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# The Implementation of Non-Conviction-Based Forfeiture in ASEAN, Mongolia and Timor-Leste<sup>1</sup>



Non-conviction-based forfeiture (NCBF)<sup>2</sup> can be a key tool in facilitating cross-border asset recovery involving the proceeds of corruption. NCBF refers to confiscation for which a criminal conviction is not required, which means this process can:<sup>3</sup>

- Proceed regardless of an offender's death, flight from a jurisdiction, and immunity;
- Proceed in circumstances where targeting the offender is not possible, such as where the assets are found but the offender is unknown; and
- Lead to time and cost savings, as NCBF proceedings could rely on a lower standard of proof, with no requirements to also wait for the conclusion of a criminal trial.

Adopted by the General Assembly in October 2003 and entering into force in December 2005, the United Nations Convention against Corruption (UNCAC) is the world's only legally binding anti-corruption instrument, with asset return serving as a "fundamental principle" of the Convention. In recognizing the challenges that States parties

may face in international confiscation cases, UNCAC addresses the question of how to facilitate the execution of international requests for seizure and confiscation without undue delay.<sup>4</sup> Article 54 of UNCAC, which refers to mechanisms for recovering property through international cooperation in confiscation, sets out provisions addressing conviction and NCBF.

Forfeiture, as part of criminal proceedings, is set out in articles 54(1)(a) and (b) of UNCAC. Article 54(1)(a) requires States parties to adopt procedures allowing its competent authorities to enforce an order of confiscation by a foreign court, while article 54(1)(b) requires States parties to ensure the ability to confiscate the proceeds of foreign predicate offences through legal proceedings involving money-laundering, or other offences within its jurisdiction, or by other procedures authorized under its domestic laws.

### **Article 54(1)(c) of UNCAC provides for NCBF.**

States parties, in order to provide mutual legal assistance pursuant to the Convention with respect to property acquired through or involved in the commission of a corruption offence established in accordance with the Convention,

<sup>1</sup> This research was conducted and commissioned by the UNODC Regional Office for Southeast Asia and the Pacific (ROSE-AP) and Field Support Section of the Corruption and Economic Crime Branch. This was with the support of the Government of Sweden, Ministry of Justice of the Republic of Korea and the Bureau of International Narcotics and Law Enforcement Affairs of the United States.

<sup>2</sup> A good practice guide on NCBF is available at: Stolen Asset Recovery (StAR) Initiative, *A good practice guide for non-conviction-based asset forfeiture* (World Bank, Washington, 2009). Available at: <https://star.worldbank.org/publications/good-practice-guide-non-conviction-based-asset-forfeiture>.

<sup>3</sup> For more information on NCBF and its use in asset recovery, refer to: StAR Initiative, *Asset recovery handbook: a guide for practitioners, second edition* (World Bank, Washington, 2021). Available at: <https://star.worldbank.org/publications/asset-recovery-handbook-guide-practitioners-second-edition>.

<sup>4</sup> UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Corruption (Second revised edition)* (New York, UN, 2012), pp. 215 - 216. Available at: [https://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/UNCAC\\_Legislative\\_Guide\\_E.pdf](https://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/UNCAC_Legislative_Guide_E.pdf).

are required, in accordance with their domestic law, to:

### **Article 54(1)(c)**

Consider taking such measures as may be necessary to allow confiscation of such property **without a criminal conviction** in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate case.

States may utilize NCBF in civil and common law jurisdictions. UNCAC and article 54(1)(c) do not focus on the differences between legal systems – instead, the emphasis is on considering the use of NCBF as a tool to recover proceeds of corruption.<sup>5</sup> As such, States may seek to implement non-conviction-based proceedings in ways that suit their legal context, including: for example, instituting proceedings where a criminal conviction is not possible due to a defendant’s death or abscondence, or via civil forfeiture proceedings, where forfeiture is pursued in the context of civil proceedings and outside of the criminal sphere.<sup>6</sup>

Furthermore, UN Member States committed to the use of NCBF in asset recovery and asset return in the Political Declaration adopted by the special session of the UN General Assembly against corruption in 2021.<sup>7</sup>

40. [UN Member States] will adequately address requests based on non-criminal proceedings, including civil, administrative non-conviction-based proceedings, as well as those related to information concerning unexplained assets held by public officials, where appropriate and consistent with domestic legal systems and applicable international obligations, with a view to, inter alia,

strengthening global efforts to prevent corruption, sanctioning acts of corruption and corruption-related offences and recovering and returning proceeds of these offences in accordance with the Convention.

47. [UN Member States] commit to using the available tools for asset recovery and asset return, in accordance with domestic law, such as conviction-based and non-conviction-based confiscation, as well as direct recovery mechanisms as outlined in chapter V of the Convention [...].

While some States and their legal frameworks do not provide for NCBF, their international cooperation framework may allow for the enforcement of NCBF orders. As such, four types of scenarios may apply, where:<sup>8</sup>

- States provide for domestic NCBF and for the enforcement of foreign NCBF orders;
- States provide for domestic NCBF but not for the enforcement of foreign NCBF orders;
- States do not provide for domestic NCBF but allow for the enforcement of foreign NCBF orders; and
- States neither provide for domestic NCBF nor the enforcement of foreign NCBF orders.

UNODC previously observed in September 2023 that only six out of 82 States parties that had completed their second cycle reviews under the Mechanism for the Review of Implementation of UNCAC (UNCAC Implementation Review Mechanism)<sup>9</sup> had established NCBF on a limited basis, such as where this was limited to proceeds or instrumentalities of “serious crime-related

<sup>5</sup> StAR Initiative, *A good practice guide for non-conviction-based asset forfeiture*, *op.cit.*, pp. 16 – 17.

<sup>6</sup> Conference of the States parties to the United Nations Convention against Corruption, “Conference room paper: Civil and administrative liability for corruption – domestic practices and ways to enhance international cooperation under the United Nations Convention against Corruption,” CAC/COSP/2023/CRP.8, 2023, p. 30. Available at: <https://www.unodc.org/documents/treaties/UNCAC/COSP/session10/CAC-COSP-2023-CRP.8.pdf>. See also: U4, “The effectiveness of non-conviction-based proceedings in asset recovery,” 2024, p. 3. Available at: <https://knowledgehub.transparency.org/helpdesk/the-effectiveness-of-non-conviction-based-proceedings-in-asset-recovery>.

<sup>7</sup> UN General Assembly, “Resolution adopted by the General Assembly on 2 June 2021: Our common commitment to effectively addressing challenges and implementing measures to prevent and combat corruption and strengthen international cooperation,” A-RES/S-32/1, 7 June 2021, pp. 11-12. Available at: <https://undocs.org/Home/Mobile?FinalSymbol=A%2FRES%2FS-32%2F1&Language=E&DeviceType=Desktop&LangRequested=False>.

<sup>8</sup> Conference of the States parties to the United Nations Convention against Corruption, “Implementation of chapter V (Asset recovery) of the United Nations Convention against Corruption,” CAC/COSP/2023/5, 9 October 2023, p. 11. Available at: <https://www.unodc.org/documents/treaties/UNCAC/COSP/session10/CAC-COSP-2023-5/2319298E.pdf>. See: “At least one State did not allow confiscation without a criminal conviction and could not execute foreign decisions in that regard. Another State reported that, despite the absence of domestic non-conviction-based confiscation, it could enforce foreign non-conviction-based confiscation orders.”

<sup>9</sup> *Ibid.*, p. 10.



activity,” money-laundering, illicit enrichment or other non-corruption offences.

In a 2021 survey conducted by the Stolen Asset Recovery Initiative<sup>10</sup> on asset recovery, 50 out of 73 responding States identified “problems related to [the] enforcement of non-conviction-based confiscation orders in a foreign jurisdiction” as a major barrier to international asset recovery.<sup>11</sup> Moreover, responding States indicated that the biggest barriers to successful asset recovery in countries *without* NCBF provisions included the lack of availability of such provisions, or challenges in enforcing foreign non-conviction-based orders due to a lack of domestic NCBF provisions.<sup>12</sup>

Following from this survey, UNODC’s analysis<sup>13</sup> demonstrated that conviction-based criminal confiscation remained the most frequently cited legal mechanism for cross-border asset recovery efforts. In 153 reported asset return cases covering the period of 2010 – 2023,<sup>14</sup> conviction-based forfeiture was used in more than half of all reported cases (51 per cent), followed by NCBF (30 per cent). Further, only four per cent of asset returns involved the enforcement of a foreign NCBF order.

In March 2024 and out of 88 States parties that have completed their second cycle reviews under the UNCAC Implementation Review Mechanism,<sup>15</sup> the Asia and Pacific States received a higher proportion of recommendations on NCBF, as compared to other regions.

In Southeast Asia, regional frameworks on anti-corruption have recently reiterated and prioritized the importance of NCBF in asset recovery. Following UNODC’s support in establishing the Regional Platform for Southeast Asia to fast-track

UNCAC implementation pursuant to resolution 9/4 of the Conference of States parties to UNCAC,<sup>16</sup> this Regional Platform for Southeast Asia collectively agreed in 2024 to provide for the greater facilitation of asset recovery, which covered NCBF:<sup>17</sup>

### **Thematic area 3: Greater facilitation of asset recovery**

**Objective 1:** Strengthen asset recovery strategic, normative and legislative frameworks

**Action point 1.2.** Ensure that the domestic framework provide for the enforcement of foreign confiscation orders, including, when appropriate, **NCBF orders**.

**Action point 1.3.** Endeavor to take measures which provide for **NCBF**.

### **The implementation of non-conviction-based forfeiture in ASEAN, Mongolia and Timor-Leste**

The implementation of NCBF in ASEAN Member States, Mongolia and Timor-Leste (collectively known as the “focus States” for ease of reference) is varied. Indonesia, Lao PDR, Mongolia and Timor-Leste do not have provisions which explicitly allow for NCBF in their jurisdictions, and also do not provide for the enforcement of foreign NCBF orders as part of their international cooperation frameworks. While the remainder of the focus States have some form of provision which provide, in one form or another, the use of NCBF, there are key differences in relation to:

- **The legal basis of NCBF and its application to Convention offences domestically:**

<sup>10</sup> STAR, “Our mission,” accessed on: 24 June 2024. Available at: <https://star.worldbank.org/about-star>.

<sup>11</sup> UNODC, “Conference room paper prepared by the STAR Initiative: Mapping international recoveries and returns of stolen assets under UNCAC: an insight into the practice of cross-border repatriation of proceeds of corruption over the past 10 years,” CAC/COSP/2021/CRP.12, 13 December 2021, p. 28. Available at: [https://www.unodc.org/documents/treaties/UNCAC/COSP/session9/CAC-COSP-2021-CRP.12\\_E.pdf](https://www.unodc.org/documents/treaties/UNCAC/COSP/session9/CAC-COSP-2021-CRP.12_E.pdf).

<sup>12</sup> *Ibid.*, p. 29.

<sup>13</sup> Conference of the States Parties to the United Nations Convention against Corruption, “Collection of information on international asset returns, including challenges, good practices and lessons learned,” CAC/COSP/2023/15, 16 October 2023. Available at: <https://www.unodc.org/documents/treaties/UNCAC/COSP/session10/CAC-COSP-2023-15/2319921E.pdf>.

<sup>14</sup> *Ibid.*, pp. 9-10.

<sup>15</sup> See: Conference of the States parties to the United Nations Convention against Corruption, “Implementation of chapter V (Asset recovery) of the United Nations Convention against Corruption and regional supplement,” *op.cit.*, p. 11. Asian and Pacific States received over 10 recommendations on UNCAC article 54(1)(c), out of over 40 recommendations that all groups (comprising of African States, Eastern European States, Latin American and Caribbean States, and Western European and other States) received in total on UNCAC article 54(1)(c).

<sup>16</sup> UNODC, “Resolutions and decisions adopted by the Conference of the States parties to the United Nations Convention against Corruption,” 2021. Available at: <https://www.unodc.org/unodc/en/corruption/COSP/session9-resolutions.html#Res.9-4>.

<sup>17</sup> UNODC, “Regional roadmap to reinvigorate the platform to fast-track the implementation of the United Nations Convention against Corruption in Southeast Asia (2024 – 2027),” 2024. Available at: [https://www.unodc.org/roseap/uploads/documents/Publications/2024/2024-2027\\_UNCAC\\_Implementation\\_Roadmap\\_in\\_Southeast\\_Asia.pdf](https://www.unodc.org/roseap/uploads/documents/Publications/2024/2024-2027_UNCAC_Implementation_Roadmap_in_Southeast_Asia.pdf).

- **Domestic NCBF, with an application to Convention offences.** Malaysia and Singapore set out NCBF explicitly in their legislation on corruption – although as an exception for Singapore, rather than its broad application in Malaysia. Brunei Darussalam’s criminal asset recovery legislation provides for NCBF, covering corrupt acts by definition.
  - **Domestic NCBF, which could cover some corrupt acts, but may not cover all Convention offences.** Some focus States set out their NCBF provisions in legislation on anti-money-laundering, which could cover some corrupt acts. For example, Cambodia, Malaysia, the Philippines and Thailand set out NCBF provisions in their anti-money-laundering legislation;
  - **The explicit recognition and enforcement of foreign NCBF orders.** For example, Brunei Darussalam has explicitly defined, in its framework for NCBF, the term “foreign confiscation order” to “include, for the avoidance of doubt, such order[s] made by a court in a foreign country which is not based on a conviction.” However, focus States may also recognize and enforce foreign NCBF orders by having sufficiently broad and/or targeted provisions in its mutual legal assistance legislation, which would allow their courts to give effect to foreign NCBF orders. This is the case for Cambodia, Malaysia, Thailand and Singapore.
  - **The scope of property covered by NCBF provisions, such as the proceeds of crime or property, including foreign proceeds, and equipment or other instrumentalities destined for the use in offences.** For example, Malaysia’s framework explicitly covers property in Malaysia or elsewhere, whether tangible or intangible, and includes interests in such property. Singapore’s framework provides that NCBF applies to “benefits derived from criminal conduct,” which would cover any property or interest held within a certain period of time, or property or interest which would be disproportionate to the person’s known sources of income, with holdings which cannot be explained to the satisfaction of the court. Brunei Darussalam’s definition of “tainted property” broadly covers property which could be reasonably believed to be proceeds of crime “due to any circumstance such as, but not limited to, its nature, value, location or place of discovery, or the time, manner or place of its acquisition.”
  - **Circumstances which allow for NCBF.** For example, in Thailand and Viet Nam, NCBF for the purposes of mutual legal assistance is only allowed where the offender is deceased. In Singapore, NCBF is allowed in circumstances where the perpetrator cannot be found, is apprehended, or has been extradited after investigations for a serious offence has commenced.
  - **The level of legislative detail governing the process of NCBF.** This includes detailing the responsible parties who are to file applications for NCBF orders, the timeframes, and the consequences if such applications are not filed, as is the case in Brunei Darussalam, Malaysia and Thailand.
  - **How third parties may assert an interest in confiscated property.** Malaysia, Singapore, the Philippines and Thailand explicitly provide parties who may wish to assert an interest in a property a timeframe in which they are to file opposing applications. Commonly, third parties are required to provide evidence on several matters, including that they obtained the property with sufficient consideration or fair value, and that they did so without involvement or knowledge of the defendant’s criminal conduct. There may also be additional criteria – for example, in Thailand, third parties claiming an interest in an asset under its anti-money-laundering legislation may need to demonstrate that they secured the asset “appropriately in the course of good morals or public charity.”
- During the second review cycle under the UNCAC Implementation Review Mechanism, six focus States, Indonesia, Lao PDR, Mongolia, Myanmar, Thailand, and Viet Nam, received recommendations concerning NCBF:<sup>18</sup>
- Three focus States, Indonesia, Lao PDR and Mongolia, received recommendations to consider adopting

<sup>18</sup> At the time of writing, recommendations from the second review cycle under the UNCAC Implementation Review Mechanism for Brunei Darussalam and Timor-Leste were not yet available.

legislation, measures and/or procedures on NCBF, given that they did not have any provisions which explicitly allowed for the use of NCBF during the country visit;

- Three focus States, Myanmar,<sup>19</sup> Thailand and Viet Nam received recommendations on expanding the use of NCBF or amending the manner of its implementation, given limitations that were observed during the country visit.

### **Brunei Darussalam**

As of May 2024, during the country visit as part of the second review cycle under the UNCAC Implementation Review Mechanism, Brunei Darussalam provided for NCBF for tainted property pursuant to section 83 of its Criminal Asset Recovery Order 2012. This could be made upon a foreign request.<sup>20</sup>

“Tainted property” is defined extensively in section 2 to include, for example:

- Property used in, or in connection with the commission of an offence, or intended for use as such, if it was in the person’s possession at the time of, or immediately after, the commission of the offence;
- Proceeds of crime;
- Income from sources unrelated to the criminal activity that cannot reasonably account for the acquisition of that property;
- Property which can be reasonably believed to be property in the categories above due to any circumstance such as (but not limited to) its nature, value, location or place of discovery.

To demonstrate that the property is tainted, section 83(6) notes that it is not necessary to show that the property was derived directly or indirectly, in whole or in part, from a particular criminal offence, or that any person had been charged in relation to such offence – showing that the property was used, or was intended to be used, to commit some criminal offence, would be sufficient.

Where the Public Prosecutor makes an application and the High Court is satisfied, on a balance of probabilities, that the property is tainted property, the High Court may order that the property be forfeited to the Government of Brunei Darussalam. Section 83(5) further specifies that the High Court may grant a NCBF order whether or not any person has been charged, or convicted of, a money-laundering offence or serious offence.

“Serious offence” is defined in section 2 to cover any offending in Brunei Darussalam which has a term of imprisonment of over six months and a fine of not less than BN\$ 1,000 (US\$ 744). This would cover most forms of corrupt acts in Brunei Darussalam – its Prevention of Corruption Act<sup>21</sup> stipulates that, for example, bribing a member of Brunei Darussalam’s public body can lead to a conviction of a fine of BN\$ 30,000 (US\$ 22,314) and imprisonment for seven years. Moreover, “serious offending” is also defined to cover offending in a foreign country which could “include an offence of a purely fiscal character.”

The rights of third parties are provided for. Under section 83(2), if a third party can demonstrate that they: did not acquire the interest in the property as a result of any serious offence; had the interest before any serious offence occurred or had acquired the interest for fair value after the serious offence occurred; and did not or could not reasonably have known at the time of the acquisition that the property was tainted property, then this person’s interest would not be affected by the forfeiture order. In circumstances where confiscation is pursuant to a foreign request, section 94 provides that a person claiming an interest in the property may order the Attorney-General to give an undertaking with respect to the payment of damages or costs in relation to the order.

Brunei Darussalam provides a time limit for commencing NCBF proceedings. Section 84 notes that in circumstances where no proceedings are commenced by the Public Prosecutor and no claim, in writing, has been made by any person, then the property becomes forfeited to the Government of Brunei Darussalam within three months from the date of its seizure.

<sup>19</sup> Information contained in this report reflects Myanmar’s non-conviction-based forfeiture provisions prior to the military takeover on 1 February 2021 (see S/RES/2669 (2022)), which refers to “the ongoing state of emergency imposed by the military in Myanmar on 1 February 2021”. The information provided at that time may not reflect the current context.

<sup>20</sup> Attorney General’s Chambers, “Criminal Asset Recovery Order 2012,” accessed on 16 July 2024. Available at: [https://www.agc.gov.bn/AGC%20Images/LAWS/Gazette\\_PDF/2012/EN/s047.pdf](https://www.agc.gov.bn/AGC%20Images/LAWS/Gazette_PDF/2012/EN/s047.pdf).

<sup>21</sup> Attorney General’s Chambers, “Prevention of Corruption: Revised edition 2019,” accessed on 16 July 2024. Available at: [https://www.agc.gov.bn/AGC%20Images/LAWS/ACT\\_PDF/CAP%20131.pdf](https://www.agc.gov.bn/AGC%20Images/LAWS/ACT_PDF/CAP%20131.pdf).

Brunei Darussalam explicitly recognizes and defines foreign NCBF orders. Section 94 of the Criminal Asset Recovery Order 2012 provides for the enforcement of foreign confiscation orders, which authorities have confirmed extends to the enforcement of foreign non-conviction-based orders. On application by the Attorney-General, the High Court is required to register such orders if it is satisfied that at the time of registration, the order is in force in the foreign country and is not subject to appeal. In its Criminal Asset Recovery (Amendment) Order 2023,<sup>22</sup> “foreign confiscation order” is defined to include, “for the avoidance of doubt, orders made by a court in a foreign country which is not based on a conviction.”

### **Cambodia**

As of 2019, during the country visit as part of the second review cycle under the UNCAC Implementation Review Mechanism,<sup>23</sup> Cambodia’s international cooperation framework was observed to allow for the enforcement of NCBF orders, while domestic NCBF orders could apply to money-laundering offences in specific circumstances.

Cambodia’s mutual legal assistance legislation provides for NCBF. Article 32 of Cambodia’s Law on Mutual Legal Assistance in Criminal Matters 2020<sup>24</sup> clarifies that a Cambodian court has the power to make a decision in relation to the forfeiture of property even if the relevant offence did not occur in Cambodia. This is to ensure that Cambodia can take proceeds of crime action against property located in Cambodia in response to a mutual legal assistance request, regardless of where the offence was committed. Article 32 notes that Cambodian courts have the power to make a decision relating to the forfeiture of property even if the offender or alleged offender has died, has not been identified, or has escaped, if the court of the requesting State has issued an order or judgment that the property constitutes proceeds of crime or instrumentalities of crime.

Cambodia also allows for the use of NCBF for money-laundering offences in specific circumstances. Article 32(2) of Cambodia’s Law

on Anti-Money Laundering and Combating the Financing of Terrorism 2020<sup>25</sup> notes that where an offence involving money-laundering or a predicate offence is established by the court and the perpetrator cannot be convicted because they are unknown, absconded or died, the court may order the confiscation of the seized property if sufficient evidence is adduced that it constitutes the property of an offence.

Article 33(1) notes that property that can be confiscated include:

- Property constituting the proceeds of the offence, including property intermingled with or exchanged for such proceeds;
- Property constituting income and other benefits obtained from the proceeds of the offence;
- The instrumentalities, materials or any objects being used in carrying out of the criminal offence or committing offence;
- Any property referred to above that has been transferred to any party, unless other third party rights apply; and
- Property of the perpetrator of the offence, with the value of which corresponds to that of the proceeds of the offence.

Third party rights are set out, with article 34 noting that a person who opposes a confiscation order under article 32 must satisfy the court that such person is entitled to that property, and that such property is not related to the offence or the proceeds of offence. No time frames or further details are explicitly set out.

### **Indonesia**

During the second review cycle under the UNCAC Implementation Review Mechanism finalized in 2018,<sup>26</sup> reviewing experts observed that Indonesia did not have provisions on NCBF and made a corresponding recommendation for Indonesia to consider adopting measures allowing for NCBF. Otherwise, article 51 of Indonesia’s Law on Mutual

<sup>22</sup> Attorney-General’s Chambers, “Criminal Asset Recovery (Amendment) Orders 2023,” accessed on 16 July 2024. Available at: [https://www.agc.gov.bn/AGC%20Images/LAWS/Gazette\\_PDF/2023/EN/S%2005\\_2023%20\[E\].pdf](https://www.agc.gov.bn/AGC%20Images/LAWS/Gazette_PDF/2023/EN/S%2005_2023%20[E].pdf).

<sup>23</sup> At the time of writing, Cambodia has not yet finalized its second review cycle.

<sup>24</sup> Ministry of Justice, “Law on mutual legal assistance in criminal matters with explanatory notes, 1 September 2020,” accessed on: 19 June 2024. Available at: <https://moj.gov.kh/files/user-folder/2022/MLA/5.Law%20on%20Mutual%20Legal%20Assistance%20in%20Criminal%20Matters%20With%20Explanatory%20Notes.pdf>.

<sup>25</sup> Financial Intelligence Unit, “Law on Anti-Money-Laundering and Combating the Financing of Terrorism, 27 June 2020,” accessed on: 19 June 2024. Available at: <https://cafiu.nbc.gov.kh/about-ml/1.2.AML%20CFT%20Law%20in%20English.pdf>.

<sup>26</sup> Implementation Review Group, “Executive Summary,” CAC/COSP/IRG/II/1/1/Add.7, 25 April 2018. Available at: <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries2/V1802700e.pdf>.



Legal Assistance in Criminal Matters No. 1/2006<sup>27</sup> provides that requests for asset confiscation and seizure can only be made when accompanied by certain documents, including those described in article 28. These include judgments that have permanent legal force. In the absence of legislation on NCBF, Indonesia has a limited mechanism to temporarily freeze financial accounts in the absence of a court decision, which occurs under its Law on the Prevention and Eradication of the Criminal Act of Money-Laundering No. 8/2010.<sup>28</sup> While this covers assets obtained from criminal acts of corruption, bribery, embezzlement and other criminal acts subject to imprisonment of four years or more, this mechanism is only limited to assets that are under the authority of a financial service provider.<sup>29</sup> In all other cases, requests by foreign States for asset seizure or confiscation must be submitted to the Indonesian Central Authority through mutual legal assistance channels and be accompanied by a final and binding court decision.

During the country visit in 2017, as part of the second review cycle under the UNCAC Implementation Review Mechanism, reviewing experts observed that a draft law on asset recovery which would provide for NCBF was in development.

### **Lao PDR**

During the second review cycle under the UNCAC Implementation Review Mechanism finalized in 2020, reviewing experts<sup>30</sup> that Lao PDR had no provisions in domestic law allowing for confiscation in the absence of a conviction. A corresponding recommendation was issued for Lao PDR to consider adopting legislative provisions on NCBF.<sup>31</sup>

Lao PDR's confiscation regime is regulated by its Penal Code, and where mutual legal assistance is concerned, the Law on Mutual Legal Assistance in Criminal Matters No. 88/NA<sup>32</sup> applies. Chapter

4 of the Law regulates Lao PDR's confiscation of assets and objects, with article 26 noting that its courts will decide on the confiscation of assets in accordance with the foreign country's court decision. Article 28 notes that in considering the confiscation of assets in accordance with a foreign country's court decision, the People's Court of Lao PDR has the right to:

- Examine the offence described in the request to see if it is an offence as defined in the laws of Lao PDR;
- Check if the request for mutual legal assistance does not conflict with other provisions in the mutual legal assistance law;
- Re-check the asset associated with the offence (offence as defined in the laws of Lao PDR).

Article 29 further notes that when the People's Court of Lao PDR considers the confiscation request and sees that there is insufficient reason, information and evidence for the confiscation, then it shall annul the order for the seizing and freezing of the assets.

### **Malaysia**

At the time of writing this paper, Malaysia allowed for domestic NCBF and the enforcement of NCBF in its international cooperation framework.

Section 41 of the Malaysian Anti-Corruption Commission Act 2009<sup>33</sup> (MACC Act) allows for the forfeiture of property where there is no prosecution or conviction for a corruption offence under the MACC Act. "Property" is defined in section 2 as "real or personal property of every description, including money, whether situated in Malaysia or elsewhere, whether tangible or intangible, and includes an interest in any such real or personal property."

<sup>27</sup> Vertic, "Law of the Republic of Indonesia: Number 1 Year 2006 concerning Mutual Legal Assistance in Criminal Matters," accessed on: 19 June 2024. Available at: [www.vertic.org/media/National%20Legislation/Indonesia/ID\\_Mutual\\_Legal\\_Assistance\\_Law.pdf](http://www.vertic.org/media/National%20Legislation/Indonesia/ID_Mutual_Legal_Assistance_Law.pdf).

<sup>28</sup> PPATK, "Law of the Republic of Indonesia: Number 8 Year 2010 concerning the Prevention and Eradication of the Criminal Act of Money-Laundering," accessed on: 19 June 2024. Available at: [https://www.ppatk.go.id/backend/assets/images/publikasi/1674614612\\_.pdf](https://www.ppatk.go.id/backend/assets/images/publikasi/1674614612_.pdf).

<sup>29</sup> Law of the Republic of Indonesia: Number 8 Year 2010, articles 2, 65 – 67.

<sup>30</sup> Implementation Review Group, "Executive summary," CAC/COSP/IRG/II/2/1/Add.20, 14 July 2020. Available at: <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries2/V2003713e.pdf>.

<sup>31</sup> Implementation Review Group, "Executive summary," CAC/COSP/IRG/II/2/1/Add.20, 14 July 2020. Available at: <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries2/V2003713e.pdf>.

<sup>32</sup> ASEAN, "Law on Mutual Legal Assistance in Criminal Matters No. 88/NA, 12 November 2020," accessed on: 19 June 2024. Available at: [https://asean.org/wp-content/uploads/2022/04/MLA\\_law\\_of\\_Lao\\_PDR\\_2020.pdf](https://asean.org/wp-content/uploads/2022/04/MLA_law_of_Lao_PDR_2020.pdf).

<sup>33</sup> Malaysian Anti-Corruption Commission, "Malaysian Anti-Corruption Commission Act 2009," accessed on: 1 September 2019, p. 48. Available at: <https://www.sprm.gov.my/admin/files/sprm/assets/pdf/penguatkuasaan/act-694-bi.pdf>.

Where the Public Prosecutor is satisfied that such property has been obtained as a result of, or in connection with, an offence under the MACC Act, the Public Prosecutor must apply to a Sessions Court Judge for an order of forfeiture within eighteen months from the date of the seizure. Should the application not be made within this timeframe, section 41(4) notes that the property shall be released to the person from whom it was seized.

Section 41 provides for third party interests. Section 41(2) notes that the judge is to publish a notice in the Gazette calling for persons who claim to have an interest in the property to attend court on a specified date, to demonstrate why the property should not be forfeited. If the judge is satisfied that the property is the subject matter of, or was used in the commission of, an offence under the MACC Act, and there was no purchase in good faith or valuable consideration in respect of the property, then the judge shall make an order for the forfeiture of the property.

Section 56 of Malaysia's Anti-Money Laundering and Anti-Terrorism Financing Act 2001<sup>34</sup> also allows for the forfeiture of property where there is no prosecution or conviction, in relation to a money-laundering or a terrorism financing offence. While section 56 is similar to that of section 41 of the MACC Act, there are key differences. For example, the time limit under section 56 for the Public Prosecutor to make an application of forfeiture to the High Court is twelve months from the date of the property's freezing or seizure. Moreover, section 56(4) explicitly states that in determining whether or not the property has been obtained as a result of, or in connection with, a money-laundering or terrorism financing offence, the court shall apply the standard of proof required in civil proceedings. The required standard of proof is not explicitly set out in section 41 of the MACC Act.

As part of its international cooperation regime, Malaysia's Mutual Assistance in Criminal Matters Act 2002<sup>35</sup> is drafted broadly to provide for the enforcement of NCBF orders, although the registration of foreign forfeiture orders would require a final order from a foreign State.

Section 31 of the Act allows a prescribed foreign

State to request Malaysia's Attorney-General to:

- "Assist in the enforcement and satisfaction of a foreign forfeiture order made in any judicial proceedings instituted in that prescribed foreign State" against property that is reasonably believed to be located in Malaysia or;
- In situations "where a foreign forfeiture order may be made in judicial proceedings which have been or are to be instituted in that prescribed foreign State," to assist in the "restraining of dealing in any property that is reasonably believed to be located in Malaysia and against which the order may be enforced or which may be available to satisfy the order."

Section 32, which regulates the registration of foreign forfeiture orders, notes that Malaysia's High Court may register the foreign forfeiture order if certain conditions are satisfied, including that: the "order is in force and not subject to further appeal in the prescribed foreign State;" an affected person who did not appear for the proceedings in a foreign State was notified of the proceedings in sufficient time; and enforcing the order in Malaysia "would not be contrary to the interests of justice." Section 32(4) notes that the registration of a foreign forfeiture order would be revoked if the order has been satisfied by payment of the amount due under it, or by the person against whom it was made serving imprisonment, or by other means.

### **Mongolia**

During the second review cycle under the UNCAC Implementation Review Mechanism finalized in 2023, Mongolia received a recommendation<sup>36</sup> to consider taking measures to allow confiscation without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence, or in other appropriate cases.

Mongolian's Criminal Code<sup>37</sup> provides only for conviction-based forfeiture. Article 7.2 allows a court to impose certain "mandatory actions" on a person who has committed a crime – these actions may be imposed on persons who may

<sup>34</sup> Ministry of Home Affairs of Malaysia, "Anti-Money Laundering and Anti-Terrorism Financing Act 2001," 2001, p. 30. Available at: [https://www.moha.gov.my/images/maklumat\\_perkhidmatan/membanteras\\_pembiayaan\\_keganasan/AMLATFA.pdf](https://www.moha.gov.my/images/maklumat_perkhidmatan/membanteras_pembiayaan_keganasan/AMLATFA.pdf).

<sup>35</sup> ASEAN, "Laws of Malaysia – Mutual Assistance in Criminal Matters Act 2002," accessed on 9 September 2024. Available at: <https://asean.org/wp-content/uploads/2021/10/01.-Mutual-Assistance-in-Criminal-Matters-Act-2002.pdf>.

<sup>36</sup> Implementation Review Group, "Executive Summary," CAC/COSP/IRG/II/4/1/Add.3, 26 January 2023. Available at: <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/12-16June2023/CAC-COSP-IRG-II-4-1-Add.3/2301357E.pdf>.

<sup>37</sup> Legislation Online, "Criminal Code of Mongolia," accessed on: 21 August 2024. Available at: <https://legalinfo.mn/mn/detail?lawId=11634>.



have been released on probation or be additional to existing penalties. The confiscation of assets and proceeds is included as a mandatory action.

Article 7.5, in regulating the confiscation of assets and proceeds gained by committing a crime, defines “assets and proceeds” to cover property or non-property assets obtained directly or indirectly by committing a crime, as well as costs or proceeds of the respective assets, techniques and tools used (or were attempted to be used) in committing a crime. This crime could be committed in Mongolia, or where applicable, a foreign country where the crime has a penalty of imprisonment of at least one year. Article 7.5 provides for the rights of third parties, by noting that courts shall assess situations where assets and proceeds have been assigned to others on the basis of a lawful contract.

### **Myanmar<sup>38</sup>**

During the second review cycle under the UNCAC Implementation Review Mechanism finalized in 2020, Myanmar’s Anti-Corruption Commission was observed to be able to execute domestic NCBF orders without the involvement of judicial authorities. Chapter 9 of Myanmar’s Anti-Corruption Law 2013,<sup>39</sup> titled “confiscation of monies and properties obtained through illicit enrichment as State property,” allows the Anti-Corruption Commission to confiscate monies and properties owed by persons who are “enriched by bribery” based on the findings of an assigned Preliminary Scrutinizing Team. In addition to physical currency, “money” is defined in chapter 1 to cover transferable instruments, remittances, loan contracts, treasury bonds, loan insurance contracts and foreign currencies, while “property” is defined to cover assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and title to or such interest in such assets.

If the person can show that such monies and properties are obtained by lawful means, or if it is

found that the confiscated monies and properties have been acquired and transferred legally in good faith to another person, chapter 9 notes that the Commission shall return such monies and properties.

Under the second review cycle under the UNCAC Implementation Review Mechanism, Myanmar received a recommendation to consider introducing measures allowing the confiscation of property without a criminal conviction as part of court proceedings, and to provide clear procedures for the execution of foreign NCBF orders.<sup>40</sup>

### **The Philippines**

At the time of writing this paper, domestic NCBF existed in the Philippines through its anti-money-laundering framework. Rule 12(a) of the Anti-Money Laundering Act (AMLA) authorizes the Anti-Money Laundering Council (AMLC) to institute civil forfeiture proceedings and all other remedial proceedings through the Office of the Solicitor General.<sup>41</sup>

Forfeiture orders apply to monetary instruments or property, which are defined in rules 3.e.1 and 3.e.2 of the AMLA. “Monetary instruments” is defined broadly to cover, for example, securities or negotiable instruments, commercial papers, deposit certificates, trading orders, transaction tickets, confirmations of sale or investments, contracts or policies of insurance, plus other similar instruments where title passes to another by endorsement, assignment or delivery. “Property” includes any item of value, real or personal, tangible or intangible, or any interest or any benefit, privilege, claim or right.

Rule 12(b) of the AMLA notes that the Rule of Procedure in Cases of Civil Forfeiture, Asset Preservation, and Freezing of Monetary Instrument, Property, or Proceeds Representing, Involving, or Relating to an Unlawful Activity or Money Laundering Offense under Republic Act

<sup>38</sup> Information contained in this report reflects Myanmar’s NCBF provisions prior to the military takeover on 1 February 2021 (see S/RES/2669 (2022)), which refers to “the ongoing state of emergency imposed by the military in Myanmar on 1 February 2021”). The information provided at that time may not reflect the current context.

<sup>39</sup> Myanmar Law Library, “Pyidaungsu Hluttaw Law No. 23/2013, Anti-Corruption Law,” accessed on: 19 June 2024. Available at: <https://myanmar-law-library.org/law-library/laws-and-regulations/laws/myanmar-laws-1988-until-now/union-solidarity-and-development-party-laws-2012-2016/myanmar-laws-2013/pyidaungsu-hluttaw-law-no-23-2013-anti-corruption-law-english.html>.

<sup>40</sup> Implementation Review Group, “Executive Summary,” CAC/COSP/IRG/II/2/1/Add.24, 29 December 2020. Available at: <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries2/V2007740e.pdf>.

<sup>41</sup> Anti-Money Laundering Council, “Revised implementing rules and regulations of Republic Act No. 9160, as amended by Republic Act No. 9194 and Republic Act No. 10167,” 2012. Available at: <http://www.amlc.gov.ph/2-uncategorised/55-revised-implementing-rules-and-regulations-of-republic-act-no-9160>.

No. 9160, as Amended (A.M. No. 05-11-04-SC)<sup>42</sup> (Rules) governs all civil forfeiture procedures. Rule 27 provides that “[n]o prior criminal charge, pendency of or conviction for an unlawful activity or money-laundering offence is necessary for the commencement or the resolution of a petition for civil forfeiture.”

Third party rights are provided for. Rule 12(c) of the AMLA notes that where the court has issued an order of forfeiture, any other person claiming an interest may, by verified petition, apply for a declaration that such instrument or property legitimately belongs to them. This person has 15 days from the forfeiture order to file this petition.

Rule 13 of the AMLA regulates mutual assistance among States. Rule 13(a) of the AMLA notes that where a foreign State makes a request for assistance in the investigation or prosecution of a money-laundering offence, the AMLC may execute the request or refuse to execute it. However, rule 13(b) of the AMLA requires a person to have been convicted of a money-laundering offence or an unlawful activity in the requesting State:

**“Rule 13.b. Powers of the AMLC to Act on a Request for Assistance from a Foreign State.** - The AMLC may execute a request for assistance from a foreign State by: (1) tracking down, freezing, restraining and seizing assets alleged to be proceeds of any unlawful activity under the procedures laid down in the AMLA, as amended, and in these Rules; (2) giving information needed by the foreign State within the procedures laid down in the AMLA, as amended, and in these Rules; and (3) applying for an order of forfeiture of any monetary instrument or property with the court: Provided, That the court shall not issue such an order unless the application is accompanied by an authenticated copy of the order of a court in the requesting State ordering the forfeiture of said monetary instrument or property of a person who has been convicted of a money laundering offense or an unlawful activity in the requesting State, and a certification or an affidavit

of a competent officer of the requesting State stating that the conviction and the order of forfeiture are final and that no further appeal lies in respect of either.”<sup>43</sup>

## **Singapore**

As of 2023, during the country visit as part of the second review cycle under the UNCAC Implementation Review Mechanism,<sup>44</sup> the use of NCBF in Singapore was observed to be the exception, rather than the rule. Confiscation is generally based on a criminal conviction, where Part 2 of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits Act) 1992<sup>45</sup> (CDSA) notes that the court must, on the application of the Public Prosecutor, make a confiscation order against the defendant in respect of benefits derived by the defendant from criminal conduct, where the defendant is convicted of a serious offence. Various corrupt acts under the Prevention of Corruption Act 1960 are listed as “serious offences” under the Second Schedule, including bribery, abetment, attempts and conspiracy.

As an exception, sections 29 and 30 of the CDSA allow for NCBF in cases where the perpetrators have died or cannot be found, are apprehended, or are extradited after investigations for a serious offence have been commenced against. Section 29 notes that a person is taken to be “convicted” of a serious offence if the person absconds in connection with the serious offence. A person is taken to have absconded if:

- investigations for a serious offence have been commenced against the person; and
- the person —
  - (i) dies before proceedings in respect of the offence were instituted, or if such proceedings were instituted, the person dies before he or she is convicted of the offence; or
  - (ii) cannot be found, apprehended or extradited, at the end of the period of 6 months from the date on which the investigations were commenced against them.

<sup>42</sup> E-Codal, “A.M. No. 05-11-04-SC, Rules of Procedure in Cases of Civil Forfeiture, Asset Preservation under R.A. 9160,” accessed on 11 June 2024. Available at: <https://sites.google.com/view/e-codal/remedial/criminal-procedure/special-rules/a-m-no-05-11-04-sc-rules-of-procedure-in-cases-of-civil-forfeiture>.

<sup>43</sup> Anti-Money Laundering Council, “Revised implementing rules and regulations of Republic Act No. 9160, as amended by Republic Act No. 9194 and Republic Act No. 10167,” 2012. Available at: <http://www.amlc.gov.ph/2-uncategorised/55-revised-implementing-rules-and-regulations-of-republic-act-no-9160>.

<sup>44</sup> At the time of writing, Singapore had not yet finalized its second review cycle under the UNCAC Implementation Review Mechanism.

<sup>45</sup> Singapore Statutes Online, “Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act 1992,” accessed on: 11 June 2024. Available at: <https://sso.agc.gov.sg/Act/CDTOSCCBA1992?ProvIds=P12-#pr6->.

In relation to “benefits from criminal conduct,” section 11 notes that this covers property or interest in any property (including income accruing from the property or interest) held by the person at any time which is disproportionate to the person’s known sources of income, and which cannot be explained to the satisfaction of the court. Where the defendant is deceased, section 31 sets out how to determine benefits or the value of benefits derived from criminal conduct.

Section 16 provides for the rights of third parties. A person who asserts an interest in a property subject to a confiscation order may apply to the court, before the confiscation order is made, in respect of their interest in the property. The court must be satisfied: that the person was not in any way involved in the defendant’s criminal conduct; and that the person acquired the interest for sufficient consideration; and without knowing and in circumstances, as not to arouse a reasonable suspicion, that the property was involved in or derived from criminal conduct. Persons who make such applications must give at least seven days’ written notice of the making of the application to the Public Prosecutor.

Sections 29, 30 and the Third Schedule to the Mutual Assistance in Criminal Matters Act<sup>46</sup> permit Singapore to give effect to an order of confiscation issued by a court of another State. The definition of a “foreign confiscation order” in this Act is deemed broad enough to cover foreign NCBF orders. Section 29(1)(b) states that Singapore’s assistance may be provided in relation to a foreign confiscation order “made in judicial proceedings which have been or are to be instituted in that country.”

## **Thailand**

Thailand provides for domestic NCBF, and the enforcement of NCBF as part of its international cooperation framework in limited circumstances. During the second review cycle under the UNCAC Implementation Review Mechanism finalized in 2020, Thailand received a recommendation<sup>47</sup> to consider expanding its legislation to allow for NCBF to provide mutual legal assistance in cases where the accused cannot be prosecuted for reasons other than the death of the accused.

For the purposes of mutual legal assistance, Thailand allows for the forfeiture of property where an accused is deceased. However, this appears to be an exception and may appear to be reliant on a final court judgment. Section 35 of Thailand’s Mutual Assistance in Criminal Matters Act 1992<sup>48</sup> allows the forfeiture of property “even though the offender is deceased,” in cases where it appears “that judgment or order of a court of the foreign state has been final before such person is dead.” Otherwise, section 33 allows a foreign State to request that Thailand seize a property prior to a judgment issued by a final court, but this would require Thailand’s competent authority to file an application with a Thai court. The Thai court may determine that the application be dismissed, and such dismissals are final.

Thailand’s Anti-Money-Laundering Act 1999, as amended over the years,<sup>49</sup> provides for civil forfeiture. Forfeitable property is “asset(s) connected with the commission of an offence,” and “asset(s) connected with the commission of an offence.” This is defined broadly in section 3 to cover money or assets obtained from, for example: the commissioning of a predicate or money-laundering offence; the aiding and abetting in such offences; the distribution, disposal or transfer of money or assets; and fruits of the money or assets from the commissioning of such offences.

Under section 51, if the court is satisfied that the asset is connected with the commission of the offence, the court can order that the asset be vested in the State. The process for this is set out in section 49 – the Secretary-General refers the case to the Public Prosecutor, who then files a petition to the court. Upon receiving this petition, the court orders a notice to be posted for at least two days, so that an interested person may file an application before the court to claim ownership or interest in the asset. Section 50 allows such third parties to prove that the asset was not connected with the commission of the offence, or that they were a transferee in good faith, and secured the asset for value and “appropriately in the course of good morals or public charity.” Ultimately, where no petition is filed and no claimant comes forward to claim the return of the asset within five years, the asset

<sup>46</sup> Singapore Statutes Online, “Mutual Assistance in Criminal Matters Act 2000,” accessed on: 9 September 2024. Available at: <https://sso.agc.gov.sg/Act/MACMA2000?Provlds=P13-#pr29->.

<sup>47</sup> Implementation Review Group, “Executive Summary,” CAC/COSP/IRG/II/2/1/Add.19, 2 July 2020. Available at: <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries2/V2003397e.pdf>.

<sup>48</sup> ASEAN, “Act on Mutual Assistance in Criminal Matters, B.E. 2535 (1992),” accessed on: 19 June 2024. Available at: <https://asean.org/wp-content/uploads/2022/04/MLA-Laws-and-Related-Matter.pdf>.

<sup>49</sup> Investigation and Suppression Bureau, “Anti-Money-Laundering Act B.E. 2542 (1999),” accessed on: 19 June 2024. Available at: [https://cds.customs.go.th/data\\_files/6f86d5231634b0130986712786cfae8f.pdf](https://cds.customs.go.th/data_files/6f86d5231634b0130986712786cfae8f.pdf).



completely falls into Thailand's Anti-Money-Laundering Fund.

The Organic Act on Counter Corruption<sup>50</sup> provides for the temporary forfeiture of proceeds of predicate offences without a conviction. Such forfeiture can apply to property "connected with unusual wealthiness," with section 78 allowing the National Anti-Corruption Commission to temporarily seize such property. Where the alleged offender is unable to present evidence that the property under temporary seizure is not connected with 'unusual wealthiness,' the Commission has the power to continue its seizure until the court passes a final judgment, or if the Commission passes a resolution to note that there is no *prima facie* case within one year from the date of seizure.

### **Timor-Leste**

At the time of writing this paper,<sup>51</sup> Timor-Leste did not explicitly provide for domestic NCBF or the enforcement of foreign non-conviction-based orders. Article 102 of the Penal Code Decree Law No. 19/2009<sup>52</sup> regulates the confiscation in favour of the State of all objects that were used or destined to be used in the commission of a crime. In sub-paragraph 4, it is noted that this provision shall apply even when no specific person can be punished for the crime; however, no further details or other circumstances are listed. Article 103 of the Penal Code regulates the confiscation in favour of the States of all assets, rights or benefits, directly or indirectly acquired, as a result of the commission of a crime under the Penal Code. This would include money-laundering offences, predicate offences, and other corruption offences such as bribery and embezzlement.

Article 43 of Law No. 17/2011 (Legal Regime Covering the Prevention of and Combat Against Money-laundering and Financing of Terrorism)<sup>53</sup> provides for the confiscation of assets related to money-laundering or other predicate offences.

Confiscation under article 43 covers proceeds of crime, capital and assets, or other assets of an equivalent value, funds and property objects of the crime, instruments, and funds or assets with which the criminal proceeds have been mixed. This provision does not specify whether a conviction is required.

Provisions from the Penal Code and Law No. 17/2011 provide protection to the rights of third parties or victims. Article 102 of the Penal Code specifies the safeguarding of rights belonging to any victim or third party "who have not participated in the use or production nor taken advantage [of objects belonging to them]," while article 103 notes that forfeiture to the State is without prejudice to the rights of any victim or third party acting in good faith. Law No.17/2011's article 43(2) states that the exception to confiscation occurs where an owner of the assets can prove that they acquired such assets through the payment of a fair price, in exchange of services provided of equal value, or by any other legitimate means. Such persons would also need to prove that they had no knowledge of the illicit origin of such assets.

### **Viet Nam**

Viet Nam provides for NCBF on a limited basis. During the second review cycle under the UNCAC Implementation Review Mechanism finalized in 2021, Viet Nam received<sup>54</sup> a recommendation to consider adopting measures to allow for NCBF of any property acquired through or involved in the commission of an offence in cases where the offender cannot be prosecuted by reason of death, flight or absence, or in other appropriate cases.

Viet Nam's Criminal Code provides for the confiscation of property following a conviction. Article 45 of the Criminal Code<sup>55</sup> notes that the confiscation of property shall only be imposed upon people who are convicted of serious crimes against national security, drug-related crimes,

<sup>50</sup> FAO, "Organic Act on Counter Corruption, B.E. 2542 (1999)," accessed on: 19 June 2024. Available at: <https://faolex.fao.org/docs/pdf/tha202806.pdf>.

<sup>51</sup> At the time of writing, the country visit to Timor-Leste as part of the second review cycle under the UNCAC Implementation Review Mechanism had not yet occurred.

<sup>52</sup> World Intellectual Property Organization, "Penal Code, approved by Decree-Law No. 19/2009, Timor-Leste," accessed on: 12 June 2024. Available at: <https://www.wipo.int/wipolex/en/legislation/details/10928>.

<sup>53</sup> Ministry of Justice, "Law No.17/2011 of 28<sup>th</sup> of December, legal regime covering the prevention of and combat against money laundering and financing of terrorism," accessed on: 12 June 2024. Available at: <https://mj.gov.tl/jornal/lawsTL/RDTL-Law/RDTL-Laws/Law%2017-2011%20.pdf>.

<sup>54</sup> Implementation Review Group, "Executive Summary," CAC/COSP/IRG/II/2/1/Add. 28, 9 July 2021. Available at: [https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/6-10September2021/CAC-COSP-IRG-II-2-1-Add.28/V2105226\\_E.pdf](https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/6-10September2021/CAC-COSP-IRG-II-2-1-Add.28/V2105226_E.pdf).

<sup>55</sup> WIPO, "Criminal Code No. 100/2015/QH13 of November 27, 2015," accessed on: 19 June 2024. Available at: <https://www.wipo.int/wipolex/en/legislation/details/17225>.

corruption, or other prescribed crimes. Property that can be confiscated include: instruments and vehicles used for the commission of the crime; items or money earned from the commission of the crime from selling or exchanging them; or illegal profits earned from the commission of the crime.

During the country visit as part of the second review cycle under the UNCAC Implementation Review Mechanism in 2019, it was confirmed that article 106 of the Criminal Procedure Code<sup>56</sup> regulates the handling of exhibits during the investigation, prosecution and adjudication processes. The authorities provided that article 106 can be used, in practice, to confiscate exhibits in the event of the death of the offender. However, the article does not explicitly state this, nor does the provision allow for non-conviction-based confiscation of all types of property and proceeds of crime. Authorities also reported that the Supreme People's Court was developing a draft resolution on the recognition and enforcement of foreign court judgments and decisions involving NCBF. At the time of writing this paper, this draft resolution was not yet in force. However, following the country visit, article 91 of Viet Nam's Law No. 11/2022/QH15, Law on Inspections<sup>57</sup> has been used to provide for domestic NCBF. During or after conducting inspections, the person issuing the inspection decisions (usually the Head of Inspection Agency) can issue decisions on confiscating assets which are appropriated, illegally used, or lost due to violations, without waiting for the conclusion of the inspection. Such decisions must be made in writing and include information on the assets that are to be recalled, the responsibilities of relevant agencies, organizations and individuals, the duration of implementation and the responsibilities of persons whose assets are recalled.

## Recommendations

Improving the implementation of NCBF is key to ensuring that the recovery of corrupt proceeds can occur more quickly and with fewer legislative hurdles. To enhance international cooperation and facilitate cross-border asset recovery, it is also important that States explicitly recognize and allow for foreign NCBF orders to be enforced.

Given the varied implementation of NCBF in ASEAN Member States, Mongolia and Timor-Leste, and building on the outcomes of the country reviews under the UNCAC Implementation Review Mechanism, these States parties could consider the following:

- Explicitly enacting legal provisions for NCBF in relation to Convention offences;
- Allowing NCBF for the purposes of mutual legal assistance;
- Allowing for the recognition and enforcement of foreign NCBF orders;
- Clearly setting out the legal basis of NCBF, including, where appropriate, defining the relationship between NCBF proceedings, other forms of civil forfeiture, and forfeiture where final judgments or outcomes are required;
- Setting out the standard of proof required for NCBF;
- Explicitly allowing NCBF in a broad range of circumstances where a criminal prosecution is unavailable or unsuccessful;
- Providing secondary legislation, administrative rules, and guidance to supplement legislation on NCBF;
- More explicitly setting out how third parties who have a legitimate interest in assets, subject to forfeiture, can intervene in proceedings, including providing them with time limits to file and respond to NCBF proceedings, and procedures and methods for providing third parties with notice;
- Subjecting a wide range of assets to NCBF proceedings, including all the proceeds and instrumentalities of the crime, and all the proceeds and benefits derived from the crime, including foreign offences; and
- Strengthening expertise and building the capacity of national authorities to manage both domestic and foreign NCBF.

<sup>56</sup> WIPO, "Criminal Procedure Code No. 101/2015/QH13 of November 27, 2015," accessed on: 19 June 2024. Available at: <https://www.wipo.int/wipolex/en/legislation/details/21477>.

<sup>57</sup> Thu Vien Phap Luat (Law library), "Law No. 11/2022/QH15," accessed on: 9 September 2024. Available at: <https://thuvienphapluat.vn/van-ban/Bo-may-hanh-chinh/Luat-Thanh-tra-2022-544688.aspx>.