originals Required

This Order requires the production of the originals of all documents ordered herein, except as particularly noted below. Submission of photocopies in lieu of originals shall not comply with this Order.

II. Documents to Be Produced

A. Without regard to the limitation in Section I.B above, all such documents, or, in lieu thereof, a sworn statement that will show:

- 1) The Company's full corporate name, the date and state of incorporation, the dates and places of all Company registrations as a foreign corporation, and the identities of all parent, subsidiary and predecessor corporations and all entities with which the Company has engaged in joint ventures in the past 8 years.
- 2) The identity, address and telephone number, of each director and outside director of the Company.
- 3) The identity of each officer, director, employee, agent, consultant or other representative of the Company whose duties have included dealings with the [name of government agency].
- 4) The identity of each administrative assistant, secretary or other clerical assistant to each of the persons named in response to Section II.A(3) above, together with the name of the person for whom the individual worked, the dates of each such assignment and the present business and residence addresses and telephone number of each individual.

B. Any and all originals of the following documents:

- 1) Documents relating directly or indirectly to any contact between Company and any of the following persons, including, but not limited to, correspondence, briefings, agendas, notes or memoranda of meetings or of contact, rough notes, diary entries, reports prepared by or received by Company before, during or after any such contact, and documents of similar purport, whether or not related to any company business.
- 2) All documents relating to any bank accounts, either domestic or foreign, in the name of or under the control or maintained for the benefit of the Company.

- 3) Any and all documents relating to expenses incurred and reimbursement vouchers submitted by or on behalf of [name] and payments by you in response thereto and all documents relating to how those agencies were treated in the financial books and records of the company, and the tax returns from [date].
- 4) Any and all documents relating to travel by [name] including, but not limited to, itineraries, expense records, receipts, reimbursement records, correspondence with travel agencies, credit card invoices, credit card receipts from [date].
- 5) All documents relating directly or indirectly to the presentation of any honorariums, gifts, grants, loans, fees, gratuities, commissions or any payment or presentation of anything of value to any public official or person who has been selected to be a public official of [country] or any foreign government, or to any political party representative of any political party in [country] or in any foreign nation whether or not in connection with the obtaining or retaining of any Company business with [country] or any foreign government, or to any person acting as an agent or intermediary or any of the above.
- 6) All calendars, calendar pads, note pads, notebooks, day books, appointment books, reminder pads, telephone call books, address books, rotary files or other records of addresses, visitor logs, and diaries, wherever located, that were maintained or used in any connection with the Company's business, by or on behalf of [name].
- 7) Complete personnel records for [name] including pay, benefits and bonus information.
- 8) All banking records of the corporation, including (a) bank statements, canceled checks, checkbooks, check stubs or registers, check vouchers, deposit slips and deposit items; (b) all records of certificates of deposit and other time deposits purchased or redeemed; (c) records of all safe deposit boxes; (d) records of all wire transfer of funds; (e) records of all bank checks, official checks, cashier's checks, treasurer's checks, money orders and travelers checks purchased or negotiated; and (f) all Treasury currency reports, exempt currency transaction applications or requests and foreign currency transaction reports, all relating directly or indirectly to [name] or any of the individuals identified in Section II.B.(1) above, or lobbying activities of the company.
- 9) Copies of the Company's corporate charter and by-laws, including all revisions and amendments thereto.
- 10) Any and all internal policy manuals, internal or external audit control manuals or procedures related to dealings with public officials or person who has been selected to be a public official or foreign government official.
- 11) Minutes of all Company Board of Directors meetings, or meetings of any government committee thereof, of whatever date, relating directly or indirectly to

- a) company travel;
  - b) providing things of value to public officials or person who has been selected to be a public official;
  - c) any of the individuals identified in Section II.A.(3), II.B.(1).
- 12) With respect to the internal and outside auditing procedures or audits of the Company:
- a) all written internal audit controls and procedures in effect during the period;
  - b) all auditor's letters to management reporting on the Company's internal control audits and related matters;
  - c) all audit reports, blue black reports, special reports and studies, informal memoranda, management advisory service reports, recommendation or advice to management, memoranda on discussions of recent developments and other correspondence concerning the Company's accounting procedures and internal controls;
  - d) all audit programs used in these audits including any additions, deletions, substitutions, or amendments thereto and any documents reflecting the reason for any such event;
  - e) all minutes of the Executive Review Committee, Special Audit Committee or committee of similar purpose;
  - f) any and all records related to audits by the Internal Revenue Service.
- 13) All corporate ledgers and journals of the Company, including the general ledger, cash receipts journal, sales journal, cash disbursement journal, voucher register and any other ledgers and journals maintained by the Company relating directly or indirectly to [name] or to any of the individuals identified in Section II.B.(1), above. The records should reflect all travel, gifts, lodging, dinners, honorariums and/or these books and records.
- 14) All documents, including Company and/or personal credit card records, petty cash receipts, expense vouchers, and any other records containing an itemization of expenses claimed or reimbursed which evidence the travel transportation, lodging, telephone, entertainment, food, drink, or other expenses incurred on behalf of the Company by [name] or each person identified in Section II.B.(1).
- 15) All financial statements and annual reports for the period [dates]; records should include all disclosures, attachments, and correspondents.
- 16) All records of local and long distance telephone charges, including telephone bills, and all other charges for telecommunications, telexes, courier and mail services, incurred by or on behalf of [name] or any company employee working with or for him.
- 17) Originals of all passports possessed or used by you during the period from [date] to the date hereof.



# Appendix VI: Pre-Seizure Planning Guide

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The attached Pre-Seizure Planning Guide of the United States Marshals Service is intended to provide guidance and checklists to be used by all components participating in an asset forfeiture program. The goal of these checklists is to aid in anticipating and making informed decisions about what property is to be seized, about how and when it is going to be seized, and most important, about whether it should be seized.

The checklists include the following:

- **Pre-Seizure Planning Summary Sheet:** This sheet is a summary of all the assets involved in a given case. One summary sheet should be completed per case.
- **Real Property:** A separate Real Property checklist should be completed for each piece of real property. A separate Net Equity Worksheet accompanies the Real Property checklist.
- **Business:** A Business checklist should be completed for each business being considered for forfeiture. The complex nature of business forfeitures may make it necessary to include information that is not explicitly mentioned in the checklist.
- **Conveyances:** A Conveyances checklist should be completed for the seizure of multiple and/or unique conveyances. A Net Equity Worksheet for conveyances is also included.
- **Personal Property:** A Personal Property checklist should be completed for unique or complex assets such as livestock, furniture/household items, precious items, collectables, and fine art.

Each case is unique and users may find that the information included in these checklists does not apply to all assets in all cases; more or less information may be necessary. Therefore, these checklists should be used as a starting point, adding any additional information that may be useful in the forfeiture process.

<b>PRE-SEIZURE PLANNING SUMMARY SHEET</b>	
Date _____	
<b>POINTS OF CONTACT:</b>	
AUSA _____	Phone # _____
Asset Forfeiture AUSA _____	Phone # _____
Agency _____ Agent _____	Phone # _____
DUSM _____	Phone # _____
<b>CASE INFORMATION:</b>	
Case Identifier: _____	
Originating District: _____	
Other Districts involved: _____	
Task Force Case:	<input type="checkbox"/> YES <input type="checkbox"/> NO   If yes, participating agencies _____
Adoptive Case:	<input type="checkbox"/> YES <input type="checkbox"/> NO
If yes, contact name _____ Phone # _____	
Type of Case:	<input type="checkbox"/> Civil <input type="checkbox"/> Criminal
Proposed date of seizure / Post & Walk _____	
Will a TRO or Protective Order be Issued: <input type="checkbox"/> YES <input type="checkbox"/> NO	
Proposed date of indictment/complaint/warrant of arrest in rem: _____	
Is a draft copy available? <input type="checkbox"/> YES <input type="checkbox"/> NO <i>If yes, obtain a copy.</i>	
Defendant's Name: _____	
Defendant's Status:	Fugitive <input type="checkbox"/> YES <input type="checkbox"/> NO
Type of Case:	<input type="checkbox"/> Drugs <input type="checkbox"/> Money Laundering <input type="checkbox"/> RICO
Other ( <i>describe</i> ) _____	
<b>ASSET INFORMATION:</b>	
Number of assets, by category, targeted for seizure – <i>once identified, refer to applicable form:</i>	
_____ Real Estate   _____ Business(es)   _____ Personal Property   _____ Other	
Number of personal properties by category targeted for seizure:	
_____ Vehicles	_____ Aircraft
_____ Art	_____ Jewelry
_____ Vessels	_____ Collectibles
_____ Cash (approx.) \$ _____	
_____ Financial Instr.	
_____ Other ( <i>describe</i> ) _____	
Describe: _____	
_____	
_____	

Case Identifier: \_\_\_\_\_

## PRE-SEIZURE PLANNING QUESTIONNAIRE REAL PROPERTY

Complete one form per property

**TYPE OF REAL PROPERTY:**

- |   |  |
|---|--|
| <input type="checkbox"/> Single Family Detached Residence | <input type="checkbox"/> Apartment/Condo Unit              |
| <input type="checkbox"/> Apartment/Condo Building         | <input type="checkbox"/> Commercial ( <i>type of use</i> ) |
| <input type="checkbox"/> Vacant/Undeveloped Land          | <input type="checkbox"/> Other ( <i>describe</i> ) _____   |

Location/Address: \_\_\_\_\_

Legal Description: (*attach copy if available*) \_\_\_\_\_

\_\_\_\_\_

Title Owner: Name: \_\_\_\_\_ Phone#: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

O & E/Title Report/Appraisal available?  Yes  No *If yes, obtain a copy.*

Has a Lis Pendens been filed?  Yes  No

Items to be procured by USMS:  Drive-By Appraisal  Title Report/Abstract  
 Full Appraisal (*Only if full, unrestricted access to property is available and the actions taken by the appraisers or USMS personnel will not inhibit or reveal the investigation.*)

**SAFETY CONSIDERATIONS:**

Is there any available information that will assist the USMS regarding personal safety issues during seizure operations (pets, fences, alarms, water hazards, booby traps, children, etc.)?

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

	Case Identifier: _____	
<b>REAL PROPERTY (CONT'D.)</b>		
<b>ENVIRONMENTAL FACTORS:</b>		
Property Condition:	<input type="checkbox"/> Excellent <input type="checkbox"/> Good <input type="checkbox"/> Fair <input type="checkbox"/> Poor	
Photos Available:	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Potential Contamination:	<input type="checkbox"/> Yes <input type="checkbox"/> No	
If yes, what contaminants? _____		
If yes, has anyone been contacted to provide an assessment of the property? <input type="checkbox"/> Yes <input type="checkbox"/> No		
Company Name: _____ Phone # _____		
Year Built: _____		
If pre-1960 and residential, has lead-based paint assessment been completed? <input type="checkbox"/> Yes <input type="checkbox"/> No		
If yes, Company Name: _____ Phone # _____		
Date _____		
<b>SPECIFIC CONCERNS (describe briefly if applicable):</b>		
<input type="checkbox"/> Swimming pool	<input type="checkbox"/> Safe on premises	<input type="checkbox"/> Structural defects
<input type="checkbox"/> Laboratories	<input type="checkbox"/> Historical site	<input type="checkbox"/> Incomplete construction
<input type="checkbox"/> Live stock	<input type="checkbox"/> Environmentally protected	<input type="checkbox"/> Hazardous chemicals
<input type="checkbox"/> Other structures	<input type="checkbox"/> Association fees	<input type="checkbox"/> Known code violations
<input type="checkbox"/> Underground tanks	<input type="checkbox"/> Other personal property	<input type="checkbox"/> Other potential liabilities
Describe: _____		
_____		
_____		
<b>CONTENTS OF PROPERTY:</b>		
Are contents being seized? <input type="checkbox"/> Yes <input type="checkbox"/> No		
If no, have arrangements been made to remove or destroy? <input type="checkbox"/> Yes <input type="checkbox"/> No		
Is an inventory required? <input type="checkbox"/> Yes <input type="checkbox"/> No		
Additional comments on contents: _____		
_____		
_____		
_____		

Case Identifier: \_\_\_\_\_

## REAL PROPERTY (CONT'D.)

### OCCUPANCY:

Is the property occupied?    Yes    No      If yes,    Owners    Renters

Occupants, if allowed to remain occupied, provide name, phone, and identifier (i.e., DOB, SSN)

Name: \_\_\_\_\_ Phone #: \_\_\_\_\_ Identifier: \_\_\_\_\_

Will the defendant(s) be arrested simultaneously at the time of seizure?    Yes    No

Following the arrest of the defendant(s), will the property be left vacant?    Yes    No

General remarks: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

### NET EQUITY *(If info is available, complete Net Equity Worksheet):*

Does the asset meet the minimum net equity threshold value?    Yes    No    Unknown

If no, what law enforcement benefits are to be derived from the seizure? \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

### FOLLOW-UP INFORMATION:

Will the AUSA provide or give a press release?    Yes    No

Next meeting scheduled?    Yes    No      If yes, Date: \_\_\_\_\_ Time: \_\_\_\_\_

Location of next meeting: \_\_\_\_\_

\_\_\_\_\_

Prepared by: Printed name: \_\_\_\_\_ Title: \_\_\_\_\_

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Case AUSA's concurrence, review and approval:

Printed name: \_\_\_\_\_ Signature: \_\_\_\_\_ Date: \_\_\_\_\_

	Case Identifier: _____																																																						
<h2 style="margin: 0;">REAL PROPERTY NET EQUITY WORKSHEET</h2>																																																							
Name of Case: U.S. v. _____																																																							
District: _____ Court Case: (Docket number) _____																																																							
<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 60%;">1. a. Appraised value (Date of appraisal _____) .....</td> <td style="width: 5%;"></td> <td style="width: 35%; text-align: right;">\$ _____</td> </tr> <tr> <td style="padding-left: 20px;">minus</td> <td></td> <td></td> </tr> <tr> <td>b. Expenses<sup>1</sup> .....</td> <td></td> <td style="text-align: right;">( _____ )</td> </tr> <tr> <td style="padding-left: 20px;">equals .....</td> <td></td> <td style="text-align: right;">\$ _____</td> </tr> <tr> <td style="padding-left: 20px;">plus</td> <td></td> <td></td> </tr> <tr> <td>c. Income .....</td> <td></td> <td style="text-align: right;">\$ _____</td> </tr> <tr> <td style="padding-left: 20px;">equals</td> <td></td> <td></td> </tr> <tr> <td>d. Net value .....</td> <td></td> <td style="text-align: right; border: 1px solid black;">\$ _____</td> </tr> <tr> <td colspan="3" style="padding: 10px 0 0 0;">2. a. Net value .....</td> </tr> <tr> <td style="padding-left: 20px;">minus</td> <td></td> <td style="text-align: right;">\$ _____</td> </tr> <tr> <td>b. Liens<sup>2</sup> .....</td> <td></td> <td style="text-align: right;">( _____ )</td> </tr> <tr> <td style="padding-left: 20px;">equals</td> <td></td> <td></td> </tr> <tr> <td>c. U.S. equity .....</td> <td></td> <td style="text-align: right; border: 1px solid black;">\$ _____</td> </tr> <tr> <td colspan="3" style="padding: 10px 0 0 0;">3. a. U.S. equity .....</td> </tr> <tr> <td style="padding-left: 20px;">divided by</td> <td></td> <td style="text-align: right;">\$ _____</td> </tr> <tr> <td>b. Appraised value .....</td> <td></td> <td style="text-align: right;">\$ _____</td> </tr> <tr> <td style="padding-left: 20px;">equals</td> <td></td> <td></td> </tr> <tr> <td>c. Percentage of U.S. equity .....</td> <td></td> <td style="text-align: right; border: 1px solid black;">_____ %</td> </tr> </table>		1. a. Appraised value (Date of appraisal _____) .....		\$ _____	minus			b. Expenses <sup>1</sup> .....		( _____ )	equals .....		\$ _____	plus			c. Income .....		\$ _____	equals			d. Net value .....		\$ _____	2. a. Net value .....			minus		\$ _____	b. Liens <sup>2</sup> .....		( _____ )	equals			c. U.S. equity .....		\$ _____	3. a. U.S. equity .....			divided by		\$ _____	b. Appraised value .....		\$ _____	equals			c. Percentage of U.S. equity .....		_____ %
1. a. Appraised value (Date of appraisal _____) .....		\$ _____																																																					
minus																																																							
b. Expenses <sup>1</sup> .....		( _____ )																																																					
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equals																																																							
c. Percentage of U.S. equity .....		_____ %																																																					
<p><sup>1</sup>Includes advertising, maintenance (includes management fees of \$ _____ /month x 12 months), sales commission, sellers' expenses to close, etc.</p> <p><sup>2</sup>Includes the total of all items, principal and interest from the date of seizure to the date this worksheet is completed.</p>																																																							
<p>Prepared by:</p> <p>Printed Name: _____ Title: _____ Date: _____</p> <p>AUSA's Signature: _____ Date: _____</p>																																																							

Case Identifier: \_\_\_\_\_

## PRE-SEIZURE PLANNING QUESTIONNAIRE BUSINESS

Complete one form per business

### BUSINESS IDENTIFIERS:

Type of Business (i.e., restaurant, warehouse, automobile dealership, etc.): \_\_\_\_\_

Legal or Corporate Name: \_\_\_\_\_

Address: \_\_\_\_\_ Phone #: \_\_\_\_\_

Business name (Doing business as): \_\_\_\_\_

Address: \_\_\_\_\_ Phone #: \_\_\_\_\_

Is the business:  Corporation     Partnership     Sole Proprietorship  
 Joint Venture     Limited Liability Company (LLC)

Describe: \_\_\_\_\_

If applicable, list all shareholders, officers, and directors:

Name: \_\_\_\_\_ Phone #: \_\_\_\_\_ Position: \_\_\_\_\_

Name: \_\_\_\_\_ Phone #: \_\_\_\_\_ Position: \_\_\_\_\_

Name: \_\_\_\_\_ Phone #: \_\_\_\_\_ Position: \_\_\_\_\_

Is business privately or publicly owned?     Private     Public

Is the business currently operating or idle?     Operating     Idle

If operating, will the business continue to operate upon the arrest of the defendant(s)?

Yes     No

Status of registration with the State:     Active     Inactive     Defunct     Other

### SAFETY CONSIDERATIONS:

Is there any available information that will assist the USMS regarding personal safety issues during seizure operations (guard dogs, fences, weak floors, water hazards, booby traps, security personnel, open pits, heavy machinery, etc.)? List or describe:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Case Identifier: \_\_\_\_\_

## BUSINESS (CONT'D.)

### ASSET INFORMATION:

Are we seizing the legal entity? (the entire corporation with assets and liabilities)  Yes  No

If no, what assets are targeted for seizure? \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

Upon seizure, will the government hold a majority interest?  Yes  No

If not, how much? \_\_\_\_\_ %

Will the business require a monitor or the appointment of a trustee?  Yes  No  Unknown

Is the business located on leased or owned property?  Leased  Owned  Unknown

Real Property Lessor(s) or owner(s):

Name(s): \_\_\_\_\_ Phone#: \_\_\_\_\_

Address: \_\_\_\_\_

Current status of lease/mortgage:  Current  Behind

If in arrears, how many months?: \_\_\_\_\_

Will the real estate be seized as part of the business?  Yes  No

Type of Structure:

Stand alone building of steel and block construction

Attached structure to residence

Strip mall store

Warehouse

Other (describe): \_\_\_\_\_

Condition of Structure:

Excellent  Good  Fair  Poor

Size of Structure: Approx. \_\_\_\_\_ Sq. footage

Known structural defects or immediate repairs identified: List and describe: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Case Identifier: \_\_\_\_\_

## BUSINESS (CONT'D.)

### ASSET INFORMATION *(Cont'd.)*

**Specific concerns:**

- |  |   |
|--|---|
| <input type="checkbox"/> Hazardous materials on site       | <input type="checkbox"/> Incomplete construction                |
| <input type="checkbox"/> Potential contaminants            | <input type="checkbox"/> Known code violations                  |
| <input type="checkbox"/> Underground tanks                 | <input type="checkbox"/> Type of safes/security systems         |
| <input type="checkbox"/> Operable fire extinguisher system | <input type="checkbox"/> Other potential liabilities (describe) |

Describe Specific Concerns: \_\_\_\_\_  
 \_\_\_\_\_

Will the locks require replacement?  Yes  No

Are contents of business leased or owned?  Leased  Owned  Unknown

**Real Property Lessor(s) or owner(s)**

Name(s): \_\_\_\_\_ Phone#: \_\_\_\_\_

Address: \_\_\_\_\_

### BUSINESS RECORDS:

**List all business licenses and indicate if they are current:**

Tax License: \_\_\_\_\_  Current  Expired

License: \_\_\_\_\_  Current  Expired

License: \_\_\_\_\_  Current  Expired

Records Custodian: \_\_\_\_\_ Phone # \_\_\_\_\_

Address: \_\_\_\_\_

Corporate Attorney: \_\_\_\_\_ Phone # \_\_\_\_\_

Address: \_\_\_\_\_

Corporate Accountant: \_\_\_\_\_ Phone # \_\_\_\_\_

Address: \_\_\_\_\_

Are there any records that have been subpoenaed that will assist in determining the financial status of the business (tax returns, financial reports, etc.)?  Yes  No

If yes, are they available for review by the USMS?  Yes  No

Obtain availability date for review by the USMS: \_\_\_\_\_

Has a lien/judgment search been initiated?  Yes  No If yes, obtain a copy.

Case Identifier: \_\_\_\_\_

## BUSINESS (CONT'D.)

### DEFENDANT AND/OR EMPLOYEE INFORMATION (Cont'd.):

- Will the defendant(s) be arrested simultaneously at the time of seizure?  Yes  No  
Following the arrest of the defendant(s), will the property be left vacant?  Yes  No

### FOLLOW-UP INFORMATION:

- Next meeting scheduled?  Yes  No  
If yes, obtain Date: \_\_\_\_\_ Time: \_\_\_\_\_
- Will media coverage or public knowledge of the seizure effect negatively on the operating business?  
 Yes  No
- Will the seizure impact the local economy or population? (i.e., major community employer):  
 Yes  No If yes, (indicate which) what efforts can be made to minimize this effect?  
\_\_\_\_\_  
\_\_\_\_\_

- Will the AUSA provide or give a press release?  Yes  No  
If yes, obtain name and phone number of press information officer:  
Name: \_\_\_\_\_ Phone # \_\_\_\_\_  
Location of next meeting: \_\_\_\_\_

**NOTE: THIS QUESTIONNAIRE, ONCE COMPLETED, MUST BE FAXED TO YOUR ASSET FORFEITURE OFFICE REPRESENTATIVE.**

Prepared by:  
Printed name: \_\_\_\_\_ Title: \_\_\_\_\_  
Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Case AUSA's concurrence, review and approval:  
Printed name: \_\_\_\_\_  
Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Case Identifier: \_\_\_\_\_

## PERSONAL PROPERTY NET EQUITY WORKSHEET

Name of Case: U.S. v. \_\_\_\_\_  
 District: \_\_\_\_\_  
 Court Case: (Docket number) \_\_\_\_\_  
 CATS #: \_\_\_\_\_

Identification of Personal Property: \_\_\_\_\_

- |    |  |          |           |
|----|--|----------|-----------|
| 1. | a. Appraised value (Date of appraisal _____) ..... | \$ _____ |           |
|    | minus  |          |           |
|    | b. Expenses <sup>1</sup> .....                     |          | ( _____ ) |
|    | equals   |          |           |
|    | c. Net value .....                                 | \$ _____ |           |
|    |  |          |           |
| 2. | a. Net value .....                                 | \$ _____ |           |
|    | minus  |          |           |
|    | b. Liens <sup>2</sup> .....                        |          | ( _____ ) |
|    | equals   |          |           |
|    | c. U.S. equity .....                               | \$ _____ |           |
|    |  |          |           |
| 3. | a. U.S. equity .....                               | \$ _____ |           |
|    | divided by   |          |           |
|    | b. Appraised value .....                           | \$ _____ |           |
|    | equals   |          |           |
|    | c. Percentage of U.S. equity .....                 |          | _____ %   |

<sup>1</sup> Includes maintenance and disposal expenses, e.g., advertising, sales commission, property manager salary, etc.

<sup>2</sup> Includes total of all liens, principal and interest from the date of seizure to the date this worksheet is completed.

Prepared by:  
 Printed Name: \_\_\_\_\_ Title: \_\_\_\_\_ Date: \_\_\_\_\_

Supervisory Review: \_\_\_\_\_

Case Identifier: _____	
<b>PRE-SEIZURE PLANNING QUESTIONNAIRE CONVEYANCES</b>	
USMS District: _____	CATS Number: _____
Seizing Agency: _____	Seizure Date: _____
USMS Custody Date: _____	Seizure Location: _____
Type of Forfeiture: <input type="checkbox"/> Administrative <input type="checkbox"/> Civil <input type="checkbox"/> Criminal	
<b>CONVEYANCE DESCRIPTION:</b>	
Type: <input type="checkbox"/> Vehicle <input type="checkbox"/> Vessel <input type="checkbox"/> Aircraft <input type="checkbox"/> Other	
Make: _____	VIN/Serial/TAG: _____
Model: _____	State of Registration: _____
Plate/Tag Number/Tail Number: _____	
Conveyance Condition: <input type="checkbox"/> Good <input type="checkbox"/> Fair <input type="checkbox"/> Poor <input type="checkbox"/> Scrap	
Is the conveyance operating? <input type="checkbox"/> Yes <input type="checkbox"/> No	
For Aircraft: Are logbooks present? <input type="checkbox"/> Yes <input type="checkbox"/> No	
<b>VALUE INFORMATION:</b>	
Seizing Agency Appraisal: \$ _____	USMS (NADA Loan): \$ _____
First Lienholder: _____	Second Lienholder: _____
Address: _____	Address: _____
Amount: \$ _____	Amount: \$ _____
<b>POINTS OF CONTACT:</b>	
Seizing Agent: _____	Phone #: _____
AUSA: _____	Phone #: _____
Other: _____	Phone #: _____
<b>CUSTODY:</b>	
USMS Contractor: _____	Phone #: _____
State/Local Agency: _____	Phone #: _____
Seizing Agency: _____	Phone #: _____
Other: _____	Phone #: _____
Is Equitable Sharing Anticipated? <input type="checkbox"/> Yes <input type="checkbox"/> No	
Placing into Official Use? <input type="checkbox"/> Yes <input type="checkbox"/> No	

Case Identifier: \_\_\_\_\_

## CONVEYANCES NET EQUITY WORKSHEET

CATS ID #: \_\_\_\_\_

Docket #: \_\_\_\_\_

Vehicle     
  Vessel     
  Aircraft     
  Other

Year: \_\_\_\_\_ Make: \_\_\_\_\_

Model: \_\_\_\_\_ Color: \_\_\_\_\_

VIN #: \_\_\_\_\_

Serial #: \_\_\_\_\_

Tail #: \_\_\_\_\_

Location of Hidden Trap(s) - if any: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Appraised value (Date of Appraisal: _____) .....	\$ _____	
minus		
Cost of Storage per month \$ _____ X 9 .....	- \$( _____ )	
Lien <sup>1</sup> .....	- \$( _____ )	
Misc. Costs (prep for sale/repairs) <sup>2</sup> .....	- \$( _____ )	
Costs to Disable/Seal Hidden Traps .....	- \$( _____ )	
equals		
Total Net Equity .....	= \$ _____	

\$ _____	/	\$ _____	=	
Total Net Equity	Divided by	Appraised Value	Equals	_____ %
				% of U.S. Equity

<sup>1</sup> Includes total of all liens, principal and interest from the dates of seizure to the date this worksheet is completed.

<sup>2</sup> Includes maintenance and disposal expenses, e.g., advertising, sales commission, property manager salary, etc.

Preparer's Name: \_\_\_\_\_ Title: \_\_\_\_\_

Preparer's Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Case Identifier: _____	
<b>PRE-SEIZURE PLANNING QUESTIONNAIRE PERSONAL PROPERTY</b>	
USMS District: _____	CATS Number: _____
Seizing Agency: _____	Seizure Date: _____
USMS Custody Date: _____	Seizure Location: _____
Type of Forfeiture: <input type="checkbox"/> Administrative <input type="checkbox"/> Civil <input type="checkbox"/> Criminal	
<b>TYPE OF PROPERTY:</b>	
<input type="checkbox"/> Animal	<input type="checkbox"/> Chemical/Hazardous Materials
<input type="checkbox"/> Electronic Equipment	<input type="checkbox"/> Explosives/Firearms
<input type="checkbox"/> Furniture/Household Items	<input type="checkbox"/> Gambling Devices
<input type="checkbox"/> Grow Equipment	<input type="checkbox"/> Heavy Machinery
<input type="checkbox"/> Precious Items	<input type="checkbox"/> Other ( <i>describe</i> ) _____
Condition: <input type="checkbox"/> Excellent <input type="checkbox"/> Good <input type="checkbox"/> Fair <input type="checkbox"/> Poor	
<b>VALUE INFORMATION:</b>	
Appraised Value: \$ _____	
Monthly Cost (storage): \$ _____	
First Lienholder: _____	Second Lienholder: _____
Address: _____	Address: _____
Amount: \$ _____	Amount: \$ _____
<b>POINTS OF CONTACT:</b>	
Seizing Agent: _____	Phone #: _____
AUSA: _____	Phone #: _____
Other: _____	Phone #: _____
Custodian: _____	Phone #: _____
Is Equitable Sharing Anticipated? <input type="checkbox"/> Yes <input type="checkbox"/> No	
Placing into Official Use? <input type="checkbox"/> Yes <input type="checkbox"/> No	

Case Identifier: \_\_\_\_\_

**PERSONAL PROPERTY  
NET EQUITY WORKSHEET**

Name of Case: U.S. v. \_\_\_\_\_  
 District: \_\_\_\_\_  
 Court Case: (Docket number) \_\_\_\_\_  
 CATS #: \_\_\_\_\_

Identification of Personal Property: \_\_\_\_\_

- |    |  |          |         |
|----|--|----------|---------|
| 1. | a. Appraised value (Date of appraisal _____) ..... | \$ _____ |         |
|    | minus  |          |         |
|    | b. Expenses <sup>1</sup> .....                     |          | ( )     |
|    | equals   |          |         |
|    | c. Net value .....                                 | \$ _____ |         |
|    |  |          |         |
| 2. | a. Net value .....                                 | \$ _____ |         |
|    | minus  |          |         |
|    | b. Liens <sup>2</sup> .....                        |          | ( )     |
|    | equals   |          |         |
|    | c. U.S. equity .....                               | \$ _____ |         |
|    |  |          |         |
| 3. | a. U.S. equity .....                               | \$ _____ |         |
|    | divided by   |          |         |
|    | b. Appraised value .....                           | \$ _____ |         |
|    | equals   |          |         |
|    | c. Percentage of U.S. equity .....                 |          | _____ % |

<sup>1</sup> Includes maintenance and disposal expenses, e.g., advertising, sales commission, property manager salary, etc.

<sup>2</sup> Includes total of all liens, principal and interest from the date of seizure to the date this worksheet is completed.

Prepared by:  
 Printed Name: \_\_\_\_\_ Title: \_\_\_\_\_ Date: \_\_\_\_\_

Supervisory Review: \_\_\_\_\_



# Appendix VII: Web Sites for Key Organizations, Legal Instruments, and Initiatives

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## Commonwealth Model Legislation

- <http://www.thecommonwealth.org/> (Commonwealth Secretariat home page)
- [http://www.thecommonwealth.org/shared\\_asp\\_files/uploadedfiles/21B7788D-F604-4FB6-85A1-AB8370566AFC\\_commonwealthmodellegislativeprovisionsonthecivilrec.pdf](http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/21B7788D-F604-4FB6-85A1-AB8370566AFC_commonwealthmodellegislativeprovisionsonthecivilrec.pdf) (Commonwealth Model Legislative Provisions on the Civil Recovery of Criminal Assets Including Terrorist Property)

## European Union

- <http://europa.eu.int> (European Union home page)
- <http://eur-lex.europa.eu> (Official Journal of the European Union, home page)
- <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:332:0103:0105:EN:PDF> (Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime)
- <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32005F0212:EN:NOT> (Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property)

## Financial Action Task Force on Money Laundering

- <http://www.fatf-gafi.org> (FATF home page)
- <http://www.fatf-gafi.org/dataoecd/7/40/34849567.pdf> (The Forty Recommendations)
- <http://www.fatf-gafi.org/dataoecd/8/17/34849466.pdf> (Special Recommendations on Terrorist Financing)

## G-8 Best Practices

- [http://www.justice.gov/criminal/cybercrime/g82004/G8\\_Best\\_Practices\\_on\\_Tracing.pdf](http://www.justice.gov/criminal/cybercrime/g82004/G8_Best_Practices_on_Tracing.pdf) (G-8 Best Practice Principles on Tracing, Freezing and Confiscation of Assets)
- <http://www.apgml.org/issues/docs/15/G8%20Asset%20Management%20Best%20practices%20042705%20FINAL.doc> (G-8 Best Practices for the Administration of Seized Assets)

## Organization of American States — CICAD

- <http://www.oas.org/> (home page)
- [http://www.cicad.oas.org/Lavado\\_Activos/ENG/ModelRegulations.asp](http://www.cicad.oas.org/Lavado_Activos/ENG/ModelRegulations.asp) (Model Regulations Concerning Laundering Offenses Connected to Illicit Drug Trafficking and Other Serious Offenses)

## Stolen Asset Recovery (StAR) Initiative

- [www.worldbank.org/star](http://www.worldbank.org/star) (StAR Web site)
- <http://siteresources.worldbank.org/NEWS/Resources/Star-rep-full.pdf> (Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan)

## United Nations

- <http://www.un.org> (United Nations home page)
- <http://www.unodc.org> (United Nations Office on Drugs and Crime)
- <http://www.unodc.org/unodc/en/treaties/CAC/index.html> (United Nations Convention against Corruption)
- <http://www.unodc.org/unodc/en/treaties/CTOC/index.html> (United Nations Convention against Transnational Organized Crime and Its Protocols — *Palermo Convention*)
- <http://www.unodc.org/unodc/en/treaties/illicit-trafficking.html> (United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 — *Vienna Convention*)

## The World Bank Group

- <http://www.worldbank.org> (World Bank home page)
- <http://www.amlft.org> (Financial Market Integrity Group's Web site, *Promoting the Integrity of the Financial Model*)



## ECO-AUDIT

### *Environmental Benefits Statement*

The World Bank is committed to preserving endangered forests and natural resources. The Office of the Publisher has chosen to print *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* on recycled paper with 30 percent postconsumer fiber in accordance with the recommended standards for paper usage set by the Green Press Initiative, a nonprofit program supporting publishers in using fiber that is not sourced from endangered forests. For more information, visit [www.greenpressinitiative.org](http://www.greenpressinitiative.org).

#### Saved:

- 9 trees
- 6 million British thermal units of total energy
- 816 pounds of net greenhouse gases
- 3,386 gallons of waste water
- 435 pounds of solid waste





Non-Conviction Based (NCB) asset forfeiture is a powerful tool for recovering the proceeds of corruption, particularly in cases where the proceeds have been transferred abroad. Because it provides for the restraint, seizure, and forfeiture of tainted assets without the need for a criminal conviction, it can be the best option when the wrongdoer is dead, has fled the jurisdiction, is immune from prosecution, or is too powerful to prosecute—all common in cases of grand corruption. A growing number of jurisdictions have established a system to allow NCB forfeiture, and it has been recommended as a tool for asset recovery at regional and multilateral levels. The United Nations Convention Against Corruption (UNCAC) urges countries to consider taking such measures as may be necessary to allow NCB asset forfeiture in cases in which “the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.”

With this increased focus on the issue, there is a corresponding need for a practical tool that jurisdictions contemplating NCB forfeiture legislation can use. *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* is that practical tool. It is the first book of its kind on the subject and the first knowledge publication under the Stolen Asset Recovery (StAR) Initiative. A collaborative effort of practitioners of forfeiture and NCB forfeiture, *Stolen Asset Recovery* identifies the key concepts—legal, operational, and practical—that an NCB asset forfeiture system should encompass to be effective in recovering stolen assets. Thirty-six key concepts are explored through practical experiences, examples from cases, and excerpts from NCB asset forfeiture legislation. Included in the book and companion CD-ROM are tools that can be used by practitioners, such as samples of cases, investigative forms, court pleadings, and pre-seizure planning guidelines.



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StAR



978-0-8213-7890-8



SKU 17890