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## REPORTS OF THE COURSE

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### GROUP 1

### EFFECTIVE MEASURES TO DEPRIVE CRIMINALS AND CRIMINAL ORGANIZATIONS OF CRIME PROCEEDS

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<b>Chairperson</b>	Mr. Jumpon Phansumrit	(Thailand)
<b>Co-Chairperson</b>	Mr. Chethiya Goonesekera	(Sri Lanka)
<b>Co-Chairperson</b>	Mr. Koji Morishita	(Japan)
<b>Rapporteur</b>	Mr. Ramadhan Ali Nassib	(Tanzania)
<b>Co-Rapporteur</b>	Mr. Anthony Adverse Vanderhyden	(Guyana)
<b>Co-Rapporteur</b>	Mr. Kazuyoshi Tsuji	(Japan)
<b>Members</b>	Ms. Tuyet Mien Duong	(Viet Nam)
	Mr. Naoki Fukuda	(Japan)
	Mr. Toshiyuki Igusa	(Japan)
	Mr. Katsuhiko Manabe	(Japan)
<b>Visiting Experts</b>	Ms. Jean B. Weld	(U.S.A.)
	Mr. Wayne Walsh	(Hong Kong)
<b>Advisers</b>	Prof. Naoyuki Harada	(UNAFEI)
	Prof. Kumiko Izumi	(UNAFEI)
	Prof. Haruhiko Higuchi	(UNAFEI)
	Prof. Yuichiro Wakimoto	(UNAFEI)

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### I. INTRODUCTION

This group discussed “Effective Measures to Deprive Criminals and Criminal Organizations of Crime Proceeds” under the following sub headings:

- a. Measures to identify and trace the proceeds of crime;
- b. Measures to freeze/seize the proceeds of crime;
- c. Confiscation/deprivation of the proceeds of crime;
- d. Recovery of the confiscated proceeds of crime;
- e. Capacity building.

### II. MEASURES TO IDENTIFY AND TRACE THE PROCEEDS OF CRIME

#### A. Current Situation

##### 1. Establishing an FIU

All participants stated that in their countries there are measures to identify and trace the proceeds of crime. During the discussion it was discovered that in each country there is an FIU or legislation to establish an FIU. However, the status of FIUs varied from one country to another. Some FIUs belong to the Ministry of Finance, some to the National Police Agency, some to the central/State bank, etc.

It was also found that most FIUs do not have duties and powers to conduct investigation, but the Thai FIU has investigative power for civil forfeiture. In Sri Lanka, the Financial Intelligence Unit does not have investigative powers but there is another Financial Investigating Unit, which belongs to the police, with investigative power.

##### 2. Suspicious Transactions Reporting (STR) System

All participants’ countries have Suspicious Transaction Reporting systems in accordance with the FATF 40+9 Recommendations, and they have also sanctions against designated institutions which do not report suspicious transactions. However, there are some countries that are not in compliance with the FATF 40+9 Recommendations where attorneys, judicial scriveners, administrative scriveners and licensed tax accountants, etc. do not have to report suspicious transactions.

Most participants’ countries require that the transactions exceeding certain amounts, such as US\$10,000, have to be reported to the FIU for analysis. However, Japan does not have such a threshold requirement.

Also, all participants' countries have laws or guidelines regarding Customer Due Diligence (CDD), but requirements vary. In some countries, CDD requirements are lenient and people have to present identification but no photograph when opening an account; similarly, companies do not have to present a list of shareholders when opening an account.

However, co-operation of banks and non-bank financial institutions and FIUs in all participants' countries is well secured. Banks and non-banks have to report suspicious transactions to their country's FIUs and other competent investigative organs can get information from the FIU.

In all countries, an investigative agency can receive information on customers of banks or non-banks if necessary. (In some countries, the investigative agency needs a warrant from a judge or court.) So there are no obstacles caused by bank secrecy laws.

### 3. Asset Disclosure

All participants' countries, except Tanzania-Zanzibar, have an Asset Disclosure System for politicians in the legislature. In some countries, civil servants of high rank also have to declare their assets. However, access to information of disclosed assets is different. In some countries, such as Thailand and Japan, ordinary citizens can access information on politicians' assets; but in Sri Lanka, Guyana, mainland Tanzania and Vietnam ordinary citizens cannot access the information, only competent investigative authorities.

### 4. Co-operation and Information-sharing

Co-operation and information-sharing among relevant authorities domestically and internationally was also considered in the group discussion. Domestically it was found that in all countries, except Japan and Vietnam, FIUs send information of STRs, after analysis, if an investigative agency requests the FIU to send it. But in Japan, Guyana and Vietnam, FIUs disseminate STR information, after analysis, to competent authorities without request. However, in none of the participants' countries can investigation agencies access STR information (before analysis) directly.

### 5. International Co-operation

All participants' countries, except Tanzania, are members of the Egmont Group. The members of the Egmont Group can exchange STR information between FIUs. However, Non-Egmont Group countries can exchange STR information between FIUs upon a Memorandum of Understanding, etc. Non-Egmont Group countries, even if they do not have an MOU, can exchange STR information on a voluntary basis between FIUs.

## **B. Problems, Countermeasures**

1. Our recommendation is that FIUs should be independent from politicians and governments and each country should establish a suitable FIU according to its system. The aim of this recommendation is that the FIU should not be interfered with by politicians.
2. In some countries, FIUs have investigative powers. In countries where the FIUs have limited personnel and capacity, the introduction of investigative power to the FIUs may cause problems. Therefore, the FIUs should focus on analysis and dissemination of information, not investigation.
3. Most participants think that threshold requirements should be introduced in order that financial institutions cannot avoid reporting of transactions. But the economy of one country may differ from that of another. Our recommendation is that each country has to set its own threshold requirement depending on its economy, because if the threshold is too low, the amount of information of suspicious transactions will be huge, and it will be difficult for the FIU to analyse it efficiently.
4. If there is no clear definition of a suspicious transaction, setting a threshold alone is not enough to detect suspicious transactions; criminals may easily circumvent the threshold set. The group recommends that each country has to give a clear definition or standard of a suspicious transaction. There might be two ways to give a clear definition or standard of a suspicious transaction:
  - a. Define it in law; or
  - b. Establish guidelines.

The former has merit: the definition is clear, and the definition has legal force. The latter also has merit: it is possible to provide detailed guidelines, and it is flexible; guidelines can be changed. So each country has to give a clear definition or standard, depending on its legal system.

5. Asset disclosure requirements for appropriate public officials should be set up. That disclosed information should be at least accessible to the competent investigative authorities.

### III. MEASURES TO FREEZE/SEIZE THE PROCEEDS OF CRIME

#### A. Current Situation

##### 1. Legislation for Rapid Freezing/Seizure

All participants' countries have legislation for rapid freezing or seizure of relevant property. However, each country has a different organ for freezing and seizing. In Sri Lanka, Guyana and Vietnam it is the police who freeze and seize, but in Japan there is a need for a judicial order for the police or a public prosecutor to execute. In Thailand freezing is done by committee; in Tanzania-Zanzibar there is a need for judicial order to freeze property, and there is a need for the Director of Public Prosecutions to order the freezing of a bank account.

##### 2. Protection of the Rights of *bona fide* Third Parties

Confidentiality is maintained in all participants' countries before the execution of the order of freezing or seizure of relevant property. However, when the relevant organs are executing the order the owner is informed. Also, in all countries the rights of the third party are protected. The third party can appeal against the freezing or seizure order.

##### 3. International Co-operation

Co-operation between countries is done through Mutual Legal Assistance or agreements. In some countries, a judicial order from a requesting country is required to accompany the request.

#### B. Problems, Countermeasures

In some participants' countries, the police or public prosecutor needs the order of a judge or court to freeze the relevant property for confiscation. In such countries, it is difficult for the police or public prosecutor to freeze the property quickly because more time is needed to pursue the order from a court. Therefore, the property might be concealed or lost.

Our recommendation is that countries should consider adopting a system in which:

- (i) police, public prosecutors or other competent authorities can temporarily freeze property quickly without a judicial order (as an administrative measure);
- (ii) if police, public prosecutors or other competent authorities can identify the relevant property which can be confiscated, they should be able to freeze only that property. But if they cannot identify the relevant property which can be confiscated, they should be able to freeze the whole property of the suspect;
- (iii) the owner of the property can appeal against the temporary freezing order, and if he or she can prove that the property has a legitimate source, the freezing order might be cancelled (in order to protect the right of the owner).

The aim of the recommendation is to regulate between quick and effective freezing of the property and protection of rights of the third party owner.

For international co-operation, if confidentiality is not established in the requested country, there will be a problem.

Our recommendation is that all countries should adopt a system of confidentiality before the freezing or seizure of property, because if the owner of the property is aware of the request for freezing or seizure, the property might be concealed or lost. In addition, to protect the rights of the *bona fide* third party, it is sufficiently fair if there is a system whereby the owner can appeal against the freezing order, after its execution.

International co-operation of freezing or seizure has two points for discussion. First, in some countries, it is difficult to execute judicial orders of the requesting country quickly, because in some requested countries, a judicial procedure to execute a foreign judicial order is required.

The group recommends that the court proceedings of the requested country should be simple, for example, only registering judicial orders in the court of the requested country. Informal consultation should be widely used before formal request.

The second problem concerns orders of the requesting country, including not only orders of judges or courts but also orders of other competent authorities. In some countries, only judicial orders can be executed in the requested country; it is difficult to execute orders of other competent authorities. For example, in some countries, only committees can issue orders to freeze the property; such orders cannot be executed in the requested country.

Our recommendation is that such countries should, like Guyana, consider adopting provisions in accordance with the UNCAC, whereby orders of any competent authorities can be executed in the requested country.

#### IV. CONFISCATION/DEPRIVATION OF THE PROCEEDS OF CRIME

##### A. Current Situation

###### 1. Conviction-Based Confiscation

All participants' countries have legislation on conviction-based confiscation. But the collection of equivalent sum of the relevant property is not possible in some countries. If the property is transformed or converted in all participants' countries except Sri Lanka, it is possible to confiscate the property. If the property is intermingled with other legitimate property, all countries have provisions to confiscate the property, except Sri Lanka and Vietnam.

###### 2. Non-Conviction Based Confiscation

On the issue of non-conviction based confiscation it was explained that Tanzania, Guyana and Thailand have NCB confiscation provisions but Japan, Sri Lanka and Vietnam do not.

###### 3. Administrative Forfeiture

Only Thailand has administrative forfeiture, which only applies in cases of tax and property tax evasion.

###### 4. Confiscation without the Presence of Accused (*ex parte*)

Guyana, Sri Lanka and Tanzania have *ex parte* confiscation procedures but Japan, Vietnam and Thailand do not have such procedures. However the *ex parte* procedure can be applied in civil confiscations in Thailand.

###### 5. Shifting the Burden of Proof

Currently, most participants' countries have provisions for shifting the burden of proof to the accused/defendant. But in Japan the provisions are only applicable under the Anti-drugs Special Law. In Sri Lanka (Money Laundering Act), Guyana, Tanzania and Thailand the accused/defendant has to prove the property has a legitimate source on the balance of probabilities.

###### 6. Taxation of Criminal Proceeds

Legislation for taxation of criminal proceeds is only found in Japan and Tanzania. In Japan, proceeds of crime are taxed after confiscation. In Tanzania, provisions of tax laws provide that any income accrued in Tanzania is subject to tax.

###### 7. International Co-operation

All participants said that international co-operation in confiscation is possible in their countries through MLA or agreements. In all countries, except Vietnam, judicial orders of confiscation from requesting countries are required to accompany the request.

## **B. Problems, Countermeasures**

1. Some countries do not confiscate proceeds transformed or converted or intermingled with other legitimate property. The group believes that this is a problem, especially where the proceeds cannot be found. Therefore, countries are urged to consider including collection of equivalent sums of transformed or converted property and property intermingled with other legitimate acquired property, because sometimes, it is difficult to prove connection between crime and the property.

The reason for the recommendation is that usually criminals conceal the property by converting or transforming the property, and it becomes difficult to confiscate illicit property perfectly.

2. All participants' countries should consider adopting a non-conviction based confiscation system. Such a system has many merits, including that the level of proof is not higher than a conviction based confiscation system and that competent authorities can confiscate the property even if the defendant is not guilty. Also, competent authorities can confiscate the property even if the defendant absconds or dies.
3. Administrative forfeiture is a simple and speedy procedure. However, the excessive scope of administrative forfeiture can cause unfairness to the owner of the property. For instance, in Thailand, the tax authority can exercise administrative forfeiture to confiscate all types of property, including real property, without any limitation of amount of property. If the property owner wants to challenge the confiscation, the property owner has to initiate the litigation in court which causes an unfair burden.

The group suggests that, if countries want to adopt administrative forfeiture, some limitations similar to the U.S. model should be considered; for example, that it is applicable to only monetary instruments with some limitation of amount. And if the forfeiture order is challenged, the government has to take the case to court for confirmation of forfeiture.

4. All participants considered that a system to shift the burden of proof to the defendant is a very useful and effective system to confiscate illegitimate property. However, the presumption of innocence will be at stake. Therefore, the group recommended that when they consider adopting such system, it is important that the government should set basic requirements to be proved by the prosecutor. For example, it could be required to prove that the defendant associated with the offender, that there is a connection between crime and the property, or that the defendant committed a crime, before the burden of proof is shifted to the accused.
5. Taxation of criminal proceeds is an effective measure to deprive criminals of the proceeds of crime. Participants' countries are urged to consider adapting or adopting taxation of proceeds of crime. It was commented that, if taxation of crime proceeds is possible in addition to the confiscation of the proceeds, it can impose additional damage on the criminals. It may also lead to deprivation of hidden crime proceeds, which cannot be confiscated.
6. In international co-operation it has been learned that requirements are higher in some countries which need judicial orders or a treaty or agreement. This procedure causes delay. So the group recommends that all countries should lower requirements to meet reciprocity and include requests from other competent authorities rather than only judicial orders. Countries should also establish firm and fair procedures to make sure that confiscation is done properly.

## **V. RECOVERY OF THE CONFISCATED PROCEEDS OF CRIME**

### **A. Current Situation**

#### **1. Returning the Proceeds of Crime**

All participants' countries have provisions for returning the proceeds of crime to individual victims. But in Japan recovery is only possible for victims of organized crime and money laundering offences. The scope of recovery of proceeds of crime in Japan is limited.

With regard to international asset recovery, all participants' countries, except Thailand, have a system of returning the proceeds of crime to the requesting countries.

2. Asset Sharing

Only Sri Lanka has provisions on asset sharing; in other countries asset sharing is possible depending on individual countries' agreement. In Thailand asset sharing is not possible.

**B. Problems, Countermeasures**

1. In some countries, the scope of returning confiscated proceeds is limited and sometimes there are no funds to compensate victims. Thus the group recommended that countries with limited scope should broaden the scope of recovery to victims. Also, each country should consider establishing a fund, similar to the U.S.A. model, in order to compensate victims. But the fund should be subject to domestic laws.
2. Our group recommends that all countries should consider introducing a law to return assets to victim countries in order to comply with Article 57 of UNCAC. Property should be returned to the origin countries where real victims are present. If a requested country returns the assets to the victim country, the reciprocity principle can be asserted when the victim country returns the asset to the requested country in the future.
3. Our group recommends that all countries should consider establishing a law or regulation on asset sharing. When establishing the law or regulation, they can consider establishing a law or regulation that allows deducting a reasonable amount of expenses in the requested country before returning the assets. The percentage of asset sharing is decided by mutual agreement on a case by case basis. Some participants consider that retaining some additional amount in the requested country is strong incentive for the requested country and can hasten the procedures of asset recovery.
4. International co-operation is urged by requesting countries to ask for technical assistance from international organizations, for example the Basel Institute on Governance, to help in consultation on how asset sharing can effectively be achieved, if the requesting country faces some obstacles.

**VI. CAPACITY BUILDING**

Our group agrees that capacity building of investigators, public prosecutors and judges in attacking the proceeds of crime is important. Therefore, holding of meetings, seminars and training of relevant officers is imperative and indispensable.

Also, acquiring experience and expertise from organizations such as the Basel Institute on Governance and UNAFEI is important. The responsible officers should not be rotated frequently and should be specialized. If rotation is necessary, the head or supervisors of the department should not be rotated frequently.