

# **Confiscation in Taiwan: The Laws and Ideas for Reform**

by

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## **Abstract**

This Occasional Paper shows the evolution of confiscation law in Taiwan. It reviews the current state of confiscation laws and policies in Taiwan and also proposes suggestions for reform of the confiscation system. Taiwan adopts both object confiscation, and value confiscation as the methods of deprivation of illegal proceeds. However, confiscation in Taiwan has been ignored for a long time and has just started to be noticed again recently. Because an old concept of confiscation has to be adapted to new crimes, a lot of unfairness and conflict have arisen in the new circumstances. It is therefore necessary to adapt, modify and interpret the legal concept underlying confiscation in new ways so that the tradition of legal confiscation of proceeds of crime can serve new functions and address a wider range of criminal activities. Confiscation in other jurisdictions, like the United States and Hong Kong, is a powerful weapon in the fight against crime through deprivation of crime-tainted property, but confiscation in Taiwan is far behind. The author will explain why Taiwan is far behind and what the country has to do in order to improve the confiscation system.

## Confiscation in Taiwan: The Laws and Ideas for Reform

### Introduction

The first and most important legal tool for depriving a defendant of illegal profits is the confiscation of proceeds from crimes. The definition of confiscating given in the 1990 European Council Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crimes provides a helpful starting point in understanding the aim and scope of confiscation legislation.<sup>1</sup> This definition describes confiscation as ‘a penalty or measure, ordered by a court following proceedings in relation to a criminal offence or offences resulting in the final deprivation of property’.<sup>2</sup> According to the preceding definition, confiscation amounts to a final deprivation of property. Obviously, there is an element of simple justice in ensuring that a wrongdoer is deprived of the fruits of his illegal acts. Surely the incentive to engage in economic crime is diminished if people contemplating such activity understand that there is a high likelihood that they will not be allowed to retain any profits that might flow from their temporary success. Convicting the defendant but leaving him in possession of the riches of wrongdoing gives others the impression that a life of crime is worth the risk<sup>3</sup> because the defendant can still enjoy the fruits of crime on his release.

Specifically, asset confiscation is construed as a form of punishment. Confiscation possesses the function of taking profits obtained by the defendant from the commission of an offence. We should take how a crime is committed and how many illegal proceeds are obtained into account when punishing a defendant. Otherwise even though the defendant is punished for his unlawful activity, he can still profit from the crime. If the

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<sup>1</sup> See electronic resource, *Butterworth Money Laundering title: Division 3 Primary Offences, B Legislative history*, available at: <http://www.lexisnexis.com/ap/auth/default.asp?customer=HKU&ie6check=no> Last accessed 7<sup>th</sup> April, 2011.

<sup>2</sup> See Article 1(d) in the 1990 European Council Convention on Laundering, Search, Seizure and Confiscation of Proceeds of Crimes.

<sup>3</sup> See Stefan D. Cassella, *An Over view of Asset Forfeiture in the United States*, Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime, Ed SNM Young, Edward Elgar Publishing, UK. 2009.

appropriated property is not taken away from the crime, it will be a loophole in the crime-fighting policy.<sup>4</sup>

Taiwan adopts both object confiscation<sup>5</sup>, and value confiscation (indemnifying the value either by demanding a payment from the offender or by offsetting such value with the property of the offender) as the methods of deprivation of illegal proceeds. Furthermore, there is a power to aggravate a fine based on proceeds from the commission of crimes pursuant to Article 58 of the Criminal Law which also has the effect of confiscation, but it can not apply to offences which are not finable. However, confiscation in Taiwan has been ignored for a long time and has just started to be noticed again recently. Because an old concept of confiscation has to be adapted to new crimes, a lot of unfairness and conflict have arisen in the new circumstances. It is therefore necessary to adapt, modify and interpret the legal concept underlying confiscation in new ways so that the tradition of legal confiscation of proceeds of crime can serve new functions and address a wider range of criminal activities.

This article reviews the current state of confiscation laws and policies in Taiwan and also proposes suggestions for reform of the confiscation system in Taiwan.

## **The Essence of Confiscation**

### *Current state*

The relevant Articles of the Taiwanese Criminal Code provides as follows:

#### **Article 32 of the Criminal Law**

*Criminal punishment is divided into principal punishment and accessory punishment.*

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<sup>4</sup> See Ke Yao Cheng, *The Exercise and Review of Confiscation, Demanding a payment, and Offsetting the value with the property*, the 59<sup>th</sup> volume in 6<sup>th</sup> issue of Law Monthly Publication. 參照柯耀程著，沒收、追徵、追繳與抵償制度之運用與檢討，法令月刊第五十九卷第六期。

<sup>5</sup> In this chapter, the term “confiscation” relates to the proceeds of crime.

**Article 34 of the Criminal Law**

*Accessory punishments are of the following kinds:*

1. *deprivation of citizen's rights.*
2. *confiscation.*
3. *demanding a payment from the defendant or offsetting such value with the property of the defendant.*

**Article 39 of the Criminal Law**

*Independent forfeiture is permitted in respect of the person whose punishment has been remitted.*

**Article 40 of the Criminal Law**

*Unless there is another regulation applicable, forfeiture must be pronounced at the time of sentencing made by the court.*

*Contraband may be pronounced forfeited separately and later.*

There are two models of criminal punishment under Article 32 of the Criminal Law: principal punishment and accessory punishment. Accessory punishment can be pronounced only when the principal punishment exists unless other specified laws are applicable. Independent confiscation (confiscation pronounced independently without principal punishment) is only permitted in respect of a person whose punishment has been remitted under Article 39 or in relation to contraband under Article 40(2) of the Criminal Law. Contraband are things that are prohibited to plant, import, manufacture, transport, traffic, hide, rent, lend, possess and smoke by law.<sup>6</sup> Since confiscation is a kind of accessory punishment, a ruling of confiscation must pertain to a principal sentence.

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<sup>6</sup> See Ke Qing Xian, *the Research of Criminal Law*, April 2008, p276. 見柯慶賢著，*刑法專題研究*，2008年4月，第276頁。



Criminal confiscation is part of the sentencing stage in a criminal case so that confiscation is only possible after conviction. Thus, when the suspect or accused has died or absconded, a criminal conviction is not possible and death brings an end to criminal proceedings so confiscation cannot be pronounced independently. This eliminates criminal confiscation as an option to interdict illegal proceeds where the defendant is a fugitive or is dead so that assets acquired illegally are protected by any personal avoiding prosecution.

An example of this loophole in action lies in the case of Taiwanese arms trade businessman, Wang Chuan-pu. Wang was suspected of receiving huge unauthorized commissions from the sales of French Mirage jet fighters and Lafayette frigates to Taiwan and other arms sales cases, accumulating US\$700 million in accounts in Switzerland, and potential others accounts in the Cayman Islands, Luxembourg and Saudi Arabia. Wang, his wife and four children were charged with corruption and murder. A court issued a warrant for Wang's arrest but he went into exile, first in the United States and later in Europe. In August 2006, with the help of the Attorney General of Switzerland, Wang's account in Switzerland was seized but the seizure was temporary because criminal confiscation requires a criminal trial and conviction in Taiwan. Unless the Court in Taiwan can provide a confiscation judgment against Wang's seized money, the money will remain in Switzerland until then. However, since Wang has fled Taiwan, there will not be any independent confiscation judgment because of the essential requirement of a conviction for any confiscation in Taiwan. Only after an amendment of Article of 34 of the Criminal Law, deeming confiscation is not a kind of accessory punishment, would the court in Taiwan be able to order independent confiscation to recover the frozen assets in Switzerland.

The situation regarding individuals who are sentenced to probation is also problematic. Justice Yuan's No.45 Interpretation made on 23 October 1954 states that according to Article 74 of the Criminal Law, if a defendant receives probation, the principal sentence is suspended and will be not carried out immediately. However, according to Yuan's Yuan-Tze No. 781 Interpretation, even though confiscation is

originally subordinate in nature, pursuant to Article 39 of the Criminal Law concerning exclusive confiscation and Article 40(2) concerning the need for an independent declaration to confiscate, it is sufficient to prove that confiscation also can be ordered in respect of the principal sentence even though it may have been suspended. Therefore, even though the principal sentence is suspended because of probation, the confiscation order is effective and still has to be executed.<sup>7</sup>

### ***Suggestions for reform***

When the wrongdoer is dead, or has fled the jurisdiction, such illegal proceeds should not be allowed to be held by him or his family. In this regard, the United States has enacted the Fugitive Disentitlement Act. This statute prevents a claimant from formally appearing in a non-conviction based asset confiscation proceeding and raising a defence to the action.<sup>8</sup> The government must establish that the claimant is a fugitive in a criminal action related to the confiscation action and has actual 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 re-enter the United States or otherwise evading the jurisdiction of the court where the criminal case is pending against him.<sup>9</sup> In Hong Kong, both the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405) and

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<sup>7</sup> See *Judicial Yuan's No.45 Interpretation*. 司法院大法官第 45 號解釋參照。

<sup>8</sup> See, Theodore S. Greenberg; Linda M. Samuel; Wingate Grant; Larissa Gray, *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture*, World Bank Publications 2009. Available at: <http://www.assetrecovery.org/kc/node/0c821e25-503b-11de-bacd-a7d8a60b2a36.1>

<sup>9</sup> 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 evade 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 jurisdiction for commission of criminal conduct in that jurisdiction.

the Organized and Serious Crimes Ordinance (Cap 455) make confiscation proceedings possible even when the defendant has died or absconded.<sup>10</sup> The prosecution just has to prove that the person could have been convicted on the standard of the balance of probabilities.<sup>11</sup>

As mentioned previously, confiscation is one model of accessory punishments in Taiwan. If there is no principle punishment, the confiscation order cannot be issued or executed. For the purpose of not allowing the wrongdoer who refuses or is unable to appear for a related criminal case to enjoy the fruits of criminal activities, the legislation in Hong Kong and the United States may be used as the basis for changing the law in Taiwan and the essence of confiscation should be amended to enable confiscation when the defendant is dead, or has fled the jurisdiction.

### **What types of Property are Subject to Confiscation?**

#### *Current state*

The relevant Articles of the Taiwanese Criminal Code provide as follows:

#### **Article 133(1) of the Code of Criminal Procedure**

*A thing which can be used as evidence or is subject to confiscation may be seized.*

Article 133(1) of the Code of Criminal Procedure (hereinafter the CCP) raises the issue of what types of property are subject to confiscation. A “thing” is defined by the judiciary in the Yuan Yuan-Tze No.2140 Interpretation. According to the Interpretation, a “thing” obtained from the commission of a crime means something obtained “directly” from the commission of the crime so that, for example, money from the sale of a stolen thing is not forfeitable.<sup>12</sup> This definition is obviously intended to include only the original property derived from the commission of an offence and excludes property that

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<sup>10</sup> See section 3 of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405) (Hong Kong).

<sup>11</sup> See *Secretary for Justice v Lee Chau Ping and Another* [2000] 1 HKLARD 49 (CFI) (Hong Kong).

<sup>12</sup> See *Yuan Yuan-Tze No.2140 Interpretation*. 司法院院字第 2140 號解釋參照。

can be traced. Therefore, a thing obtained “indirectly” from the commission of the crime, such as pecuniary advantages, benefits of property and pecuniary creditor’s right are not objects that can be confiscated under Article 133(1) of the CCP. Furthermore, the court cannot order the confiscation of the proceeds of an offence once they have been converted into another asset - a house, stocks and shares, or valuables of any sort.

**Article 38 of the Criminal Law:**

*Seized properties which are contraband, instrument used in the commission of or preparation for the commission of an offence, and proceeds acquired through the commission of a criminal offence.*

*Contraband should be forfeited whether or not it belongs to the offender.*

*The instrument used in and proceeds of criminal offences which belong to the offender should be forfeited unless there are other specified laws applicable.*

**Article 14(1) of the Money Laundering Control Act**

*The property or property interests obtained from the commission of a crime by an offender violating the provisions set forth in Article 11 of this Act, other than that which should be returned to the injured party or a third party, shall be confiscated, regardless of whether the property or property interests belong to the offender or not.*

Article 38 of the Criminal Law provides the definition of forfeitable things and also prescribes that property of third parties cannot be confiscated in a criminal case unless there are other specified laws applicable. Only Article 14(1) of the Money Laundering Control Act (hereinafter the MLCA) is applicable to the other specified laws regulated in the third paragraph. Article 14(1) of the MLCA provides that any property, regardless of whether it belongs to the defendant or not can be confiscated. Furthermore, according to Article 4 of the MLCA, the property or the interests include the ones obtained directly from the commission of the crime, the remuneration obtained from the commission of the crime and the property or property interests derived from the above two benefits.

Therefore, we can see that Article 14(1) confiscates illegal proceeds belonging to a third party as a mechanism to avoid a defendant from enjoying the fruits of his illegal acts by transferring proceeds to a third party. In Chong-Su-Tze No.27 of 2004 in the Taiwan Tainan District Court, the Court ordered a confiscation pursuant to Article 14(1) of the MLCA against a defendant who knew the money other defendants gave to him was ransom but still deposited it in his unwitting, adopted daughter's bank account.<sup>13</sup>

Because of the limitations of Article 133 of the CCP and Article 38 of the Criminal Law, it is very hard for the court to order the confiscation of illegal proceeds obtained from the commission of most indictable offences. Not many things are subject to confiscation. This is the most fundamental reason why the confiscation system is not very effective to take the profit out of the crime and halt the motivation of criminal activities in Taiwan.

### *Suggestions for reform*

With regard to what things can be confiscated, the issue of whether converted or transformed property is within the range of the definition is of interest. According to Article 133(1) of the CCP, Article 38 of the Criminal Law and the Yuan Yuan-Tze No.2140 Interpretation, only the property obtained directly from the commission of crime and still belonging to the defendant is subject to confiscation. The forfeitable thing is very narrowly defined so that it could not encompass all the proceeds of crime. Thus, a third party challenging a criminal confiscation on the ground that the property belonged to him, not to the defendant, does not have to be innocent. In criminal cases, non-innocent spouses and unindicted co-conspirators can recover the confiscated property during trial proceedings and a defendant could attempt to avoid criminal confiscation by transferring his property to another before conviction.

To enable confiscation to be more effective and prevent the need to constantly seek interpretation of existing legislation as technology develops new forms of property, the

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<sup>13</sup> See *Chong-su-tze No.27 judgment of 2004*, Taiwan Tainan District Court. 臺灣台南地方法院 93 年度重訴字第 27 號判決參照。

legislation in Taiwan should be re-drafted carefully in defining categories of property subject to confiscation. The definition could be expanded to ‘assets of every kind, whether movable or immovable, tangible or intangible, or interest in such assets<sup>14</sup>, or rights *in rem* and *in personam* pertaining to these objects subject to confiscation<sup>15</sup>, regardless of whether the property or property interests belong to the offender or not’. In this way, no matter into what form into which the defendant might attempt to change proceeds into, nor whom the defendant transfers assets to, the illegal proceeds still could be traced and confiscated. However, it would seem fair that property which is obtained by a third party without the knowledge of criminal activities should be excluded.

### **Value of Illegal Proceeds**

#### ***Current state***

The relevant Articles of the Taiwanese Criminal Code provide as follows:

#### **Article 7(2) of Organized Crime Prevention Act:**

*If the source of obtaining the property cannot be legally established, any property obtained by an offender acting in contravention of Article 3 of this Act after participating in the criminal organization shall be traced for collection or confiscated subsequent to deducting the portion to be returned to the victims. Where the property cannot be confiscated in part or in whole, then an amount equivalent to the ascribed monetary value of the aside property shall be traced for levied.*

#### **Article 10(2) of Anti-Corruption Statute**

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<sup>14</sup> Article 1(b) of Chapter I of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime provides that “*property*” includes *property of any description, whether corporeal or incorporeal, movable or immovable, and legal document or instruments evidencing title to, or interest in such property.*

<sup>15</sup> Article 33 and 33a of the Dutch Criminal Code states that *all goods that are obtained wholly or largely by means of a criminal offence,...., rights in **rem** and in **personam** pertaining to these objects to confiscation.*

*The prosecutor or the judge, as any person subject to this statute who commits any of the corrupt acts listed in Articles 4 through 6 of this statute, for the purpose of determining whether the defendant has benefited from corruption can order the defendant to explain the source of any suspicious property have been received by him, his spouse and minor children at any time since the beginning of the period of 3 years ending when he committed a corrupt offence. If the source of obtaining the property cannot be legally established, the preceding suspicious property will be assumed as his proceeds of corruption.*

Article 7(2) of the Organized Crime Prevention Act (hereinafter the OCPA) and Article 10(2) of the Anti-Corruption Statue (hereinafter the ACS) both provide stipulations about the presumption of proceeds of crime but the presumption only applies to the specified offences under the OCPA and the ACS. These two statues create a rebuttable presumption that unexplained wealth accumulated during a period is attributable to corruption or organized crimes that results in the confiscation of the increased wealth, unless the defendant can sufficiently explain how the increase in wealth occurred through legitimate means.

The Legislative Yuan in Taiwan consulted Section 10 of Prevention of Bribery Ordinance in Hong Kong to amend Article 10(2) of the ACS on 22 April 2009. Section 10 of Prevention of Bribery Ordinance in Hong Kong states that any person is in control of pecuniary resources or property disproportionate to his present or past official emoluments, shall, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be guilty of an offence and the property which the defendant cannot explain its source will be subject to confiscation under Section 12AA. In Taiwan, the prerequisite of Article 10(2) of the ACS is that the defendant has to commit offences described in Articles 4 to 6 of the ACS so that the prosecutor has to prove the defendant's guilt of corruption beyond a reasonable doubt and at the same time, even though there is a statutory presumption, the amount of proceeds obtained from the commission of corruption has to be proven on the same evidential standard. A conflict



exists between the application of presumption and how the proceeding actually practices. However, this stipulation was only amended two years ago so there is no judgment about this conflict yet.

Apart from Article 7(2) of the OCPA and Article 10(2) of the ACS, there is no mandatory statutory assumption aiding the prosecution in the quantification process of illegal proceeds. Further, the evidentiary and procedural standards required by the law are at the level of beyond reasonable doubt and therefore it is difficult or impossible for prosecutors to prove the value of proceeds. Only when the court is satisfied as to the value of the proceeds, it may order a confiscation in respect of the property. However, the profits of serious crime are so great that the deterrent effect of even a lengthy imprisonment is insignificant, as the convicted criminals know that their illicit gains will be available to them on their release.<sup>16</sup>

Take the investigation of drug-trafficking in Taiwan for instance. Drug dealers earn a fortune by selling drugs. Criminals typically spend their spoils on expensive items but in most drug-trafficking cases, confiscation is not an effective form to deter the crime. The reason is that the only way to calculate how much a drug dealer gains is to find drug addicts buying drugs from the dealer and then interview the addicts about the specific time, place, kinds of drug and price. After such an investigation, the amount of proceeds can be calculated according to the addicts' affidavits but the amount is likely to be only a small part of what the defendant profits from drug-trafficking. The proceeds cannot be traced and confiscated. Just like an American judge once put it succinctly: 'A racketeer who dissipates the profits....on wine, women and song has profited from organized crime to the same extent as if he had put the money in his bank account'.<sup>17</sup>

Confiscation possesses the element of sanction against the owner to interdict crime-tainted property. However, based on the aim of confiscating illegal proceeds, if a

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<sup>16</sup> See Angela V.M. Leong, *Assets recovery under the Proceeds of Crime Act 2002: The UK Experience*, Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime, Ed SNM Young, Edward Elgar Publishing, UK, 2009.

<sup>17</sup> *United States v Richard A. Ginsburg*, 773 F.2d, 798 (7<sup>th</sup> Cir. 1985).



defendant does not profit from the crime, there will not be any necessity and possibility to take away the proceeds. Since the purpose of confiscation is deprivation of proceeds obtained from the commission of a crime, the sum of confiscation should depend on the benefits each defendant gains from each offence. However, it is very hard to investigate such individual amounts and in Taiwan, judges do not have a statutory discretion to estimate. In the Supreme Court judgment of Tai-Shang-Tze No.7421 of 2005, the Court held that confiscation was a kind of rehabilitative measure for the purpose of deprivation of the property obtained from the commission of the crime and that this was distinct from penalties by way of fine, so that the court should order all the joint defendants jointly liable for confiscation rather than order every defendant liable for the entire sum of illegal proceeds.<sup>18</sup> Moreover, the decisions in Tai-Shang-Tze No.3074 of 2002 and No.41 of 2004 contend that the court cannot calculate how much a defendant gains from the joint commission of corruption individually for the purpose of confiscating the illegal proceeds or returning them to the victims separately or repeatedly.<sup>19</sup> The reason why the Supreme Court emphasizes that confiscation is a kind of rehabilitative measure and different from a fine penalty is to reach the conclusion that the court cannot issue separate or repeated confiscation orders against every single joint offender so that the court may avoid the need to calculate what is the exact amount of illegal proceeds every offender gains individually in a joint criminal case.<sup>20</sup>

Another example of this approach can be found in the Zhu-Chong-Su-Tze No.4 judgment of 2006 in the Taiwan Taipei District Court, where the former President of Taiwan, Chen Shui-bian was convicted of embezzlement of State Affairs Confidential Funds, fraudulent obtainment of money and property under colour of legal authority, and acceptance of a bribe for an official act. Chen Shui-bian was found guilty on six counts

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<sup>18</sup> See *Tai-Shang-Tze No.7421 judgment of 2005*, Taiwan Supreme Court. 最高法院 94 年度台上字第 7421 號判決參照。

<sup>19</sup> See *Tai-Shang-Tze No.3074 judgment of 2002 and No.41 judgment of 2004*, Taiwan Supreme Court. 最高法院 91 年度台上第 3074 號判決、93 年度台上第 41 號判決參照。

<sup>20</sup> See Xue Zhi Ren, *the Definition and Attribute of Confiscation (the complex comments of the relevant Judgments in the Supreme Court)*, Taiwan Journal, Ed 98, 2007.參照薛智仁著，沒收之定性與屬性（上）—最高法院相關裁判綜合評釋—，臺灣本土法學雜誌 98 期，2007 年 9 月。

and was given an overall sentence of life imprisonment and fined NT\$200 million, and deprived of his civil rights for the remainder of his life. The Court also imposed a confiscation order in the amount of NT\$247,688,166 and US\$8.38 million in relation to the illegal proceeds and held that if all or part of confiscation could not be satisfied, the value should be indemnified from the offender. Moreover, because there were other defendants having joint intent to commit and participating in the committing of crimes, the joint offenders were liable for the confiscation order for the crimes they were involved in.<sup>21</sup>

### *Suggestions for reform*

A common problem in confiscation litigation is that criminals usually use their proceeds to place title in the names of insiders, including close friends and family members, as a way to avoid detection and confiscation. In the Draft Report of the informal Money Laundering Experts Group of the EU Multidisciplinary Working Group on Organized Crime the conclusion was reached that it was in practice almost impossible to prove, beyond reasonable doubt, the criminal origin of assets if they were owned by legal persons domiciled in offshore centers.<sup>22</sup>

In the United Kingdom, the court can make a presumption which is provided for in statute law. Section 10 of the Proceeds of Crime Act 2002 provides that when a person is convicted of an offence or offences in proceedings before the Crown Court<sup>23</sup>, unless the offender can show otherwise, all income and gifts received by that person within the previous six years would be assumed to be the proceeds of crime and confiscated. The court has a discretion not to apply this assumption if the result would be unjust or

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<sup>21</sup> See *Zhu-Chong-Su-Tze No.4 judgment of 2004*, Taiwan Taipei District Court. 臺灣台北地方法院 94 年度曠重訴字第 4 號判決參照。

<sup>22</sup> *Draft Report of the Money Laundering Experts Group*, 12706/98, GRIMORG 173, Brussels, 6 November 1998, p. 37, quoted from *Reversal of the burden of proof in confiscation of the proceeds of crime: a Council of Europe Best Practice Survey of European Committee of Crime Problems* 25<sup>th</sup> May 2000.

<sup>23</sup> In the United Kingdom, the Crown Court deals with more serious criminal case such as murder, rape or robbery, some of which are on appeal or referred from Magistrate's court.

disproportionate given the circumstances of the defendant.<sup>24</sup> Hong Kong has similar stipulations in the Drug Trafficking (Recovery of Proceeds) Ordinance and Organized and Serious Crimes Ordinance.<sup>25</sup> The United States adheres to the so-called relation-back doctrine, according to which transfer of property title is deemed to take place at the moment the offence at issue is committed.<sup>26</sup> The judicial decision ordering the confiscation is only a declaratory power. This involves a legal fiction under which the state is deemed to have been owner of the property involved in the offence from the moment the offence was committed, and it has important consequences: proceeds from crime which can be confiscated under the relation-back doctrine in principle remain always ‘untouchable’ as any transfer of property title is in principle void, given the fact that the state has become owner at the moment the offence at issue was committed.<sup>27</sup> The law in the United States imposes a presumption and shifts the burden of proof to the titleholder to prove that such property was obtained in good faith. In addition, an innocent owner is required to prove by a preponderance of evidence that he acquired the property as a bona fide purchaser without knowledge of the illicit source.

The most important conclusion to adduce with regard to these concepts is that once a presumption of criminal origin of proceeds has been established by the prosecution, and the burden to rebut this presumption lies with the defendant.<sup>28</sup> In Taiwan, if the legislation were amended to adopt this type of statutory presumption in specified serious offences and to reverse the burden of proof in relation to the criminal origin of alleged proceeds from crime, the prosecution would only have to show probable cause or reasonable doubt, a much lower threshold than in criminal proceedings, that the assets

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<sup>24</sup> See section 10 of Proceeds of Crime Act 2002 (the United Kingdom).

<sup>25</sup> See Section 4 of Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405) (Hong Kong), Section 9 of Organized and Serious Crimes Ordinance (Cap 455) (Hong Kong)

<sup>26</sup> Title 21 United States Code, Section 853(c), 881(h), and 18 United States Code, Section 1963(c) provide: All right, title, and interest in properly[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.

<sup>27</sup> See electronic resource, Stessens, Guy, *Money Laundering: A New International Law Enforcement Model*, Cambridge University Press, 2000.

<sup>28</sup> *Ibid.*

were obtained by the commission of crime. If the property is subsequently transferred, it could remain subject to confiscation, unless the transferee established that he is a bona fide purchaser for value without knowledge that the property is subject to confiscation. Thus, such amendment would mean that confiscation can defeat insider transfers where the defendant attempts to avoid criminal confiscation by transferring the property to another before conviction.

## **Restraint Orders**

### *Current State*

Illegal proceeds are difficult, sometimes impossible, to trace if immediate action is not taken. Property may be restrained or frozen pending a criminal trial to ensure that it will be available in the event of a confiscation order being made on subsequent conviction.<sup>29</sup> In this way, property can be secured to enable a proceeds order to be enforced.<sup>30</sup> In Taiwan, a prosecutor can order the restraint of assets during investigation. The issue here is whether a prosecutor can request a bank to detain or restrain an account pursuant to Article 133(1) of the CCP. First of all, the nature of a bank account is within the definition of creditor's right under Article 199 of the Civil Code and this right means that a customer has an agreement with a bank for the payment based on the bank account record. Therefore, the illegal proceeds in an account have to the benefit of being protected by creditor's right and the proceeds are not "things obtained from the commission of an offence".<sup>31</sup> Under this circumstance, an order to detain or restrain cannot be issued against the improper proceeds in a bank account according to Article 38

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<sup>29</sup> See Felix J. McKenna and Kate Egan, *Ireland: A Multi-disciplinary Approach to Proceeds of Crime*, Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime, Ed SNM Young, Edward Elgar Publishing, UK, 2009.

<sup>30</sup> See Sylvia Grono, *Civil Forfeiture: The Australian Experience*, Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime, Ed SNM Young, Edward Elgar Publishing, UK, 2009.

<sup>31</sup> See Handouts provided by the Judge Lin Meng Huang in the Seminar of Securities and Futures Legislations and Cases on 11<sup>th</sup> July 2010 見民國 99 年 7 月 1 日證券暨期貨市場法務與案例研討會，臺灣臺北地方法院林孟皇法官講義第 28 頁。

of the Criminal Law and Article 133(1) of the CCP. So a prosecutor has to rely upon other provisions to justify an order.

**Article 9 of the Money Laundering Control Act:**

*Whenever the prosecutor obtains sufficient evidence to prove that the offender has committed a crime prescribed in Article 11 herein by transporting, transmitting, or transferring a monetary instrument or funds through bank deposit, wire transfer, currency exchange or other means of payment, the prosecutor may request the court to order the financial institution to freeze that specific money laundering transaction to prevent withdrawal, transfer, payment, delivery, assignment or make other necessary disposition of the involved funds for a period not more than 6 months.*

*The prosecutor on their own authority may freeze a specific money laundering transaction and request the court's approval within three days whenever the prosecutor has probable cause to believe that the property or property interests obtained by the offender from the commission of crime are likely to disappear under exigent circumstances.*

*The prosecutor must immediately remove the hold on transaction if the prosecutor fails to obtain the court's approval within three days. If the court fails to approve within three days or if the prosecutor fails to petition to the court for approval within three days, the hold shall be removed. During the trial proceedings, the presiding judge has discretion to order a financial institution to freeze the offender's money laundering transaction for purposes of withdrawal, transfer, payment, delivery, assignment or make other necessary disposition.*

*The order to freeze the offender's money laundering transactions for withdrawal, transfer, payment, delivery, assignment or other related property disposition in a financial*

*institution must be in writing and meet the requirements set forth in Article 128 of the Criminal Procedure Code.*

Article 9 of the MLCA provides that a prosecutor should apply to the court to restrain the property or property interests and prohibit any specified person or persons from dealing with any realizable property held by him for the purposes of satisfying a confiscation order.<sup>32</sup> The preservation of assets through a restraint order is valid for six months, and on the application of a prosecutor before the expiration of five days from issuance of a restraint order, the court may for good cause extend its validity for a period not exceeding a further six months. If the court issues the restraint order, the order will be effective until the conclusion of confiscation proceedings. It is not effective for six months only. However Article 9 of the MLCA is only applied when a person commits those ‘specified offences’ listed in Article 11. While Article 11 of the MLCA captures many serious statutory offences, it does not include all indictable offences. In the decision of Jien No.2159 of 2006 of the the Chiayi District Prosecution, the prosecutor granted a restraint order of property obtained from the commission of an underground remittance by the defendant pursuant to Article 9 the MLCA. When investigating the money flow, the prosecutor found out that the defendant laundered stakes for a co-defendant who was involved in the offence of gambling, and detected a large amount of suspicious property in other different bank accounts. However, the prosecutor could not issue an order of restraint against the stakes because gambling is not a specified offence in the MLCA. This case demonstrated the limitations of restraint orders.

Some jurisdictions, such as South Africa, Ontario, and Australia, permit the initial restraint of assets on a probable cause or reasonable grounds to believe standard, the same evidentiary standard that permits the issuance of search and arrest warrants.<sup>33</sup> In the judgement of Sheng-Tze No.400 Decree of 2008 in the Taiwan Taipei District Court, the

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<sup>32</sup> In the United Kingdom, once the restraint order has been served, the bank should recall any credit card previously issued the defendant. See *Supra.* footnote 8.

<sup>33</sup> For specific examples, see Prevention of Organized 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, also the Proceeds of Crime Act 2002. (Australia).

Court found that there was a reasonable doubt that the seized sealed, bankbooks were essential evidence to prove the joint defendant's illegal activities and those items could not be returned.<sup>34</sup> Since restraint orders involve an element of seizure, the order should be issued on the same evidentiary grounds. Taiwan, therefore, adopts the reasonable doubt grounds during the restraint phases of asset confiscation proceedings.

**Article 45-2(1) of the Banking Act:**

*A bank shall exercise the due care of a good-faith administrator with respect to deposit accounts. Where a deposit account is suspected of illegality or an obviously irregular transaction, a Bank may temporarily suspend of funds.*

There is another provision regulating the restraint order. This states that a bank has the power to temporarily freeze a suspicious deposit account, but it is obviously up to the bank to decide if there are grounds of suspicion and then decide whether or not it should suspend the funds. Neither the government nor the judiciary can review whether the bank fulfills its legal duty in this regard.<sup>35</sup>

Neither Article 9 of the MLCA nor Article 45-2(1) of the Banking Act requires a judicial official to provide notice to the asset holder. If the fear of advance notice would tip off the violator and enable him or her to take some action, such as secreting away or transferring the assets, then no notice need be given as it would jeopardize the confiscation case. However, if the asset holder's interest is concerned, notice should be given to protect the holder's property rights but the time and the mechanism of the notice should be measured more carefully to avoid hampering the investigation.

***Suggestions for reform***

Article 9 of Switzerland's Money Laundering Act of 1998 introduced due diligence obligations, particularly the obligation to report suspicious transactions. Intermediaries

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<sup>34</sup> See *Sheng-Tze No.400 Decree of 2008*, Taiwan Taipei District Court. 臺灣臺北地方法院 97 年度聲字第 400 號 參照。

<sup>35</sup> See *Supra*. footnote 31, p28.



are required to report any “founded suspicion that funds derive from crime” where that crime has a maximum penalty of over three years’ imprisonment. If they fail to do this or to enforce other money-laundering requirements, there are maximum fines of CHF (Swiss Franc) 200,000. These apply to all financial intermediaries: not just banks, but also insurance companies, independent asset managers and so on.<sup>36</sup> Under Article 10 of Switzerland’s Money Laundering Act, assets held by any financial intermediary which are reported in a suspicious transaction report must be frozen immediately until five business days later or until a decision is made by the competent prosecution authority to freeze funds for longer, whichever is the earlier date.<sup>37</sup>

In Taiwan, Article 8(1) of the MCLA provides that “for any financial transaction suspected of committing a crime prescribed in Article 11 herein, the financial institutions referred to in this Act shall ascertain the identity of the customer and keep the transaction record as evidence, and report the suspect financial transactions to the Investigation Bureau, Ministry of Justice”. All financial institutes have an obligation to report suspicious transaction involved in Article 11 of the MCLA as a way to prevent money laundering, but there is no relevant stipulation about what the next step should be taken. A defendant may transfer or hide the property immediately just after the suspicious transaction report so that the function of fighting money laundering is less effective. Therefore, after a suspicious transaction is reported, assets held in any financial institute should be frozen immediately to avoid the possible release of illegal property, but there should be a limitation of period for such a temporary restraint order for the purpose of reducing the degree of violating the civilian’s property right.

Although Article 11 of the MLCA captures many serious statutory offences, it does not include all indictable offences so that the application of a restraint order is limited to specified offences. As noted earlier in the case of Jien No.2159 of 2006 in the Taiwan Chiayi District Prosecution Court, the judicial organization is unable to order the restraint

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<sup>36</sup> See electronic resource, available at <http://www.eda.admin.ch/eda/en/home/topics/finec/intcr/mlaun.html>, Last accessed 18<sup>th</sup> April 2011.

<sup>37</sup> *Reversal of the Burden of Proof in Confiscation of the Proceeds of Crime: A Council of Europe Best Practice Survey of European Committee of Crime Problems* 25<sup>th</sup> May 2000.



of the gambling stake deposited in bank accounts. This makes confiscation impossible in some cases, so restraint orders to freeze assets in bank accounts should be applicable to all criminal activities for the purpose of enabling confiscation.

### **Confiscation of Substitute Assets**

#### *Current State*

The confiscation of substitute assets permits a government to confiscate untainted assets of an equivalent value to those assets that cannot be recovered because of some action by the violator.<sup>38</sup> When the criminal proceeds subject to confiscation have been disposed of, the judge can order an equivalent compensatory payment. Basically, demanding payment from the defendant and offsetting the value with the property of the defendant are two kinds of confiscation of substitute assets and possess the same legal effect of depriving the defendant of the illegal proceeds as well as punishing the viciousness of the crime.<sup>39</sup>

Confiscation is applicable only when the proceeds obtained from the commission of a crime are under the control of the enforcement power, so if the proceeds have been seized in the first instance for criminal confiscation, the court will order the confiscation of the original proceeds rather than a substitute. However, when the property is not under seizure, it cannot be deprived by confiscation. Payment should be received as an insurance policy so that the court in a criminal confiscation case can order the defendant to pay a money judgment or to confiscation substitute assets if the directly recoverable property has been dissipated or cannot be found.<sup>40</sup> That is the reason demanding payment and offsetting the value both have the supplementary legal effect of confiscation.

There are two parts in the Criminal Law dealing with substitute assets. One is the general provision which regulates the fundamental principles of general application and the other is that which delineates different kinds of specific offences. In the general

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<sup>38</sup> See *Supra.* footnote 8.

<sup>39</sup> See *Supra.* footnote 4.

<sup>40</sup> See *Supra.* footnote 3.

provision, if some or all of illegal proceeds are not recovered, the equivalent value of the defendant's own money or property cannot be confiscated as a substitute. Confiscation is the only mechanism in the general provisions to be used to deprive a defendant of illegal proceeds. However, demanding payment from the defendant and offsetting the value with the property of the defendant are regulated in some specified offences, such as Articles 121, 122, 133, and 143 of the Criminal Law, Article 10 of the ACS, Article 7 of the OCPA, Article 19 of the Statute for Narcotics Hazard Control and Article 67-1 of the Financial Holding Company Act (hereinafter FHCA). To establish a lawful fundamental application of the demanding payment and offsetting value, an amendment was added in Article 34(3) of the Criminal Law in 2005 providing that demanding payment from the defendant and offsetting the value with the property of the defendant are both types of accessory punishment.

Two models of crimes can be distinguished. One is violating others' property rights to gain illegal interests (for example, stealing and robbery) and the other is that the criminal act is illegal because it creates illegal benefits by itself (for example, bribery and corruption). This distinction in the first place concerns the model in which a victim's property rights are violated and demonstrates whether ordering the confiscation of substitute assets is applicable to these two models of offences. Confiscation has an inherently punitive element. If the court orders the confiscation of the defendant's substitute assets in a criminal case in which a victim also claims for compensation from the defendant, there will be an extra punishment besides the imprisonment the court imposes and the compensation the defendant has to pay. The defendant's rights are potentially violated because of double jeopardy against his property. Therefore, it can be argued that confiscation of substitute assets to deprive illegal proceeds should only be applied to the offences that result in general costs that have to be borne by society as a whole.<sup>41</sup>

#### **Article 10(4) of Anti-Corruption Statute**

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<sup>41</sup> See *Supra*. footnote 4.

*To ensure the payment of such restitution the defendant's assets and property may be subject to seizure.*

#### **Article 14(2) of the Money Laundering Control Act**

*The offender's property may be seized, if necessary, to protect the property or property interests obtained from the commission of a crime by an offender violating of the provisions set forth in Article 11 of this Act.*

#### **Article 416(1) of the Code of Criminal Procedure**

*A subject of a ruling may file a motion to withdraw or change the following rulings to the court in charge if disagrees with the ruling made by the presiding judge, commissioned judge, requisitioned judge, or prosecutor.*

*Rulings regarding detention, release on bail, committing to the custody of another, a limitation on residence, search, seizure, return of seized property, committing the defendant to a hospital or other places for expert examination, and rulings regarding prohibition or seizure pursuant to Paragraphs 3 and 4 of Article 105.*

Article 10(4) of the ACS and Article 14(2) of the MLCA provide that for the purpose of satisfying confiscation of substitute assets and hampering criminal activities, a defendant's property, which is not used as evidence or not subject to confiscation, may be seized before the trial. In *Tai-Kang-Tze No.602 Decree of 2010* in the Taiwan Supreme Court, it was held that in the absence of specific regulations concerning seizure of substitute assets, if the court or the prosecution has the power to file for and to execute such proceedings, the seizure proceedings are those in Article 10(4) of the ACS and Article 14(2) of the MCLA, and would amount to an infringement of people's property rights. A judicial official should consider the due process based on the constitution and the defendant's right to interlocutory appeal should be protected pursuant to Article 416(1) of the CCP.<sup>42</sup> In the decision of *Sheng-Tze No.1943 Decree of 2010* in Taiwan Taipei

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<sup>42</sup> See *Tai-Kang-Tze No.602 Decree of 2010*, Taiwan Supreme Court. 臺灣最高法院 99 年度台抗字第 602 號參照。

District Court, the Court found that a judge should approach the matter of violating people's property rights versus the necessity of the issuance based on the spirit of protecting property right in the Constitution into consideration when ordering seizure pursuant to Article 10(4) and Article 14(2) of the MLCA. Thus, only when a judge ensures that the defendant actually or highly probably has committed the offence and it is necessary to seize the property in advance for ensuring the payment of restitution, is due legal process able to be satisfied under the Constitution<sup>43</sup>

### *Suggestions for reform*

Whereas some jurisdictions, such as the Netherlands<sup>44</sup>, have adopted value confiscation as the main model for depriving defendants of illegal proceeds, many jurisdictions such as Belgium and Switzerland only allow value confiscation as a subsidiary alternative for object confiscation, namely when the property constituting the proceeds can not be traced any more.<sup>45</sup>

In the United States, in order to truly separate the racketeer from his dishonest gains, the statute requires confiscation of the total amount of the proceeds of his racketeering activity, regardless of whether the specific dollars received from that activity are still in his possession.<sup>46</sup>

In Taiwan, the government's power to confiscate the profits or proceeds of criminal activity should not be limited to whatever is left or unspent at the time of conviction. Value confiscation is still based on the assessment of the value of illegal proceeds. When the object that the court orders to confiscate does not exist, the government should order the defendant to pay a certain amount of money equivalent to the value of the illegal

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<sup>43</sup> See *Sheng-Tze No.1943 Decree of 2010*, Taiwan Taipei District Court. 臺灣台北地方法院 99 年度聲字第 1943 號參照。

<sup>44</sup> Article 36e of Criminal Code (Netherlands) allows for value-based confiscation, meaning that the offender must pay a sum of money to the state not exceeding the value of illegally obtained profits deriving from: (1) the particular offence for which the offender was convicted; (2) similar offences, where there is sufficient evidence that they were also committed by him/her; (3) other criminal activity, which has resulted in illegally obtained profits.

<sup>45</sup> See *Supra*. footnote 27.

<sup>46</sup> *United States v Richard A. Ginsburg*, 773 F.2d, 798 (7<sup>th</sup> Cir. 1985).

proceeds. Confiscation of substitute assets is a necessary mechanism when property is no longer in the possession of the defendant. Thus, value confiscation should be applied to all offences without victims to meet the purpose of confiscation.

### **When the Confiscation Order is not Satisfied**

#### *Current State*

The relevant Articles of the Taiwanese Criminal Code provide as follows:

#### **Article 470 of the Code of Criminal Procedure**

*A ruling for fines, pecuniary penalty, confiscation, forfeit, payment pursue, and compensation shall be executed upon instruction by the prosecutor; provided that after pronouncing the ruling for fines or pecuniary penalty, if consented by the sentenced and the prosecutor is absent, the court may instruct the execution at the trial. The instruction in the preceding paragraph has the same effect as the title for civil execution.*

*The legacy of the sentenced may be subject to the execution of fines, confiscation, forfeit, payment pursue, and compensation*

#### **Article 10(4) of Anti-Corruption Statute**

*To ensure the payment of such substitute for confiscation, the defendant's assets and property may be subject to seizure.*

#### **Article 7(3) of Organized Crime Prevention Act**

*The prosecutor may where necessary seize the property of the said offender referred to in the preceding two paragraphs to ensure the payment of confiscation or such substitute for confiscation.*

Article 470 of the CCP states that confiscation, payment pursuit, and compensation orders can be treated as writs of execution. When the confiscation is not satisfied, the

orders can be enforced as a civil debt. However, the average time from the beginning of investigation to filing the charge sheet to trial in the District Court is two months<sup>47</sup>. Additionally, the average time for a case to proceed to trial when the indictment is filed by the Supreme Court is almost six months.<sup>48</sup> The average period does not include the time that the Judicial system spends on remand and retrial cases. During these investigation and trial proceedings, except where a defendant's property is under seizure pursuant to Article 10(4) of the ACS and Article 7(3) of the CPA, a defendant can continue to transfer all the property involved in offences he commits without impunity. This demonstrates the issue that when the confiscation proceeding are initiated, if the convicted person is unable to pay or deliberately does not pay the amount of illegal proceeds that have been ordered to be confiscated, the confiscation will never be satisfied. Thus, the rate of recovery is much lower than the sums ordered to be confiscated.

To facilitate enforcement, the judge making the confiscation order must also impose a default term of imprisonment. The confiscation order should be treated as a fine for purpose of enforcement.<sup>49</sup>

### **Article 42 of the Criminal Law**

*The convicted person should pay all the fines in two months after the final verdict. If he does not pay, the civil enforcement must be initiated. If he is unable to pay, he shall perform labor service. When he cannot pay his fine in full in two months, payment by installment in one year is allowed but when he delays the payment or does not pay in full, the rest of the fines will be enforced or labor service must be performed.*

*If the convicted person has no property liable to be enforced, the prosecutor may order him to perform the labor service instead.*

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<sup>47</sup> Based on data for the period from 2006 to 2010 (up to the end of December) found in the Statistics of Justice from 2006 to 2010.

<sup>48</sup> Based on data for the period from 2006 to 2010 (up to the end of December) found in the Taiwan Judiciary Annual Report from 2006 to 2010.

<sup>49</sup> See Simon N.M. Young, *Civil Forfeiture in Hong Kong*, Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime, Ed SNM Young, Edward Elgar Publishing, UK. 2009.

*The length of such labor service for a period of not more than one year shall be calculated at the rate of NT\$1000, 2000 or 3000 a day.*

#### **Article 58 of the Criminal Law**

*The convicted person's solvency and the amount of proceeds from the commission of crime shall be considered when the court orders the fine penalty. If the proceeds exceed the maximum of fines, the fine can be aggravated but not more than the proceeds.*

#### **Article 67-2 of Financial Holding Company Act**

*Those who violate this Act and are fined a criminal fine of NT\$50 million or more, but are unable to pay their fine in full, shall perform labor service for a period of not more than 2 years; the length of such labor service shall be calculated by the rate of the total amount of the fine to the number of days in 2 years. Those who are fined NT\$100 million or more, but are unable to pay their fine in full, shall perform labor service for a period of not more than 3 years; the length of such labor service shall be calculated by the rate of the total amount of the fine to the number of days in 3 years.*

Articles 42 and 58 of the Criminal Law provide the Court with a discretion to aggravate the fine based on the amount of proceeds from the commission of crime and the imposition of labor service if the fine is not paid, and allow for installment payments for up to one year after conviction. Article 67-2 of the FHCA also provides for the imposition of labor service for not more than three years. Therefore, due to the limited time period of labor service the court is able to impose, the punitive nature of confiscation will be reduced and a possible imbalance will exist between the benefit the defendant gains and the punishment given to the defendant.

*Suggestions for reform*

It is possible to imprison persons who have not complied with an order of confiscation. In Hong Kong, the judge must pose a default term of imprisonment which is to be served if the confiscation order is not satisfied. The length of the term of imprisonment will depend on the amount of the confiscation order and can be as long as 10 years if the amount of the order exceeds HK\$10 million.<sup>50</sup> The standard rate to decide the length of default imprisonment, pursuant to Section 8(2) of the Drug Trafficking (Recovery Proceeds) Ordinance, is found in the following table:<sup>51</sup>

<i>An amount not exceeding \$200,000</i>	<i>12 months</i>
<i>An amount exceeding \$200,000</i>	<i>18 months</i>
<i>An amount exceeding \$500,000 but not exceeding \$1 million</i>	<i>2 years</i>
<i>An amount exceeding \$2.5 million but not exceeding \$10 million</i>	<i>3 years</i>
<i>An amount exceeding \$2.5 million but not exceeding \$10 million</i>	<i>5 years</i>
<i>An amount exceeding \$10 million</i>	<i>10 years</i>

<sup>50</sup> *Ibid.*

<sup>51</sup> See section 8 of Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405). (Hong Kong).



In Taiwan the legislation should be amended so that confiscation orders can carry severe terms of imprisonment where a defendant has failed to satisfy the confiscation order. After a confiscation order has been made, the court should be able to decide the period of imprisonment which the defendant has to serve if he fails to pay. The length of default imprisonment should be decided corresponding to the amount of illegal proceeds ordered to be confiscated. The purpose of this kind of default imprisonment is to make it clear that the defendant can never enjoy the fruits of criminal activity even though he is unable or reluctant to pay.

Furthermore, if default imprisonment is available in Taiwan in the future, judicial officials can order the defendant to pay within a prescribed period. Thus, it will not be necessary to waste resources to bring a civil case against the defendant to recover the property.

### **Third Parties**

#### *Current state*

The relevant Articles of the Taiwanese Criminal Code provide as follows:

#### **Article 7(1) (2) of Organized Crime Prevention Act**

*The overall property of a criminal organization owned by an offender acting in contravention of Article 3 of this Act shall be traced for collection or confiscated after deducting any portion belonging to the victims.*

*If the source of obtaining the property cannot be legally established, any property obtained by an offender acting in contravention of Article 3 of this Act after participating in the criminal organization shall be traced for collection or confiscated subsequent to deducting the portion to be returned to the victims. Where the property cannot be confiscated in part or in whole, then an amount equivalent to the ascribed monetary value of the aside property shall be traced for levied.*

**Article 10(1) of Anti-Corruption Statute**

*Any person subject to this statute who commits any of the corrupt acts listed in Articles 4 through 6 of this statute, the proceeds of such corrupt act shall, depending on the circumstances of the case, be either confiscated or returned to the original owner as restitution.*

**Article 14(1) of the Money Laundering Control Act**

*The property or property interests obtained from the commission of a crime by an offender violating the provisions set forth in Article 11 of this Act, other than that which should be returned to the injured party or a third party, shall be confiscated, regardless of whether the property or property interests belong to the offender or not.*

**Article 67-1 of Financial Holding Company Act**

*Any criminally obtained assets or property in the possession of those who have violated this Act shall be confiscated, with the exception of compensations due to those victims or parties eligible for claims against damages.*

**Article 142(1) of the Code of Criminal Procedure**

*If it appears unnecessary to retain seized property until the conclusion of a case, it shall be returned by a ruling of the court or an order of the public prosecutor; if a third party does not claim the seized stolen property, it shall be returned to the victim.*

**Article 487(1) of the Code of Criminal Procedure**

*Those who injured by an offence may bring an ancillary civil action along with the criminal procedure, to request compensation from the defendant and those who may be liable under the Civil Code.*

Third parties are those with interests in the property subject to confiscation, and include victims the owners or possessors of the property. In a case where the crime

involves innocent victims, asset confiscation can be the most effective means of recovering property that may be used to compensate these victims. Restoration of property to victims in most cases is the first priority of law enforcement when it comes to disbursing confiscated property.<sup>52</sup> Confiscated proceeds should be used to compensate the victim and Article 14(1) of the MLCA, Article 10(1) of the ACS, Article 7(1) of the OCPA, and Article 67-1 of the FHCA are the relevant stipulations for returning illegal proceeds to victims. In the judgment of Chong-Su-Tze No.27 of 2004 in the Taiwan Tainan District Court, restitution of property to the victim was ordered pursuant to Article 14(1) of the MLCA and this forced a defendant who knew the money other defendants gave to him was ransom but still deposited in his unwitting adopted daughter's bank account to return NT\$159 back to the victim.<sup>53</sup> In Su-Tze No.276 of 1997 in the Taiwan Keelung District Court, the court ordered the restitution of property to the victim under Article 7(2) of the OCPA.<sup>54</sup>

Article 142(1) of the CCP states that the seized stolen property should be returned to the victim, but if stolen property has been sold, the pecuniary advantage is not recoverable. Furthermore, when a victim wants to claim damages from the defendant he has to launch a civil suit by himself according to Article 487 of the CCP. The proceeds, except for the specified offences under the MCLA, ACS, OCPA and FHCA, cannot be confiscated as remedies for the victim. Possible unfairness, therefore, exists for both the victims.

As mentioned in the preceding section, Article 38 of the Criminal Law states that only illegal proceeds owned by the offender are subject to confiscation. Article 14(1) of the MLCA provides the power to confiscate property or property interests, regardless of whether the property or property interests belong to the offender or not, but if the owner

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<sup>52</sup> See *Supra*. footnote 3.

<sup>53</sup> See *Chong-Su-Tze No.27 judgment of 2004*, Taiwan Tainan District Court. 臺灣臺南地方法院 93 年度重訴字第 27 號判決參照。

<sup>54</sup> See *Su-Tze No.276 judgment of 1997*, Taiwan Keelung District Court. 臺灣基隆地方法院 86 年度訴字第 276 號參照。

is a bona fide purchaser for value of the property without knowledge of the illegal conduct involving the property, it is not included. This is the only circumstance where owners or possessors would have their interests taken into consideration. Because this kind of confiscation is not against an individual defendant, but against the property, the owner of the property is a third party who should have the right to defend the property. In Taiwan, because the length of imprisonment is connected with the amount of proceeds, the court has to decide how much a defendant obtains from his crime. Whether the property is subject to confiscation or not should be considered in trial proceeding so a third party who claims the ownership of the property will be included in criminal proceedings.

### *Suggestions for reform*

The sentencing court has no discretion to reduce the amount of a confiscation order for the purpose of compensating the victims so a victim's interests are not normally considered at the confiscation stage in Taiwan. The possible unfairness this creates is illustrated by a Hong Kong case *HKSAR v Lung Wai-Hung* in Hong Kong<sup>55</sup>. In this case, the Defendant, without the authority of her employer, sold grey cloth belonging to two companies, Wide Wade Textile Ltd and Tat Shing Cotton Co Ltd which had been stored at a warehouse. The proceeds of HK\$1,249,000 were credited to her own bank. Counsel on behalf of the Secretary for Justice made an application prior to sentence for a confiscation order pursuant to Section 8 of the Organized and Serious Crimes Ordinance. The solicitor representing Speedy Godown Co Ltd and Tat Shing Cotton Co Ltd, the original victims of these thefts sought to intervene in the proceeding and claim restitution and compensation from the proceeds. However, even though the Court held that any innocent parties should have their claims met from the ill-gotten gains, the court had no discretion to return the proceeds back to the genuine third party who claims money being confiscated emanating from the victim of the crime. Any confiscation system should take the interest of victims of crime into consideration and ensure that victims have the right to launch legal proceedings, such as intervening in criminal proceedings or having their

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<sup>55</sup> *HKSAR v Lung Wai Hung* [1998] 4 HKC 161 (CA)

views heard in criminal proceedings, against those responsible for the damage they have suffered. Even though the victim's money cannot be directly traceable to the defendant's assets, the courts should have the discretion to allow restitution if the victim is able to prove a loss.<sup>56</sup>

If a third party has an interest in the property subject to confiscation, fundamental principles of due process and basic fairness require his right should be considered in the proceeding. This is provided for in Articles 5 and 21 of Chapter II of the Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds of Crime.<sup>57</sup> The provisions guarantee "effective" legal remedies for interested third parties. This implies that there should be a system where such parties, if known, are duly informed by the authorities of the possibilities to challenge decisions or measures taken, that such challenges may be made even if a confiscation order has already become enforceable (if the party had no earlier opportunity to do so), that such remedies should allow for a hearing in court, that the interested party has the right to be assisted or represented by a lawyer and to present witnesses and other evidence, and that the party has a right to have the court decision reviewed<sup>58</sup>.

## **International Cooperation**

### ***Current State***

Where the proceeds of crime have been moved across borders to elude detection, cooperative measures that require one country to assist another in investigating, restraining, forfeiting and returning the proceeds of crime become engaged.<sup>59</sup> When assets are moved through the international financial system, they move almost instantly from jurisdiction to jurisdiction. Due to the fact that most countries around the world do not recognize Taiwan (ROC) as a sovereign state, Taiwan has only entered into bilateral

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<sup>56</sup> In the Proceeds of Crime Act 2002 (United Kingdom) for example, Section 301 provides for the 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.

<sup>57</sup> Available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/141.htm>

<sup>58</sup> See *Supra*. footnote 8.

<sup>59</sup> See *Supra*. footnote 49.

cooperative treaties with seven countries (i.e. Commonwealth of Dominica, Dominican Republic, the Republic of South Africa, Kingdom of Swaziland, Republic of Malawi and Republic of Costa Rica) and only has mutual legal assistance agreements with the USA<sup>60</sup>, Mainland China<sup>61</sup> and the Republic of Korea (South Korea). Only the Republic of South Africa has a MOU for police cooperation with Taiwan.<sup>62</sup> This weakens Taiwan's ability to successfully conduct investigations and prosecutions, and to trace, freeze, confiscate, and return the proceeds in cross border crimes.

Article 2(1) of the Agreement on Mutual Legal Assistance in Criminal Matters between the Taipei Economic and Cultural Representative Office in the United States and the American Institute in Taiwan states that the Parties shall provide mutual assistance through the relevant authorities of the territories they represent, in accordance with the provision of this Agreement, in connection with the investigation, prosecution, and prevention of offences, and in proceedings related to criminal matters. Article 2(2) obliges assistance in tracing investigations and identification and co-operation relating to collection of evidence and confiscation of assets and Article 17 provides for assistance in confiscation proceedings.

The general principles prescribed by Chapter 3 of the Cross-Strait Joint Crime-Fighting and Judicial Mutual Assistance Agreement with Mainland China (PRC) are that parties co-operate to the widest extent possible both in investigations and proceedings relating to confiscation. Similarly, parties must adopt necessary measures that enable them to comply with requests by the other party for assistance in confiscation proceedings.

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<sup>60</sup> *Agreement on mutual legal assistance in Criminal Matters between the Taipei Economic and Cultural Representative Office in the United States and the American Institute in Taiwan.*

<sup>61</sup> *Cross-Strait Joint Crime-Fighting and Judicial Mutual Assistance Agreement.* 海峽兩岸共同打擊犯罪及司法互助協議。

<sup>62</sup> See Chen Hong Da, *the Recovery of Illegal Asset and Extradition of Defendants in Corruption Crime*, Taiwan Prosecutor Review No.1, January 2007. 「貪污犯罪之資產返還及人員引渡—出席 APEC 反貪污研討會紀實」, 檢察新論創刊號 2007 年 1 月, 陳宏達著。

**Article 15(2) of the Money Laundering Control Act**

*The Ministry of Justice may distribute the confiscated property or property interests in whole or in part to a foreign government, foreign institution or international organization which enters a treaty or agreement in accordance with Article 16 of this Act to assist our government in confiscating the property or property interests obtained by an offender from his or her commission of a crime or crimes.*

**Article 16(1) of the Money Laundering Control Act**

*The government of Chinese Taipei may, based on the principle of reciprocity, enter into cooperative treaties or other international written agreements relating to the prevention of money laundering activities with foreign governments, institutions or international organizations to effectively prevent and eradicate international money laundering activities.*

With regard to international cooperation on confiscation of proceeds from money laundering, the APG (Asia Pacific Group on Money Laundering) has pointed out that other countries are not able to enforce a civil confiscation order in Taiwan because civil confiscation has not been adopted in the legal system. In addition, although Article 15(2) of the MLCA states that The Ministry of Justice may distribute the confiscated property or property interests in whole or in part to a foreign government, foreign institution or international organization which assists the government in confiscating the property or property interests obtained from the commission of a crime or crimes, so far there is no precedent of such distribution.<sup>63</sup> Furthermore, no special fund exists to collect and distribute the pool of confiscated property.

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<sup>63</sup> APG Mutual Evaluation Report 2007 about Taiwan, quoted from Chen Hong Da, *the Recovery of Illegal Asset and Extradition of Defendants in Corruption Crime*, Taiwan Prosecutor Review No.1, January 2007. 2007 年 APG 對臺灣的雙邊評估報告，轉引自「貪污犯罪之資產返還及人員引渡—出席 APEC 反貪污研討會紀實」，檢察新論創刊號 2007 年 1 月，陳宏達著。



There has been a successful international cooperation between Switzerland and Taiwan in relation to the proceeds of money laundering involving the former President of Taiwan, Chen Shui-bian. However, Switzerland returned the proceeds back to Taiwan based on a voluntary restitution under the consent of Chen Shui-bian's son instead of the confiscation order issued by the Taiwan court. According to the press release from the Attorney General of Switzerland (OAG) on 7 December 2010, the OAG returned the sum of CHF (Swiss Franc) 20 million to the Supreme Prosecutors Office of Taiwan, part of the money that was deposited in Switzerland by the former President, who had been recently convicted of corruption<sup>64</sup>. This move once again demonstrates Switzerland's resolve to take action against those who use its financial centre for criminal purposes and its intention to restore assets of criminal origin to their rightful owners. Proceedings here are continuing in order to establish the origin of the remainder of assets currently frozen in Switzerland. Thanks to close and effective collaboration between the Taiwanese Supreme Prosecutors Office and the OAG, part of the funds deposited in Switzerland that are presumed to have originated from the criminal activities of the former President of Taiwan have been returned to the Taiwanese authorities as an anticipated handover. No objection was raised by any of the parties to the proceedings to the return of the sums returned thus far.

In the decision of Shang-Yi-Tze No. 619 of 2007 in the Taiwan High Court Tainan Branch Court, the defendant was convicted of gambling and sentenced to four years imprisonment and a two year compulsory work program. The Court also ordered the confiscation of his illegal proceeds including US\$119.32 million in a China Trust Commercial Bank Hong Kong Branch account,, US\$52.86 million in a Bank Sinopac

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<sup>64</sup> See also, "Switzerland returns US\$20m in Chen funds", Taipei Times, December 8, 2010, Available at: <http://www.taipeitimes.com/News/taiwan/archives/2010/12/08/2003490398>



Hong Kong Branch account, and HK\$0.42million, US\$16.61 million, and HK\$24.95 million in a Taishin International Bank Hong Kong branch account.<sup>65</sup>

The Mutual Legal Assistance in Criminal Matters Ordinance (Cap 525) of Hong Kong (hereinafter the MLA HK) provides for the enforcement of external confiscation orders (being those from another jurisdiction) in respect of serious crimes cases. According to Sections 27 and 28 of the MLAHK, registration of external confiscation orders must be on the application of the Secretary for Justice to the Court of First Instance so that external confiscation orders can be enforced in Hong Kong. However, since there is no mutual legal assistance agreement between Hong Kong and Taiwan, the confiscation order from Taiwan is not enforceable in Hong Kong under the provisions of the MLAHK. The courts in Hong Kong may not be able to respond to requests for legal assistance because necessary laws and mutual agreement are not in place. Thus, the issue of whether Taiwanese prosecutors can recover proceeds in Hong Kong is unsolved thus far.

### *Suggestions for reform*

Because of Taiwan's special political position in the world, it is very difficult to establish bilateral or multilateral legal assistance with other countries. All Taiwan may do is to seek reciprocity on a case by case basis.

### **Conclusion**

Economists contend that because the economy influences the behavior of society's more than law, that for the purposes of deterring economic and white-collar crimes, the government has to try its best to make any expected return for a crime smaller than the expected cost. The probability of being arrested and convicted and the length of imprisonment constitute the expected cost of crime. The probability is based on the number of resources the government devotes to fighting crime. However, the social cost

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<sup>65</sup> See *Shang-Yi-Tze No.619 judgment of 2007*, Taiwan High Court Tainan Branch Court. 臺灣高等法院台南分院 96 年度台上字第 619 號判決參照。

of fighting crimes is much higher than the cost of adjustment in the length of imprisonment and if a convicted person still can enjoy the proceeds obtained from the commission of crimes on his release, it may lead to the degradation and distrust of the judicial system. The government should think more about how to deprive illegal proceeds effectively rather than simply spending money on resources for investigating and convicting unlawful acts to deter crimes in society.<sup>66</sup>

Confiscation in other jurisdictions, like the United States and Hong Kong, is a powerful weapon in the fight against crime through deprivation of crime-tainted property, but confiscation in Taiwan is far behind. Taiwan has to try hard to improve the confiscation system and it has a long journey ahead in this regard. Moreover, there must be sufficient training, financial support, materials, and human resources at all levels to ensure the efficient and effective handling of confiscation cases. In Denmark, for example, there is a centralized prosecution system, and confiscation occurs at local, regional and central levels, including the Office for Serious Economic Crime. In Ireland, the Director of Public Prosecutions handles all serious cases and acts post-conviction in those cases in which the government seeks conventional confiscation of proceeds. In Switzerland, there is a Canton-based system of investigating judges, with small units of the Federal Police and Ministry of Justice to deal with international cases.<sup>67</sup> Specialization in confiscation will enable confiscation to be more useful in the battle against the ever-growing list of crimes of this type.

The evolution of confiscation law in Taiwan has just started and will likely never end.

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<sup>66</sup> See Chen Tian Zhi, *the Introductory of Recommendation in Law and Economics* (author: Robert Cooter & Thomas Ulen, translated by WenLi Qi) June 2003, quoted from Chen Ya Yu, *Criminal Confiscation System based on the measurement of penalty in United States*, Taiwan Prosecutor Review No.6. 陳添枝, 推薦序, 收錄於 Robert Cooter & Thomas Ulen 著, 溫麗琪編譯『法律經濟學』, 華泰文化事業公司, 2003年6月。轉引自「由美國量刑程序談刑事沒收制度」, 檢察新論第六期, 陳雅譽著。

<sup>67</sup> See *Supra*. footnote 36.

## Appendices

### **Anti-Corruption Statute (Taiwan)**

#### **Article 10**

*Any person subject to this statute who commits any of the corrupt acts listed in Articles 4 through 6 of this statute, the proceeds of such corrupt act shall, depending on the circumstances of the case, be either confiscated or returned to the original owner as restitution.*

*The prosecutor or the judge, as any person subject to this statute who commits any of the corrupt acts listed in Articles 4 through 6 of this statute, for the purpose of determining whether the defendant has benefited from corruption can order the defendant to explain the source of any suspicious property have been received by him, his spouse and minor children at any time since the beginning of the period of 3 years ending when he committed a corrupt offence. If the source of obtaining the property can not be legally established, the preceding suspicious property will be assumed as his proceeds of corruption.*

*If all or part of the proceeds mentioned in the preceding paragraph are no longer in the defendant's possession or are unable to be traced, the defender shall be ordered to make restitution equivalent to the value of the money or property obtained from the corrupt act.*

*To ensure the payment of such restitution the defendant's assets and property may be subject to seizure.*

### **The Criminal Law (Taiwan)**

#### **Article 58**

*When a fine penalty is imposed against a defendant, the court can aggravate fine under consideration of proceeds from the commission of crimes.*

#### **Article 121**

*A public official or an arbitrator who demands, agrees to accept a bribe or other improper benefit for an official act shall be punished with imprisonment for not more than seven years, and in addition, a fine of not more than NT\$5000 may be imposed.*

*A defendant has engaged in the offence in the preceding paragraph, the bribe or the benefit he obtained should be forfeited.*

*If all or part of forfeiture can not be satisfied, the court should order to indemnify the value by demanding a payment from the offender.*

#### **Article 122**

*A public official or an arbitrator who demands, agrees to accept a bribe or other improper benefit for a breach of his official duties shall be punished with imprisonment from three to ten years, and in addition, a fine of not more than NT\$7000 may be imposed.*

*A person who offers, promises or gives a bribe or other improper benefit to a public official or an arbitrator for breach of his official duties shall be punished with imprisonment for not more than three years, and in addition, a fine of not more than NT\$3000 may be imposed.*

*A defendant has engaged in the offence in the preceding two paragraphs, the bribe or the benefit should be forfeited.*

*If all or part of forfeiture can not be satisfied, the court should order to indemnify the value by demanding a payment from the offender.*

**Article 131**

*A public official directly or indirectly receives benefits from administrative matters under his control or supervision shall be punished with imprisonment from one to seven years, and in addition, a fine of not more than NT\$70,000 may be imposed.*

*A defendant has engaged in the offence in the preceding paragraph, the benefit he obtained should be forfeited.*

*If all or part of forfeiture cannot be satisfied, the court should order to indemnify the value by demanding a payment from the offender.*

**Article 143**

*A voter who demands, agrees to accept a bribe or other improper benefit for voting or not voting shall be punished with imprisonment of not more than three years, and in addition, a fine of not more than NT\$5000 may be imposed.*

*A defendant has engaged in the preceding paragraph, the bribe or the benefits should be forfeited. If all or part of forfeiture can not be satisfied, the court should order to indemnify the value by demanding a payment from the offender.*

**Financial Holding Company Act (Taiwan)****Article 67-1**

*Any criminally obtained assets or property in the possession of those who have violated this Act shall be confiscated, with the exception of compensations due to those victims or parties eligible for claims against damages. If some or all of the assets or property cannot be recovered, the equivalent value the violator's own money or property shall be confiscated as compensation.*

**The Money Laundering Control Act (Taiwan)****Article 4**

*As used in this Act, the "property or property interests obtained from the commission of the crime" means:*

- 1. The property or benefits on property obtained directly from the commission of the crime.*
- 2. The remuneration obtained from the commission of the crime.*
- 3. The property or property interests derived from the above two subsections. This provision, however, is not applicable to a third party who obtains in good faith the property or property interests prescribed in the preceding two subsections.*

**Article 11**

*Whoever engages in money laundering activity referred to subparagraph 1, paragraph 1 of Article 2 of this Act shall be sentenced to imprisonment for not more than five years; in addition thereto, a fine of not more than NT 3 million dollars may be imposed.*

*Whoever engages in money laundering activity referred to subparagraph 2, paragraph 1 of Article 2 of this Act shall be sentenced to imprisonment for not more than seven years; in addition thereto, a fine of not more than NT 5 million dollars may be imposed.*

*Any person who collects or provides property or property interests for him or herself or others to*

*commit any of the following crimes, thereby intimidating the public or threatening the government, a foreign government or institution, or an international organization shall be imprisoned for not less than 1 year and not more than 7 years; in addition thereto, a fine of not more than NT 10 million dollars may be imposed:*

*1. Crimes prescribed in paragraph 1 and paragraph 3 of Article 173, Article 176 to which paragraph 1 and paragraph 3 of Article 173 apply mutatis mutandis, paragraph 1 and paragraph 3 of Article 178, paragraph 1 and paragraph 4 of Article 183, paragraph 1, paragraph 2 and paragraph 5 of Article 184, Article 185, paragraphs 1 ~ 5 of Article 185-1, Article 185-2, paragraph 1, paragraph 2 and paragraph 4 of Article 186-1, Article 187-2, Article 187-3, Article 188, paragraph 1, paragraph 2 and paragraph 4 of Article 190, paragraphs 1 ~ 3 of Article 190-1, Article 191-1, paragraph 2 of Article 192, paragraph 1 and paragraph 2 of Article 271, Article 278, Article 302, paragraphs 1 ~ 3 of Article 247, Article 248, and Article 348-1 of Criminal Code.*

*2. Crimes prescribed in Article 7 of Guns, Ammunitions, and knives Control Act.*

*3. Crimes prescribed in Article 100 of Civil Aviation Act. The representative of a legal entity, the agent, employee or other worker of a legal entity or a natural person engaging within the scope of his or her employment in money laundering activities as set forth in the preceding three paragraphs shall be punished in accordance with the provisions set forth in the preceding three paragraphs of this Article. In addition, the legal entity or the natural person that the offender represents or works for, shall also be fined in accordance with the provisions set forth in the preceding three paragraphs, unless the representative of a legal entity or a natural person has done his or her best to prevent or stop the money laundering activities. If a person surrenders to the authorities within six months after engaging in money laundering activities as set forth in the preceding three paragraphs, the punishment shall be exempted. If a person surrenders later than six months after engaging in any of the money laundering activities set forth in the preceding four paragraphs, the punishment shall be reduced or exempted. Any person who confesses during the custodial interrogation or the trial that he or she has engaged in the money laundering activities set forth in the preceding four paragraphs, the punishment shall be reduced. The crimes prescribed in paragraph 1 to paragraph 3 hereof shall apply to crimes committed by citizens of the Republic of China in a territory outside the Republic of China.*

### **Organized Crime Prevention Act (Taiwan)**

#### **Article 7**

*The overall property of a criminal organization owned by an offender acting in contravention of Article 3 of this Act shall be traced for collection or confiscated after deducting any portion belonging to the victims. Where the property can not be confiscated in part or in whole, then an amount equivalent to the ascribed monetary value of the said property shall be traced and levied. If the source of obtaining the property can not be legally established, any property obtained by an offender acting in contravention of Article 3 of this Act after participating in the criminal organization shall be traced for collection or confiscated subsequent to deducting the portion to be returned to the victims. Where the property can not be confiscated in part or in whole, then an amount equivalent to the ascribed monetary value of the said property shall be traced for levied. The prosecutor may where necessary sequester the property of the said offender referred to in the preceding two paragraphs to facilitate the process of tracing for collection, confiscation, or tracing for levying.*

### **Statute for Narcotics Hazard Control (Taiwan)**

#### **Article 19**

*Any person subject to this statute who commits offences listed in Articles 4 through 9, Article 12, Article 13 or Article 14(1),(2) of this statute, the instrument used in the commission of an offence and*

*the proceeds act shall be confiscated. Where the property can not be confiscated in part or in whole, then an amount equivalent to the ascribed monetary value of the said property shall be traced and levied.*

*The prosecutor may where necessary sequester the property of the said offender referred to in the preceding paragraph to facilitate the process of tracing for collection, confiscation, or tracing for levying.*

#### **Judicial Yuan's No.45 Interpretation**

*Based upon this Yuan's Interpretation Yuan-Tze No. 781, while the effect of probation on a primary sentence also reaches its subordinate sentence, by reference to Article 39 of the Criminal Code on exclusive confiscation and Article 40 on individual declaration to confiscate, however, it is sufficient to prove that although originally a subordinate sentence in nature, confiscation is not necessarily connected to a primary sentence. The matters subject to confiscation may be either those that must be confiscated in accordance with the law or may be confiscated while being determined as a matter of necessity, which is not compatible with the meaning of Article 74 of the Criminal Code that probation is an appropriate [disposition] in tentatively not carrying out the [primary] sentence.*

#### **Civil Code (Taiwan)**

##### **Article 199**

*By virtue of an obligation, the creditor is entitled to claim a prestation from the debtor. A prestation may consist in something which cannot be valued in money. A prestation may consist in forbearance.*

#### **Agreement on Mutual Legal Assistance in Criminal Matters between the Taipei Economic and Cultural Representative Office in the United States and the American Institute in Taiwan**

##### **Article 2**

###### *Scope of Assistance*

*1. The Parties shall provide mutual assistance through the relevant authorities of the territories they represent, in accordance with the provisions of this Agreement, in connection with the investigation, prosecution, and prevention of offenses, and in proceedings related to criminal matters.*

*2. Assistance shall include:*

- (1) taking the testimony or statements of persons;*
- (2) providing documents, records, and articles of evidence;*
- (3) locating or identifying persons;*
- (4) serving documents;*
- (5) transferring persons in custody for testimony or other purposes;*
- (6) executing requests for searches and seizures;*
- (7) assisting in proceedings related to immobilization and forfeiture of assets, restitution, or collection of fines; and*
- (8) any other form of assistance not contrary to the laws of the territory represented by the Requested Party.*

*3. Except as otherwise provided in this Agreement, assistance shall be provided without regard to whether the conduct that is the subject of the investigation, prosecution, or proceeding in the territory represented by the Requesting Party would constitute an offense under the laws of the territory represented by the Requested Party.*

*4. This Agreement is intended solely for mutual legal assistance between the Parties. The provisions of this Agreement shall not give rise to a right on the part of any private person to obtain, suppress, or exclude any evidence, or to impede the execution of a request.*



**Cross-Strait Joint Crime-Fighting and Judicial Mutual Assistance Agreement with Mainland China (PRC)****Article 9***Returning the Proceeds of Crime*

*The Parties agree that, within the scope of non-contravention of each Party's own rules and regulations, they shall give assistance to returning the proceeds of crime or the transformed or converted value thereof.*

**Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405) (Hong Kong)****Section 3***(1) Where-**(a) either-*

- (i) in proceedings before the Court of First Instance or the District Court a person is to be sentenced in respect of one or more drug trafficking offences and has not previously been sentenced in respect of his conviction for the offence, or as the case may be, any of the offences concerned; or*
  - (ii) proceedings for one or more drug trafficking offences have been instituted against a person but have not been concluded because the person- (A) has died; or (B) has absconded; and*
- (b) an application is made by or on behalf of the Secretary for Justice for a confiscation order, (Amended L.N. 362 of 1997) the Court of First Instance or the District Court, as the case may be, shall act as follows. (Replaced 89 of 1995 s. 3. Amended 25 of 1998 s. 2)*

*(2) The court shall first-**(a) where subsection (1)(a)(i) is applicable-*

- (i) impose on the person such period of imprisonment or detention (if any) as is appropriate in respect of the offence, or as the case may be, the offences concerned;*
- (ii) make such order or orders (other than a confiscation order) in relation to sentence as is appropriate in respect of the offence, or as the case may be, the offences concerned, and such order or orders may be or include any order- (A) imposing any fine on the person; (B) involving any payment by the person; or (C) under section 38F or 56 of the Dangerous Drugs Ordinance ( Cap 134), or under section 72, 84A, 102 or 103 of the Criminal Procedure Ordinance ( Cap 221);*

*(b) where subsection (1)(a)(ii)(A) is applicable, be satisfied that-*

- (i) the person has died; and*
- (ii) having regard to all relevant matters before it, the person could have been convicted in respect of the offence, or as the case may be, the offences concerned;*

*(c) where subsection (1)(a)(ii)(B) is applicable, be satisfied that-*

- (i) the person has absconded and that not less than 6 months have elapsed beginning with the date which is, in the opinion of the court, the date on which the person absconded;*
- (ii) in the case of- (A) a person who is known to be outside Hong Kong and whose exact whereabouts are known- (I) reasonable steps have been taken, but have been unsuccessful, to obtain the return of that person to Hong Kong for the purposes of the proceedings concerned; (II) if that person is in custody outside Hong Kong for purposes other than the purposes referred to in sub-sub-paragraph (I), he is in such custody by virtue of conduct which would constitute an indictable offence if it had occurred in Hong Kong; and (III) notice of those proceedings was given to that person in sufficient time to enable him to defend them; (B) subject to subsection (2A), a person whose exact whereabouts are not known- (I) reasonable steps have been taken to ascertain the person's whereabouts (including, if appropriate, a step mentioned in paragraph (a),(b) or (c) of rule 5(1) of Order 65 of the Rules of the High Court (Cap 4 sub. leg. A)); and (II) notice of those proceedings, addressed to that person, has been*

- published in a Chinese language newspaper, and an English language newspaper, circulating generally in Hong Kong; and (Replaced 26 of 2002 s. 2)*
- (iii) having regard to all relevant matters before it, the person could have been convicted in respect of the offence, or as the case may be, the offences concerned. (Replaced 89 of 1995 s. 3) (2A) Where subsection (2)(c)(ii)(B) is applicable, and notwithstanding that the court is satisfied as mentioned in that subsection that actions have been taken, the court may, if it is satisfied that it is in the interests of justice to do so, require that notice of the proceedings mentioned in that subsection be given to the person mentioned in that subsection in such additional manner as the court may direct. (Added 26 of 2002 s. 2)*
- (3) The court shall then determine whether the person has benefited from drug trafficking.*
- (4) For the purposes of this Ordinance, a person who has at any time (whether before or after the commencement of this Ordinance) received any payment or other reward in connection with drug trafficking carried on by him or another has benefited from drug trafficking.*
- (5) If the court determines that he has so benefited, the court shall determine in accordance with section 6 the amount to be recovered in his case by virtue of this section.*
- (6) The court shall then, in respect of the offence or offences concerned, order the person to pay-*
- (a) that amount; or*
  - (b) without prejudice to the generality of paragraph (a), such proportion of that amount as it thinks fit after taking into account any order or orders provided for or referred to in subsection (2)(a)(ii)(A), (B) or (C) which has or have been made in respect of the person. (Replaced 89 of 1995 s. 3)*
- (7) Where-*
- (a) a person has been convicted of one or more drug trafficking offences;*
  - (b) an application for a confiscation order has been made in respect of the person; and*
  - (c) the person has died or absconded before that application has been concluded, then that application may still be concluded notwithstanding that death or abscondment, as the case may be. (Replaced 89 of 1995 s. 3)*
- (8) Where subsection (7) is applicable in relation to a person who has died-*
- (a) subsection (2)(a)(i) shall not apply in relation to the person;*
  - (b) the court shall not make a confiscation order against the person unless it is satisfied that the person has died. (Added 89 of 1995 s. 3)*
- (9) Where subsection (7) is applicable in relation to a person who has absconded, the court shall not make a confiscation order against the person unless it is satisfied that-*
- (a) the person has absconded; and*
  - (b) in the case of-*
    - (i) a person who is known to be outside Hong Kong and whose exact whereabouts are known- (A) reasonable steps have been taken, but have been unsuccessful, to obtain the return of that person to Hong Kong for the purposes of the proceedings concerned; and (B) notice of those proceedings was given to that person in sufficient time to enable him to defend them;*
    - (ii) subject to subsection (9A), a person whose exact whereabouts are not known- (A) reasonable steps have been taken to ascertain the person's whereabouts (including, if appropriate, a step mentioned in paragraph (a), (b) or (c) of rule 5(1) of Order 65 of the Rules of the High Court (Cap 4 sub. leg. A)); and (B) notice of those proceedings, addressed to that*



person, has been published in a Chinese language newspaper, and an English language newspaper, circulating generally in Hong Kong. (Replaced 26 of 2002 s. 2) (Added 89 of 1995 s. 3) (9A) Where subsection (9)(b)(ii) is applicable, and notwithstanding that the court is satisfied as mentioned in that subsection that actions have been taken, the court may, if it is satisfied that it is in the interests of justice to do so, require that notice of the proceedings mentioned in that subsection be given to the person mentioned in that subsection in such additional manner as the court may direct. (Added 26 of 2002 s. 2)

(10) For the purposes of subsection (2)(b)(ii) or (c)(iii), information may be furnished to the court after the person has died or absconded, as the case may be. (Added 89 of 1995 s. 3)

(11) For the purposes of any Ordinance conferring rights of appeal in criminal cases, a confiscation order made against a person shall be deemed to be a sentence passed on that person in respect of the offence or offences concerned and, in the case of any such person who has died (whether before or after the making of such order), his personal representative may act on his behalf for those purposes. (Added 89 of 1995 s.3)

(12) It is hereby declared that the standard of proof required to determine any question arising under this Ordinance as to-

(a) whether a person has benefited from drug trafficking; or

(b) the amount to be recovered in his case in pursuance of a confiscation order, shall be on the balance of probabilities. (Added 89 of 1995 s. 3)

(13) The fact that under subsection (2)(b)(ii) or (c)(iii) the court is satisfied that a person could have been convicted in respect of the offence, or as the case may be, the offences concerned shall not be admissible in evidence in any proceedings for an offence. (Added 89 of 1995 s. 3)

(14) For the avoidance of doubt, it is hereby declared that where an application is made for a confiscation order in any case where subsection(1)(a)(ii)(A) is applicable, the personal representatives of the deceased person concerned shall, for the purposes of opposing the application, be entitled to be heard on the application and to call, examine and cross-examine any witness. (Added 89 of 1995 s. 3)

(15) Where-

(a) before the commencement of the Drug Trafficking (Recovery of Proceeds) (Amendment) Ordinance 1995 (89 of 1995), proceedings for one or more drug trafficking offences have been instituted against a person but have not been concluded because that person has absconded; and

(b) immediately before that commencement, any realisable property of that person is the subject of a charging order or restraint order, then the provisions of this Ordinance as amended by that Ordinance shall apply in relation to that person as they would apply in relation to a person against whom, on or after that commencement, proceedings for one or more drug trafficking offences have been instituted but have not been concluded because that last-mentioned person has absconded. (Added 89 of 1995 s. 3)

(16) Where-

(a) before the commencement of the Drug Trafficking (Recovery of Proceeds) (Amendment) Ordinance 1995 (89 of 1995)-

(i) a person has been convicted of one or more drug trafficking offences;

(ii) an application for a confiscation order has been made in respect of the person; and (iii) the person has absconded before that application has been concluded; and

(b) immediately before that commencement, and realisable property of that person is the subject of a charging order or restraint order, then the provisions of this Ordinance as amended by that Ordinance shall apply in relation to that person as they would apply in relation to a person to whom subsection (7) is applicable because he has absconded. (Added 89 of 1995 s. 3)

(17) Where subsection (1)(a)(ii)(A) or (B) is applicable, the reference in that subsection to "one or more drug trafficking offences" includes any offence previously specified in Schedule 1, and the other provisions of this section and this Ordinance (including paragraphs (b) to (e) of the definition of "drug trafficking offence" in section 2(1) and any subsidiary legislation) shall be construed accordingly. (Added 26 of 2002s. 2) [cf. 1986 c. 32 s. 1 U.K.]

### Section 4(3)

(3) Those assumptions are-

(a) that any property appearing to the court-

(i) to have been held by him at any time- (A) since his conviction; or (B) where section 3(1)(a)(ii) is applicable, since the application was made for a confiscation order in his case, as the case may be; or (Replaced 89 of 1995 s. 4)

(ii) to have been transferred to him at any time since the beginning of the period of 6 years ending when the proceedings were instituted against him, was received by him, at the earliest time at which he appears to the court to have held it, as his proceeds of drug trafficking;

(b) that any expenditure of his since the beginning of that period was met out of his proceeds of drug trafficking; and

(c) that, for the purpose of valuing any property received or assumed to have been received by him at any time as his proceeds of drug trafficking, he received the property free of any other interests in it. (Amended 89 of 1995 s. 4)

### Section 8(2)

(1) Subject to this section, where the Court of First Instance or the District Court, as the case may be, makes a confiscation order- (Amended 89 of 1995 s. 9; 25 of 1998 s. 2)

(a) the court shall also make an order-

(i) subject to subsection (1A), fixing the period within which the amount he is liable to pay under the confiscation order shall be duly paid; and

(ii) fixing a term of imprisonment which the defendant is to serve if any of that amount is not duly paid within that period (including paid by way of being recovered); and (Replaced 26 of 2002 s. 2)

(b) section 114(1), (3), (4), (5), (6) and (7) of the Criminal Procedure Ordinance (Cap 221) shall apply as if-

(i) that amount were a fine imposed upon him by the court; and

(ii) the term of imprisonment fixed under this section were a term fixed under section 114(1)(c) of that Ordinance.(1A) The court shall not under subsection (1)(a)(i) fix a period longer than 6 months unless it is satisfied that there are special circumstances which justify it doing so. (Added 26 of 2002 s. 2)

(2) The terms set out in the second column of the following table shall be the maximum terms of imprisonment under subsection (1) applicable respectively to the amounts set out opposite thereto.

TABLE

An amount not exceeding \$200,000	12 months
An amount exceeding \$200,000	18 months
An amount exceeding \$500,000 but not exceeding \$1 million	2 years
An amount exceeding \$2.5 million but not exceeding \$10 million	3 years
An amount exceeding \$2.5 million but not exceeding \$10 million	5 years
An amount exceeding \$10 million	10 years

(3) Subsections (1) and (2) shall apply in relation to the District Court. (Replaced 89 of 1995 s. 9) (3A) For the avoidance of doubt, it is hereby declared that no limitation on the jurisdiction of the District Court as to the imposition of penalties set out in section 82 of the District Court Ordinance ( Cap 336) shall be construed so as to prejudice the operation of subsection (3). (Added 89 of 1995 s. 9)

(4) Where the defendant-

(a) becomes liable to serve a term of imprisonment fixed under this section in respect of a confiscation order; and

(b) is also liable to serve a term of imprisonment or detention in respect of the offence or offences concerned, the term of imprisonment mentioned in paragraph (a) shall not begin to run until after the end of the term of imprisonment or detention mentioned in paragraph (b).

(5) For the purposes of subsection (4)-

(a) consecutive terms and terms which are wholly or partly concurrent shall be treated as a single term; and

(b) there shall be disregarded-

(i) any sentence suspended under section 109B of the Criminal Procedure Ordinance ( Cap 221) which has not taken effect at the time the defendant becomes liable to a term of imprisonment under this section; and

(ii) any term of imprisonment fixed under section 114(1) of the Criminal Procedure Ordinance ( Cap 221) for which the defendant has not at that time been committed.

(6) Sections 86 and 109A of the Criminal Procedure Ordinance ( Cap 221) shall not apply in relation to fixing a term of imprisonment under this section. (Amended 89 of 1995 s. 9)

(7) This section shall not apply in relation to a confiscation order where section 3(1)(a)(ii) or (7) is applicable. (Added 89 of 1995 s. 9)

(8) At the end of each day's sitting of the Court of First Instance or the District Court, the Registrar of the High Court or District Court, as the case may be, shall deliver (or cause to be delivered) to the Commissioner of Correctional Services a certificate, in the form specified in Schedule 3, in respect of each term of imprisonment fixed under this section. (Added 89 of 1995 s. 9. Amended 25 of 1998 s. 2)

(9) A certificate referred to in subsection (8) shall be a sufficient warrant to the Commissioner of Correctional Services for receiving into his custody the defendant named in the certificate and for carrying into effect the term of imprisonment fixed under this section in respect of that defendant. (Added 89 of 1995 s. 9) [cf. 1986 c. 32 s. 6 U.K.]

**Organized and Serious Crimes Ordinance (Cap 455) (Hong Kong)****Section 9 (2)**

Those assumptions are-

- (a) that any property appearing to the court-
  - (i) to have been held by him at any time- (A) since his conviction; or (B) where section 8(1)(a)(ii) is applicable, since the application was made for a confiscation order in his case, as the case may be; or (Replaced 90 of 1995 s. 7)
  - (ii) to have been transferred to him at any time since the beginning of the period of 6 years ending when the proceedings were instituted against him, was received by him, at the earliest time at which he appears to the court to have held it, as his proceeds of organized crime; (Amended 90 of 1995 s. 7)
- (b) that any expenditure of his since the beginning of that period was met out of his proceeds of organized crime; and (Amended 90 of 1995 s. 7)
- (c) that, for the purpose of valuing any property received or assumed to have been received by him at any time as his proceeds of organized crime, he received the property free of any other interests in it. (Amended 90 of 1995 s. 7)

**Prevention of Bribery Ordinance (Hong Kong)****Section 10**

(1) Any person who, being or having been the Chief Executive or a prescribed officer- (Amended 14 of 2003 s. 17; 22 of 2008 s. 4)

- (a) maintains a standard of living above that which is commensurate with his present or past official emoluments; or
- (b) is in control of pecuniary resources or property disproportionate to his present or past official emoluments, shall, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be guilty of an offence.

(1A) If the accused in any proceedings for an offence under subsection (1) is or has been the Chief Executive, the court, in determining whether the accused has given a satisfactory explanation as provided in that subsection, shall take into account assets that he declared to the Chief Justice pursuant to Paragraph 2, Article 47 of the Basic Law. (Added 22 of 2008 s. 4)

(1B) The Chief Justice shall disclose to a court information about assets declared to him pursuant to Paragraph 2, Article 47 of the Basic Law if the disclosure is required by an order made by the court for the purposes of subsection (1A). (Added 22 of 2008 s. 4)

(2) Where a court is satisfied in proceedings for an offence under subsection (1)(b) that, having regard to the closeness of his relationship to the accused and to other circumstances, there is reason to believe that any person was holding pecuniary resources or property in trust for or otherwise on behalf of the accused or acquired such resources or property as a gift from the accused, such resources or property shall, in the absence of evidence to the contrary, be presumed to have been in the control of the accused. (Added 9 of 1974 s. 3. Amended 48 of 1996 s. 3)(3)-(4) (Repealed 56 of 1973 s. 2)

(5) In this section, "official emoluments" (公職薪俸) includes a pension or gratuity payable under the Pensions Ordinance ( Cap 89), the Pension Benefits Ordinance ( Cap 99) or the Pension Benefits (Judicial Officers) Ordinance ( Cap 401). (Amended 36 of 1987 s. 44; 85 of 1988 s. 51)

**Section 12AA**

(1) Subject to this section, where a person is convicted on indictment of an offence under section 10(1)(b) the court may, in addition to any penalty imposed under section 12(1), order the confiscation of any pecuniary resources or property-

(a) found at the trial to be in his control as provided in section 10; and

(b) of an amount or value not exceeding the amount or value of pecuniary resources or property the acquisition of which by him was not explained to the satisfaction of the court.

(2) Any application for an order under subsection (1) shall be made by the Secretary for Justice within 28 days after the date of the conviction. (Amended L.N. 362 of 1997)

(3) An order under subsection (1) shall not be made in respect of pecuniary resources or property held by a person other than the person convicted unless that other person has been given reasonable notice that such an order may be made and has had an opportunity to show cause why it should not be made.

(4) An order under subsection (1) shall not be made in respect of pecuniary resources or property held by a person other than the person convicted if that other person satisfies the court in any proceedings to show cause under subsection (3) that he had-

(a) acted in good faith as regards the circumstances in which the pecuniary resources or property came to be held by him; and

(b) so acted in relation to the pecuniary resources or property that an order in the circumstances would be unjust.

(5) Nothing in subsection (4) shall be construed as limiting the court's discretion to decline to make an order under subsection (1) on grounds other than those specified in subsection (4).

(6) An order under subsection (1)-

(a) may be made subject to such conditions as the court thinks fit in all the circumstances of the case; and

(b) may be made in respect of an offence under section 10(1)(b) where the facts that gave rise to that offence occurred before the date of commencement of the Prevention of Bribery (Amendment) Ordinance 1987 (50 of 1987).

(7) A court may make orders under both subsection (1) and section 12(3) in respect of the same offence but shall not make orders under both provisions in respect of the same pecuniary resources or property.

(8) An order under subsection (1) may make provision for taking possession of pecuniary resources or property to which the order applies and for the disposal of such resources or property by or on behalf of the Government. (Amended 1 of 2003 s. 3) (Added 50 of 1987 s. 4)

**Mutual Assistance in Criminal Matters Ordinance (Hong Kong)****Section 27**

Requests to Hong Kong for enforcement of external confiscation order

(1) Where a place outside Hong Kong requests the Secretary for Justice to make arrangements-

(a) for the enforcement of an external confiscation order; or

(b) where an external confiscation order may be made in a proceeding which has been or is to be instituted in that place, to restrain dealing in any property against which the order may be enforced or which may be available to satisfy the order, then the Secretary for Justice may, in relation to that request, act for that place under the provisions of Schedule 2.



(2) A request under subsection (1) shall, unless the contrary is shown, be deemed to constitute the authority of the place outside Hong Kong concerned for the Secretary for Justice to act on its behalf in any proceedings in the Court of First Instance under section 28 or under any provision of Schedule 2.

### **Section 28**

*Registration of external confiscation orders*

(1) On an application made by the Secretary for Justice, the Court of First Instance may register an external confiscation order if

- (a) it is satisfied that at the time of registration the order is in force and not subject to appeal;
- (b) it is satisfied, where any person against whom, or in relation to whose property, the order is made does not appear in the proceedings, that he received notice of the proceedings, in accordance with the law of the place outside Hong Kong concerned, in sufficient time to enable him to defend them; and
- (c) it is of the opinion that enforcing the order in Hong Kong would not be contrary to the interests of justice.

(2) In subsection (1), "appeal" (上訴) includes-

- (a) any proceedings by way of discharging or setting aside a judgment; and
- (b) an application for a new trial or a stay of execution.

(3) For the purposes of this section, an external confiscation order is subject to appeal so long as an appeal, further appeal or review is pending against the order; and for this purpose an appeal, further appeal or review shall be treated as pending (where one is competent but has not been instituted) until the expiration of the time prescribed for instituting the appeal, further appeal or review under the law of the place outside Hong Kong concerned.

(4) The Court of First Instance shall cancel the registration of an external confiscation order if it appears to the Court of First Instance that the order has been satisfied by

- (a) payment of the amount due under it or by the person against whom it was made serving imprisonment in default of such payment;
- (b) recovery of property specified in it (or the value of such property) or by the person against whom it was made serving imprisonment in default of such recovery; or
- (c) any other means.

(5) Where an amount of money, if any, payable or remaining to be paid under an external confiscation order registered in the Court of First Instance under this section is expressed in a currency other than that of Hong Kong, for the purpose of any action taken in relation to that order under Schedule 2 the amount shall be converted into the currency of Hong Kong on the basis of the exchange rate prevailing on the date of registration of the order.

(6) For the purposes of subsection (5), a certificate purporting to be signed by or on behalf of the Monetary Authority and stating the exchange rate prevailing on a specified date shall be admissible in any proceedings as evidence of the facts so stated.

### **Proceeds of Crime Act 2002 (the United Kingdom)**

#### **Section 10**

*Assumptions to be made in case of criminal lifestyle*

(1) If the court decides under section 6 that the defendant has a criminal lifestyle it must make the following four assumptions for the purpose of—

- (a) deciding whether he has benefited from his general criminal conduct, and*
- (b) deciding his benefit from the conduct.*

*(2) The first assumption is that any property transferred to the defendant at any time after the relevant day was obtained by him—*

- (a) as a result of his general criminal conduct, and*
- (b) at the earliest time he appears to have held it.*

*(3) The second assumption is that any property held by the defendant at any time after the date of conviction was obtained by him—*

- (a) as a result of his general criminal conduct, and*
- (b) at the earliest time he appears to have held it.*

*(4) The third assumption is that any expenditure incurred by the defendant at any time after the relevant day was met from property obtained by him as a result of his general criminal conduct.*

*(5) The fourth assumption is that, for the purpose of valuing any property obtained (or assumed to have been obtained) by the defendant, he obtained it free of any other interests in it.*

*(6) But the court must not make a required assumption in relation to particular property or expenditure if—*

- (a) the assumption is shown to be incorrect, or*
- (b) there would be a serious risk of injustice if the assumption were made.*

*(7) If the court does not make one or more of the required assumptions it must state its reasons.*

*(8) The relevant day is the first day of the period of six years ending with—*

- (a) the day when proceedings for the offence concerned were started against the defendant, or*
- (b) if there are two or more offences and proceedings for them were started on different days, the earliest of those days.*

*(9) But if a confiscation order mentioned in section 8(3)(c) has been made against the defendant at any time during the period mentioned in subsection (8)—*

- (a) the relevant day is the day when the defendant's benefit was calculated for the purposes of the last such confiscation order;*
- (b) the second assumption does not apply to any property which was held by him on or before the relevant day.*

*(10) The date of conviction is—*

- (a) the date on which the defendant was convicted of the offence concerned, or*
- (b) if there are two or more offences and the convictions were on different dates, the date of the latest.*

### **Section 301**

#### *Victims and other owners*

*(1) A person who claims that any cash detained under this Chapter, or any part of it, belongs to him may apply to a magistrates' court or (in Scotland) the sheriff for the cash or part to be released to him.*

*(2) The application may be made in the course of proceedings under section 295 or 298 or at any other time.*

(3) If it appears to the court or sheriff concerned that—

(a) the applicant was deprived of the cash to which the application relates, or of property which it represents, by unlawful conduct,

(b) the property he was deprived of was not, immediately before he was deprived of it, recoverable property, and

(c) that cash belongs to him,

the court or sheriff may order the cash to which the application relates to be released to the applicant.

(4) If—

(a) the applicant is not the person from whom the cash to which the application relates was seized,

(b) it appears to the court or sheriff that that cash belongs to the applicant,

(c) the court or sheriff is satisfied that the conditions in section 295 for the detention of that cash are no longer met or, if an application has been made under section 298, the court or sheriff decides not to make an order under that section in relation to that cash, and

(d) no objection to the making of an order under this subsection has been made by the person from whom that cash was seized;

the court or sheriff may order the cash to which the application relates to be released to the applicant or to the person from whom it was seized.

### **Prevention of Organized Crime Act 1998 (South Africa)**

#### **Section 38**

(1) The National Director may by way of an *ex parte* application apply to a High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property.

(2) The High Court shall make an order referred to in subsection (1) if there are reasonable grounds to believe that the property concerned—

(a) is an instrumentality of an offence referred to in Schedule 1; or

(b) is the proceeds of unlawful activities.

(3) A High Court making a preservation of property order may, when it makes the order or at any time thereafter, make any ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order, including an order authorizing the seizure of the property concerned by a police official.

(4) Property seized under subsection (3) shall be dealt with in accordance with the directions of the High Court which made the relevant preservation of property order.

### **Civil Remedies Act (Ontario, Canada)**

#### **Section 4(2)**

Except where it would clearly not be in the interests of justice, the court shall make an order under subsection (1) if the court is satisfied that there are reasonable grounds to believe that the property is proceeds of unlawful activity. 2005, c.33, s.21(1).

#### **Section 9(2)**

Except where it would clearly not be in the interests of justice, the court shall make an order under subsection (1) if the court is satisfied that there are reasonable grounds to believe that the property is an instrument of unlawful activity. 2005, c.33, s.24(1).



**The Proceeds of Crime Act 2002 (Australia)****Section 18(2)**

*The order must specify, as property that must not be disposed of or otherwise dealt with, the property specified in the application for the order, to the extent that the court is satisfied that there are reasonable grounds to suspect that that property is any one or more of the following:*

- (a) all or specified property of the \*suspect;*
- (aa) all or specified \*bankruptcy property of the suspect;*
- (b) all property of the suspect other than specified property;*
- (ba) all bankruptcy property of the suspect other than specified bankruptcy property;*
- (c) specified property of another person (whether or not that other person's identity is known) that is subject to the \*effective control of the suspect;*
- (d) specified property of another person (whether or not that other person's identity is known) that is:*
  - (i) in any case—\*proceeds of the offence; or*
  - (ii) if the offence to which the order relates is a \*serious offence—an \*instrument of the offence.*

**Section 19(2)**

*Order must specify, as property that must not be disposed of or otherwise dealt with, the property specified in the application for the order, to the extent that the court is satisfied that there are reasonable grounds to suspect that that property is:*

- (a) in any case—\*proceeds of the offence; or*
- (b) if the offence to which the order relates is a \*serious offence—an instrument of the offence.*

**Section 20(2)**

*The order must specify, as property that must not be disposed of or otherwise dealt with, the property specified in the application for the order, to the extent that the court is satisfied that there are reasonable grounds to suspect that that property is any one or more of the following:*

- (a) all or specified property of the \*suspect;*
- (aa) all or specified \*bankruptcy property of the suspect;*
- (b) all property of the suspect other than specified property;*
- (ba) all bankruptcy property of the suspect other than specified bankruptcy property;*
- (c) specified property of another person (whether or not that other person's identity is known) that is subject to the \*effective control of the suspect.*

**Federal Rules of Criminal Procedure (the United States)****Section 32.2**

*(c) Ancillary Proceeding; Entering a Final Order of Forfeiture.*

*(1) In General.*

*If, as prescribed by statute, a third party files a petition asserting an interest in the property to be forfeited, the court must conduct an ancillary proceeding, but no ancillary proceeding is required to the extent that the forfeiture consists of a money judgment.*

*(A) In the ancillary proceeding, the court may, on motion, dismiss the petition for lack of standing, for failure to state a claim, or for any other lawful reason. For purposes of the motion, the facts set forth in the petition are assumed to be true.*

*(B) After disposing of any motion filed under Rule 32.2(c)(1)(A) and before conducting a hearing on the petition, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure if the court determines that discovery is necessary or*

*desirable to resolve factual issues. When discovery ends, a party may move for summary judgment under Federal Rule of Civil Procedure 56.*

*(2) Entering a Final Order. When the ancillary proceeding ends, the court must enter a final order of forfeiture by amending the preliminary order as necessary to account for any third-party rights. If no third party files a timely petition, the preliminary order becomes the final order of forfeiture if the court finds that the defendant (or any combination of defendants convicted in the case) had an interest in the 45 FEDERAL RULES OF CRIMINAL PROCEDURE Rule 33 property that is forfeitable under the applicable statute. The defendant may not object to the entry of the final order on the ground that the property belongs, in whole or in part, to a codefendant or third party; nor may a third party object to the final order on the ground that the third party had an interest in the property.*

*(3) Multiple Petitions. If multiple third-party petitions are filed in the same case, an order dismissing or granting one petition is not appealable until rulings are made on all the petitions, unless the court determines that there is no just reason for delay.*

*(4) Ancillary Proceeding Not Part of Sentencing. An ancillary proceeding is not part of sentencing.*

*(d) Stay Pending Appeal.*

*If a defendant appeals from a conviction or an order of forfeiture, the court may stay the order of forfeiture on terms appropriate to ensure that the property remains available pending appellate review. A stay does not delay the ancillary proceeding or the determination of a third party's rights or interests. If the court rules in favor of any third party while an appeal is pending, the court may amend the order of forfeiture but must not transfer any property interest to a third party until the decision on appeal becomes final, unless the defendant consents in writing or on the record.*

*(e) Subsequently Located Property; Substitute Property.*

*(1) In General. On the government's motion, the court may at any time enter an order of forfeiture or amend an existing order of forfeiture to include property that:*

- (A) is subject to forfeiture under an existing order of forfeiture but was located and identified after that order was entered; or*
- (B) is substitute property that qualifies for forfeiture under an applicable statute.*

*(2) Procedure. If the government shows that the property is subject to forfeiture under Rule 32.2(e)(1), the court must:*

- (A) enter an order forfeiting that property, or amend an existing preliminary or final order to include it; and*
- (B) if a third party files a petition claiming an interest in the property, conduct an ancillary proceeding under Rule 32.2(c).*

*(3) Jury Trial Limited. There is no right to a jury trial under Rule 32.2(e).*

*(As added Apr. 17, 2000, eff. Dec. 1, 2000; amended Apr. 29, 2002, eff. Dec. 1, 2002; Mar. 26, 2009, eff. Dec. 1, 2009.)*

## **1990 European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime**

### **Article 1 of Chapter I**

*For the purposes of this Convention:*

*(a) "proceeds" means any economic advantage from criminal offences. It may consist of any property as defined in sub-paragraph b of this article;*

- (b) “property” includes property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to, or interest in such property;*
- (c) “instrumentalities” means a penalty or a measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences resulting in the final deprivation of property;*
- (d) “confiscation” means a penalty or a measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences resulting deprivation of proper.*
- (e) “predicate offence” means any criminal offence as a result of which proceeds were generated that may become the subject of an offence as defined in Article 6 of this Convention.*

#### **Article 5 of Chapter II**

*Each Party shall adopt such legislative and other measures as may be necessary to ensure that interested parties affected by measures under Articles 2 and 3 shall have effective legal remedies in order to preserve their rights.*

#### **Article 21 of Chapter III**

*Notification of documents*

- 1. The Parties shall afford each other the widest measure of mutual assistance in the serving of judicial documents to persons affected by provisional measures and confiscation.*
- 2. Nothing in this article is intended to interfere with:*
  - (a) the possibility of sending judicial documents, by postal channels, directly to persons abroad;*
  - (b) the possibility for judicial officers, officials or other competent authorities of the Party of origin to effect service of judicial documents directly through the consular authorities of that Party or through judicial officers, officials or other competent authorities of the Party of destination, unless the Party of destination makes a declaration to the contrary to the Secretary General of the Council of Europe at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession.*
- 3. When serving judicial documents to persons abroad affected by provisional measures or confiscation orders issued in the sending Party, this Party shall indicate what legal remedies are available under its law to such persons.*