Asset Confiscation (Forfeiture)

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The term **confiscation**, which includes **forfeiture** where applicable, means the **permanent deprivation of funds or other assets** by order of a competent authority or a court. Confiscation or forfeiture takes place **through a judicial or administrative procedure** that transfers the ownership of specified funds or other assets to be transferred to the State.

Confiscation or forfeiture orders are **usually linked to a criminal conviction or a court decision** whereby the confiscated or forfeited property is determined to have been derived from or intended for use in a violation of the law.

**Non-conviction based confiscation means** confiscation through judicial procedures related to a criminal offence for which a criminal conviction is not required.

**FATF Recommendations 4 and 38**
Why Confiscation/Forfeiture?

- An important part of an effective anti-money laundering and counter-terrorist financing regime.
- **Deterrence**
  - Confiscation prevents criminal property from being laundered or reinvested to facilitate other crimes
  - Stifles organized criminal operations
  - Reduces the incentives to go into by affecting the balance of risk and reward

**Redressing Harm:**

- Confiscation is the first step in redressing the victims even if partially even when the proceeds are moved around the world → only after confiscation can funds be repatriated

- **Enhancement in Confiscation (such as Non-Conviction Based Confiscation) facilitates cross border cooperation in asset location**
  - Confiscation and repatriation is essential in combating debilitating corruption in developing countries and elsewhere by easing some of the legal and operational barriers
  - Recovering stolen assets is challenging, primarily because it is very difficult to establish a trail and locate them. Funds from the ‘victim’ country where they are plundered are mainly concealed overseas, facilitated by global ‘shadow’ financial systems such as tax havens and anonymous accounts or corporations.
Asset Recovery Cycle
International Centre for Asset Recovery (ICAR)

Stolen Assets → Investigation, Collection of Evidence Tracing (Domestic and Internationally using MLA) → Securing The Assets (Domestic and Internationally using MLA) → Court Process (confiscation including NCB) → Enforcement of Judgment (Domestic and Internationally using MLA) → Return of Assets
International Requirements
FATF Recommendation 4

• adopt measures to enable freezing or seizing and confiscating the following, without prejudicing the rights of bona fide third parties
  1. property laundered
  2. proceeds from, or instrumentalities used in or intended for use in money laundering or predicate offences,
  3. property that is the proceeds of, or used in, or intended or allocated for use in, the financing of terrorism, terrorist acts or terrorist organizations, or
  4. property of corresponding value

• Such measures should include the authority to:
  a) identify, trace and evaluate property that is subject to confiscation;
  b) carry out provisional measures, such as freezing and seizing, to prevent any dealing, transfer or disposal of such property;
  c) take steps that will prevent or void actions that prejudice the country’s ability to freeze or seize or recover property that is subject to confiscation; and
  d) take any appropriate investigative measures.
**International Treatment**

<table>
<thead>
<tr>
<th>Convention</th>
<th>Art</th>
<th>Description</th>
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<tbody>
<tr>
<td>The Vienna Convention (Drug Trafficking)</td>
<td>5</td>
<td>adopt measures to enable confiscation/enable its competent authorities to identify, trace, and freeze or seize proceeds, property, instrumentalities</td>
</tr>
<tr>
<td></td>
<td>7</td>
<td><strong>Art 7: Mutual Legal Assistance</strong></td>
</tr>
<tr>
<td>The Palermo Convention (Transnational Organized Crime)</td>
<td>12</td>
<td>adopt, within their domestic legal systems, measures to enable confiscation/adopt measures necessary for the identification, tracing, freezing or seizure</td>
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<tr>
<td></td>
<td>13</td>
<td><strong>Art 13: International cooperation for purposes of confiscation</strong></td>
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<tr>
<td></td>
<td>18</td>
<td><strong>Art 18: MLA</strong></td>
</tr>
<tr>
<td>the Terrorist Financing Convention</td>
<td>8</td>
<td><strong>Art 8: take appropriate measures for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing the offences...and for the forfeiture of funds used</strong></td>
</tr>
</tbody>
</table>

• UNCAC addresses the cross-border nature of corruption by accounting for the need for international cooperation and conditions related to the return of stolen assets

• No other international instruments before this Convention declared asset recovery as their fundamental principles and regulated it in such a detail. This is a particularly important issue for many developing countries where high-level corruption has plundered the national wealth, and where resources are badly needed for reconstruction and the rehabilitation of societies under new governments.

• Chapter V lay a framework for countries to adapt both their civil and criminal law in order to facilitate tracing, freezing, forfeiting, and returning funds obtained through corrupt activities.

• International cooperation enhanced by loosening the dual criminality standards, which previously hindered Mutual Legal Assistance
Confiscation

**Conviction**
- Confiscation after criminal conviction
- Beyond reasonable doubt or “intimate conviction of the truth” in a civil law jurisdiction.

**Non-Conviction**
- Confiscation without criminal conviction; can also be civil
- ‘balance of probabilities’

**Administrative**
- Administrative nonjudicial confiscation can occur without a judicial determination, but depending on the jurisdiction, a court process may be required
- Often used to confiscate assets when a seizure is not contested and certain requirements are met (for example, there is notice to parties, publication, or where no objection is filed or in customs cases cross border transportation of currency etc.)
Non-Conviction Based (NCB) Confiscation

A legal mechanism that provides for the restraint, seizure, and forfeiture of stolen assets without the need for a criminal conviction

**UNCAC**
- Article 54(1)(c) encourages countries to take measures “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.”

**FATF**
- Countries should consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction (non-conviction based (NCB) confiscation)
<table>
<thead>
<tr>
<th>Objective/ description</th>
<th>(Post) Conviction-based Confiscation/Forfeiture</th>
<th>Non-Conviction based Confiscation/Forfeiture</th>
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<tbody>
<tr>
<td></td>
<td>Confiscation of assets following a criminal conviction.</td>
<td>Assets confiscated without a criminal conviction.</td>
</tr>
<tr>
<td>Target of order</td>
<td>Action is against a person</td>
<td>Action against property (unless an ‘Unexplained Wealth Order’)</td>
</tr>
<tr>
<td>Legal Process</td>
<td>Part of the criminal process</td>
<td>can be in parallel to a criminal procedure (or not linked to one)</td>
</tr>
<tr>
<td>Who bears burden of proof?</td>
<td>The Government/public prosecutor</td>
<td>Burden shifts to defendant to show legitimate origin of property after threshold (probable cause/reasonable grounds) met by the prosecutor</td>
</tr>
<tr>
<td>Standard of proof</td>
<td>Beyond reasonable doubt</td>
<td>Preponderance of the evidence that unlawful conduct occurred on the “balance of probabilities”</td>
</tr>
<tr>
<td>Need to prove a criminal charge/criminal conviction</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Timing of order</td>
<td>After conviction as part of sentencing</td>
<td>Can be before, after or during criminal proceedings or even without a criminal charge against a person</td>
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</table>
NCB Process

**Investigation**
- to secure the necessary evidence that an asset is either proceeds of unlawful activities or an instrumentality of an offence.
- can be part of criminal process or independently (Columbia, the Philippines)

**Asset Freeze**
- Freeze orders/motions granted by court
- Notice to the defendant who can also build a defense

**Confiscation**
- If defendant fails to meet the burden → prove legitimate origin of frozen assets then confiscation
- If burden met then freeze order lifted
Stolen Asset Recovery Initiative

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.

Advantages of NCB

- NCB cases are generally brought against property (in rem)
- Lower standard of proof—Burden shifted to defendant to prove legitimate origin of property
- The scope of NCB allows assets to be recovered from people who are absent or dead, and it can be used to target assets that are either the proceeds of or derived from corrupt conduct or that were used in illegal action.
- NCB can forfeit property of a third party who has no bona fide defense.
- NCB proceedings, moreover, can be filed before, during, or after a criminal case or even when there is no criminal charge.
- can be used to forfeit assets in situations where the defendant or violator has fled the country, is dead, or is immune from prosecution (such as for Politically Exposed Persons (PEPs))
- Different States may have different criminal offenses which hinder enforcement of judgment. NCB facilitates enforcement of judgment across States
- As a result, NCB provides investigators and prosecutors a speedy and efficient way to recover assets, discourages bad actors by impacting their gain loss calculus and also promises better odds of restituting victims.
The Anti-Money Laundering Act of 2001, as amended (2016), deals with the forfeiture of monetary instruments, property, or proceeds relating to or involving unlawful activities committed by civil servants or private individuals.

Rule 10: Freeze orders—do not require Prior Criminal Charge, Pendency of or Conviction

Rule 12: Asset Forfeiture—civil forfeiture upon probable cause, if original asset cannot be located then equal value assets; NCB type of forfeiture

the offender or any other person claiming an interest therein may apply, by verified petition, for a declaration that the same legitimately belongs to him and for segregation or exclusion of the monetary instrument or property corresponding thereto (within 15 days)
Types of Confiscation

Property Based

- aimed at assets connected to the proceeds or instrumentalities of crime.
- requires that a link be established between the identified assets and an offense.
- “proceeds” are defined as anything of value obtained directly or indirectly as the result of the offense
- “Direct proceeds” would include funds paid for a bribe or amounts stolen by an official from a national treasury or governmental program. “Indirect proceeds,” which do not accrue directly from the commission of the offense, would include appreciation in the value of the bribe payments, interest accrued on embezzled funds in a bank account, or a stock portfolio purchased with stolen treasury funds.

- Commingled: mixed with other assets that may not be proceeds of crime, and they may be converted into other forms of assets
  - Statutory Language: “Any asset or part of an asset,” “substantially derived or realized from an offense,” “Any instrumentality with which proceeds have been mingled” etc.;
- Proceeds Derived from Foreign Offenses: Corruption or other offenses often generate illegal income in one jurisdiction that is invested in another one. Most confiscation laws allow the recovery of such assets.
- Instrumentalities of an Offense—are generally assets used or intended for use in any manner or part to commit or facilitate the commission of an offense—for example, a vehicle used to transport a substantial cash bribe to the recipient of the bribe. Assets may become instrumentalities even if they have been acquired legitimately with lawfully obtained funds. It is the illegal use to which the object has been put that makes it an instrumentality.
  - May get overboard so there has to be proportionality element (e.g. use of a phone in a house to conduct illegal activity doesn’t necessarily mean the house is an instrumentality that can be confiscated.)
Types of Confiscation

Value Based

• As opposed to assets, value-based confiscation is focused on the value of benefits derived from a criminal offense and often imposes a monetary penalty equal to that value.

• Direct benefits and also the increase in value resulting from the appreciation of assets (indirect).

• This judgment may be enforceable as a collection of debt or fine against any asset of the defendant, whether or not it has any link to the offense.

• Assets are limited to those owned by the defendant, but presumptions and broad definitions of “ownership” to include assets that are held, controlled, or gifted by the defendant.
Confiscation Enhancements (NCB)
(designed to improve the effectiveness of the confiscation law or to capture an extended range of assets)

1. Rebuttable Presumption
(burden shifts to defendant but prosecutor can counter the rebuttal)

Neither criminal liability nor individual liberties at stake

Greatly enhances the possibility of obtaining a conviction or confiscation judgment
### Common bases for presumptions

<table>
<thead>
<tr>
<th>Category</th>
<th>Description</th>
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<tbody>
<tr>
<td><strong>Possession</strong></td>
<td>- assets found in the possession of a person at the time of the offense, or shortly before or after the commission of the offense, are considered to be either the proceeds or an instrumentality of the offense.</td>
</tr>
<tr>
<td><strong>Associations</strong></td>
<td>- applied in organized crime cases; assets belonging to a person who has participated in or supported a criminal organization are presumed to be at the disposal of the organization and can be confiscated.</td>
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<tr>
<td><strong>Lifestyle</strong></td>
<td>- When the offender does not have sufficient legitimate sources of income to justify the value of assets accumulated over a period of time.</td>
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<tr>
<td><strong>Transfers of assets</strong></td>
<td>- transfers to family and close associates or any transfers below market value are not legitimate; rebut by showing it was an arms length transaction and payment of fair market value.</td>
</tr>
<tr>
<td><strong>Nature of the offense</strong></td>
<td>- Usually linked to conviction for a class offenses, such as major drug trafficking, major corruption or fraud, racketeering, or organized crime ➔ the assets accumulated during a certain period before and after the commission of the crime are presumed to be the proceeds of crime and subject to confiscation.</td>
</tr>
<tr>
<td><strong>Illicit origin and unexplained wealth</strong></td>
<td>- the wealth of a politically exposed person (PEP) has significantly increased and there are reasons to think that this increase is the result of corruption, particularly if the person’s country of origin has high levels of corruption.</td>
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</tbody>
</table>
2. Confiscation Enhancement

Substitute Assets

may require proof that (a) the original assets were derived as a benefit from an offense, or a particular asset was used as an instrumentality of the offense; and (b) the asset cannot be located or is otherwise unavailable.
3. Confiscation Enhancement

Extended criminal confiscation

A type of conviction-based confiscation

- The causal link between the assets and the offense is weak or not clearly established
- The assets are assumed to be illicit
- Confiscate assets derived from similar or related criminal activities
4. Confiscation Enhancements

Voidable Transfers

Mechanisms to Void Transfers of Assets: some jurisdictions have enacted statutory provisions under which title to the confiscated assets vests in the state or government at the time the unlawful act giving rise to the confiscation took place. So subsequent transfers after such act can be voided.
5. Confiscation Enhancements

Automatic Confiscation on Conviction

- Certain conditions Met
  - No judicial determination required
  - Whoever contests the confiscation bears the burden of proof
Securing the Assets before Confiscation

the United Nations Convention against Corruption (UNCAC), article 54 (2), states parties are required to take the necessary measures to permit the freezing or seizing of assets based upon either a court’s (or other competent authority’s) order or a request “that provides a reasonable basis for the requested state party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation.”
Securing the Asset

**Domestic**

Judicial proceedings or through other properly vested authorities or administrative bodies

- (a) a target is suspected of having committed an offense from which a benefit has been derived (value-based confiscation), or (b) the assets being sought are linked to criminal activities (property-based confiscation)

Common law jurisdictions: requirements are generally established on a “reasonable grounds to believe” or “probable cause” standard of proof.

Civil law jurisdictions, the decision will rest with the prosecutor’s or judge’s belief in that the freezing order is necessary to avoid diversion or loss of assets during the investigation.

**Foreign**

Direct enforcement: On receipt of a jurisdiction’s request, the authorities in the foreign jurisdiction may enforce the restraint or seizure order that is in place in the requesting jurisdiction

- the requesting jurisdiction have extraterritorial jurisdiction over the assets located in the foreign jurisdiction, which must be listed in the restraint order

the authorities in the requested jurisdiction may apply for a domestic restraint or seizure order based upon the facts provided by the requesting jurisdiction
Mutual Legal Assistance

in criminal matters is a process by which States seek for and provide assistance to other States in servicing of judicial document and gathering evidence for use in criminal cases.

FATF Rec 38: Requires countries to have proper authority to secure and eventually confiscate assets that are proceeds and instrumentalities of unlawful activity. Specifically includes NCB confiscation

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**Traditional**

Letters Rogatory—formal request from the judicial authority of one State to the judicial authority of another State

conventionally transmitted through diplomatic channels

a matter of comity between courts, rather than treaty-based

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**Formal Treaties**

Negotiated treaty instrument (MLAT) between States

Time and resource intensive—negotiating, drafting and agreeing

not possible to have a bilateral treaty with every country in the world.

More effective when harmony of legal systems between States
Managing of Assets Subject to Confiscation

In some seizures/restraint there is not much need for management or ongoing supervision. For example bank account freeze. The bank can be sued for not complying with the specifics of the order.

Other assets such as sophisticated investment vehicles; exotic or valuable livestock; or luxury real estate, cars, boats, and high-priced wines may require more-targeted approaches to ongoing maintenance, control, and management.

- asset confiscation system needs to have the flexibility to control and manage such assets pending confiscation as well as the ability to realize them and pay the proceeds to the state, the government, or other authorized recipient after confiscation
- Need asset managers to manage such assets for which they need certain authorities such as day to day management of the assets, authorities regarding employees and so on. As asset types change, the authorities need commensurate capabilities such as virtual wallets to hold cryptocurrencies/virtual assets. Seizure of land may implicate taxes, rights of lien holders etc.
NCB Concerns

Due process concerns
- Lower burden of Proof risks State Overreach
- Burden of proof shifted to defendant which may violate individual rights
- Poor oversight over NCB process and accountability will lead to overreach

Violation of property rights
- Potential harm to innocent third parties who may hold the property by taking of the property with lower burden of proof

Contrary to human rights protection
- All persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts—encompasses the principles of legality, certainty, equality and access to justice. Inherent to the Rule of Law are various procedural safeguards — such as the right to a fair trial, the right to a defense and to a fair hearing, etc.
- The Rule of Law requires that those in power do not have unfettered opportunities to create and/or impose measures that would restrict a person’s human rights (including to private property) and liberty.
NCB Rule of law safeguards

Protection of the rule of law requires robust legal system (weakness in developing countries)

Proportionality as a means to protect property rights

- balance public interests on the one hand and private interests and rights on the other
- used by the courts to determine whether the punishment for a crime is legitimate and fair, and in the case of asset forfeiture, whether an infringement of someone’s rights through NCB is proportionate to the aims (fighting corruption)

Compensation as a way to mitigate the impact of forfeiture

- Some jurisdictions have established that the interference with property involved in civil forfeiture should be accompanied by compensation when it affects third parties unfairly and unreasonably

Protection against self-incrimination

- One way to address this is for legislators to indicate at which point NCB proceedings may start.
- Statutes may need to clarify whether a forfeiture case can proceed alongside a criminal case, but in such a way that compelled information from the asset owner is not used against him/her in a criminal case
1MDB was created by the government of Malaysia to promote economic development in Malaysia through global partnerships and foreign direct investment.

From 2009 through 2015, more than $4.5 billion in funds belonging to 1MDB were allegedly misappropriated by high-level officials of 1MDB and their associates, and Low Taek Jho (aka Jho Low).

Luxury homes and properties in Beverly Hills, New York, and London; a 300-foot superyacht; and fine art by Monet and Van Gogh. The funds also were sent into numerous business investments, including a boutique hotel in Beverly Hills, a movie production company that made “The Wolf of Wall Street” while the embezzlement scheme was ongoing, the redevelopment of the Park Lane Hotel in Manhattan, and shares in EMI, the largest private music-rights holder.

As of August 2021, over $1.2 billion had been repatriated to Malaysia.
Governments and Agencies involved in the 1MDB Case

<table>
<thead>
<tr>
<th>US</th>
<th>Foreign</th>
</tr>
</thead>
<tbody>
<tr>
<td>• 41 civil forfeiture actions</td>
<td>• Attorney General’s Chambers of Malaysia,</td>
</tr>
<tr>
<td>Money Laundering and Asset</td>
<td>• the Royal Malaysian Police,</td>
</tr>
<tr>
<td>Recovery Section (MLARS) of the Justice</td>
<td>• the Malaysian Anti-Corruption Commission,</td>
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<tr>
<td>Department’s Criminal Division under the</td>
<td>• the Attorney General’s Chambers of Singapore,</td>
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<tr>
<td>Kleptocracy Asset Recovery Initiative.</td>
<td>• the Singapore Police Force–Commercial Affairs Division,</td>
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<tr>
<td>• FBI International Corruption Squad</td>
<td>• the Office of the Attorney General and the Federal Office of Justice</td>
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<tr>
<td>• IRS-Criminal investigation</td>
<td>of Justice of Switzerland,</td>
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<td></td>
<td>• the judicial investigating authority of the Grand Duchy of Luxembourg,</td>
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<tr>
<td></td>
<td>• the Criminal Investigation Department of the Grand-Ducal Police of</td>
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<td></td>
<td>Luxembourg</td>
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Intersection of Sanctions and Forfeiture

Use of sanctions as a first response to the uncovering of large-scale kleptocratic practices became much more widespread over the last decade.

US passed the Global Magnitsky Act in 2016 which allowed the US to impose sanctions on corrupt officials and those involved in human rights abuses across the world, further increased discussion on the use of sanctions to fight kleptocracy.

- The UK and Canada soon followed
- In December 2020, the EU adopted a version of this in the EU Global Human Rights Sanctions Regime

Sanctions do not rely first on criminal conviction at home country.

Imposed by powerful countries with developed legal systems so they are effective, circumvents MLA requests/diplomatic outreach etc. and so is faster.

But sanctions can be applied in only limited circumstances, very powerful for corruption and human rights abusers though.
Confiscation plays a crucial part in preventing financial crimes by denying bad actors from enjoying their ill-gotten wealth → allows victim redress through restitution even if partially.

Enhancement in confiscation (such as NCB Confiscation) can deter people from engaging in illicit activities by altering the risk benefit calculus.

Worldwide development such as the adoption of UNCAC, standardization of regulatory regimes through FATF standards, UBO legislations etc. show promising signs that confiscation regimes getting more effective.

Use of sanctions by powerful financial centers work in tandem and amplify this effect, esp with regards to corruption and human rights abusers.

But rule of law and a robust legal system are still foundational—areas where developing countries struggle and need help.