

# Targeting Profit: Non-Conviction Based Forfeiture in Environmental Crime

## Key takeaways

- » Using legal powers to confiscate assets can be an important element of enforcement against environmental crime because it targets **the profit motive for environmental crime and disrupts the financing of further criminal activity.**
- » **Confiscating illicit assets does not require an individual to be convicted.** Many countries have judicial procedures to confiscate assets derived from criminal activity without the need for a specific criminal conviction.
- » This procedure, referred to as non-conviction based forfeiture (NCBF), can be an **effective way to target the profits from environmental crimes**, where corruption<sup>1</sup> and money laundering are frequently significant components.
- » **Understanding and applying anti-corruption and anti-money laundering laws in their country** is vital for enforcement practitioners to be able to pursue criminals' assets more effectively. Early coordination with anti-corruption and financial intelligence authorities will assist in this.
- » NCBF is no different to the process of criminal investigation and prosecution, in that it depends on the degree to which good governance, strong and accountable institutions, and a well-functioning justice system are present in a country. Prior to engaging NCBF for environmental corruption cases, **risks should be assessed in a similar manner to the risks of existing law enforcement and prosecution practices** in a given country.

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## Crime shouldn't pay – but unfortunately it does

Money is at the heart of environmental crimes that exploit wildlife, forests, fisheries or other natural resources. These transnational crimes generate significant profits, estimated at USD 7-23 billion annually for wildlife crime alone (Nellemann et al. 2014), and are mostly “serious, organized crime on an industrial scale driven by the profit motive” (Haenlein and Keatinge 2017). Wildlife traffickers rely heavily on bribery of officials, including rangers, customs, agents, prosecutors, and judges, as well as complex fraud and tax evasion (FATF 2020 p. 7).

### Following the money

Trafficking in products derived from environmental crime is commonly regarded as low-risk and high-profit. To tackle this lucrative trade, numerous experts and organizations advocate conducting thorough financial investigations to “follow the money” (FATF 2020; Reid et al. 2020) and addressing laundering of the profits (Shelley 2020).

<sup>1</sup> In the context of this Introductory Overview, references to corruption should be taken as meaning acts which would amount to a corruption offense in the country in which they have taken place.

Following the money helps investigators identify individuals involved in trafficking environmental crime products and uncover the routes through which illicit goods are trafficked. It also helps locate assets that can be subsequently confiscated.

However, asset forfeiture powers are underused in environmental crime cases, including wildlife crime (APG and UNODC 2017). This can be due to a failure to conduct financial investigations, lack of experience on the part of practitioners, or limited powers of asset forfeiture under domestic legislation. The result is that, as the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG 2016) lamented, “despite arresting traffickers and seizing illegal wildlife products, law enforcement have [sic] failed to arrest or convict, let alone confiscate/forfeit illegally acquired assets by the criminal masterminds wreaking havoc in this area across Africa.” This leaves an important tool unused.

## Taking the profit out of environmental crime

Confiscating assets from criminal actors is based on the principle that crime should not pay. Asset recovery seeks to remove the profits of criminal activity from those that benefitted from the crime. Seizing criminal assets also removes finances that would otherwise be used in further criminal activity, for example to pay bribes. Actively targeting the proceeds of environmental crime can be a significant deterrent by increasing the risk and lowering the profit for those involved.

### Basic forfeiture is no match for sophisticated criminality

The most basic form of criminal forfeiture, confiscation, involves seizure of items used to commit a crime (instrumentalities) and any proceeds originating from the crime after an individual is convicted. In the context of wildlife trafficking, this could include confiscation of a poacher’s vehicle and any money received for the animal.

### Key concepts

**Asset forfeiture (or confiscation)** is a process in which a court orders an individual to give up assets which have been established to be the proceeds and/or instrumentalities of crime. When this order is **non-conviction based**, it occurs without the individual being convicted of a criminal offense. This procedure is often pursued in civil, rather than criminal, courts and may be called civil recovery.

**Proceeds of crime** are assets generated, directly and indirectly, through criminal activity and may take the form of cash, investments, property, vehicles, jewelry, or other items of value.

**Instrumentalities of crime** are articles used to commit a crime, for example money, vehicles, firearms, snares, or containers.

**Balance of probabilities** is usually the standard of proof in civil cases. To impose sanctions, a court must be satisfied that on the evidence, the case brought by one party is more probable, or more likely than the other. This contrasts with the higher standard of proof in criminal cases, where guilt must be established “beyond a reasonable doubt.”

This may be a hardship for the poacher but has no impact on the wildlife traffickers further up the chain. As the use of criminal confiscation has increased, driven initially by drugs and other organized crime cases, criminals have become more sophisticated at concealing the profits from their activity. Many launder the proceeds through corporate structures and bank accounts in other jurisdictions. In environmental crime, those masterminding the criminal activity distance themselves from hands-on involvement, thus reducing the likelihood of being convicted of a crime and facing subsequent asset recovery measures.

## Recovering the assets of a Thailand-based wildlife trafficker

A multi-million-dollar asset forfeiture case in Thailand involving a suspected wildlife trafficker (Laohong 2021) demonstrates how prosecutors can use anti-money laundering laws to target criminal assets even without a criminal conviction.

Under Thailand's Anti-Money Laundering Act of 1999 (AMLA 1999), money laundering charges can be brought for the movement and hiding of profits of illegal exploitation of natural resources. In a case where there is convincing evidence that any asset is connected with the commission of an offense, prosecutors can file a petition to the court for an order that the asset be vested in the State. Any person claiming ownership of the asset has to demonstrate their ownership and show that it is not connected to any offense (AMLO 2019).

Using powers under this Act, in March 2021 the Thai authorities ordered the seizure and freezing of assets valued at 200 million baht (USD 6.37 million) connected with the suspected commission of wildlife trafficking offenses. The seizure is a result of a financial investigation, with support from the private sector and NGOs, into a network suspected to involve Boonchai Bach, who had earlier been convicted for wildlife offenses, but the conviction was overturned.

## Targeting higher-level criminals for corruption and money laundering

In addition to being a crime in itself, corruption enables environmental crime in a wide variety of ways. For example, criminals can use bribes and kickbacks to gain illegitimate licenses and access to natural resources, as well as leverage corrupt relationships to evade investigation and prosecution.

Corruption also facilitates the flow of products past customs and other export restrictions. However, corruption offenses can be especially difficult to prove to a criminal standard, not least because they are typically private acts between individuals which are seldom witnessed or otherwise recorded.

In countries that have them, therefore, NCBF mechanisms can be a powerful tool to target criminal finances derived from corruption related to environmental crimes, especially of those higher up the criminal chain and therefore further removed from the criminal act itself.

## Breaking down NCBF – what are the possibilities?

As with criminal confiscation, NCBF is a judicial process: a court determines whether the assets are of a criminal origin after hearing evidence from the State and the individual holding the asset. Of the different types of NCBF (CARIN 2015), the following three have the greatest potential in an environmental crime context. These could be applied in both source and destination countries, depending on capacity and on the political and legal context.

1. **Extended confiscation (forfeiture)** takes place as part of criminal proceedings after an individual is convicted of a trigger or lifestyle<sup>2</sup> offense, including trafficking offenses. Extended confiscation enables the court to look beyond the direct proceeds of the crime of which the defendant has been convicted and to consider whether the remainder of their assets have been derived from other criminal activity. Typically, the legislation will allow the court to assume that the assets are derived from criminal activity unless the offender can demonstrate their lawful origin. The United Kingdom has had some form of extended confiscation legislation since 1986, but this method of asset forfeiture took time to gain acceptance in other countries. Extended confiscation is now generally accepted as a legitimate form of asset forfeiture in cases of serious crime,<sup>3</sup> and more countries have introduced

<sup>2</sup> See for example the United Kingdom Proceeds of Crime Act 2002, Section 75.

<sup>3</sup> See for example the European Union Directive (2014/42/EU) on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

these provisions. Mozambique, as part of its long-running struggle to prevent wildlife crime, recently made this change.<sup>4</sup>

2. **Civil forfeiture (confiscation)** is a procedure in which the prosecutor seeks to prove that a specific asset has resulted from unlawful conduct. This procedure is usually civil in nature and so the lower standard of proof (balance of probabilities) applies. The prosecutor will usually have to make the case that the asset has or is likely to have derived from criminal conduct. The burden is then on the person owning or holding the asset to show that it has derived from legitimate income. It is often not necessary to show that the asset has derived from a particular criminal act for the court to order the asset to be forfeited. Civil forfeiture is not dependent upon a criminal conviction and so can be applied in cases where an individual has not been prosecuted or even where there has been an acquittal (see Box 3). States are increasingly introducing this mechanism of asset recovery, for example in Malawi<sup>5</sup> and Peru (Solorzano 2021), but the extent of its use varies among jurisdictions.

3. **Unexplained wealth or illicit enrichment procedures** can be criminal or civil in nature and can be used, for example, to target the assets of public officials who are believed to have received corrupt payments over a period of time. There is no need to prove an underlying crime (Dornbierer 2021). Instead, under this model a comparison is made between the actual accumulated wealth of an individual and their declared legitimate income and the individual is required to justify any disparity. In Kenya, for example, prosecutors used illicit enrichment laws to obtain an order for payment of KES 318 million (nearly USD 3 million) from a former public finance official following his failure to account for assets which exceeded his legitimate income (Nairobi Law Monthly 2020).

## Success factors for recovering the proceeds of corruption and environmental crime

### Growing international recognition of NCBF to target criminal finances

Forfeiture of assets without conviction could be seen as a measure that interferes with an individual's human rights. However, NCBF focuses on establishing the criminal origin of the **assets** held by an individual, not about establishing the guilt of a particular individual. There is no risk of loss of liberty. A common feature of NCBF procedures is that the State has to establish a case regarding the assets before the asset holder is given the opportunity to present evidence before the court to demonstrate the licit origin of the assets. In this sense, its application, as with all criminal justice measures, relies on good governance, strong and accountable institutions, and a well-functioning justice system.

There are many circumstances in which a criminal conviction may not be possible, for example when the suspect has died, has absconded, or is too ill to be tried. In other cases – particularly those involving corruption and environmental crime – available evidence may be insufficient for a criminal conviction but may be sufficient to show that criminal activity led to the acquisition of assets.

International courts<sup>6</sup> and forums, including the United Nations Special Session of the General Assembly against Corruption in 2021,<sup>7</sup> endorse NCBF as a legitimate complementary tool to tackle corruption and recover illicitly obtained assets.

<sup>4</sup> Mozambique: Asset Recovery Bill becomes law, heralding new era in the fight against corruption | Basel Institute on Governance, <https://baselgovernance.org/news/mozambique-asset-recovery-bill-becomes-law-heralding-new-era-fight-against-corruption>

<sup>5</sup> Financial Crimes Act 2017.

<sup>6</sup> European Court of Human Rights, *Gogitidze v. Georgia* (2015), 12 May 2015, Appl. No. 36862/05.

<sup>7</sup> Political Declaration of the 32nd UNGASS, 2021, <https://undocs.org/en/A/S-32/L.1>.

Countries have different capacities and legal frameworks for asset recovery. The chances of recovering assets from an environmental criminal are higher where:

- » A country has a **variety of asset recovery mechanisms** that can be deployed in environmental crime cases, including NCBF.
- » Law enforcement agencies, prosecutors, and other stakeholders such as wildlife and revenue agencies **cooperate** to determine investigative strategies and obtain evidence.
- » Law enforcement agencies have the **capacity to conduct effective financial investigations** to identify assets and demonstrate their criminal origin.
- » Law enforcement agencies **cooperate closely with the private sector**, such as financial and transport companies, and **specialized NGOs** to broaden their access to evidence and utilize specific technical expertise.
- » Courts **effectively seize and freeze** suspected criminal assets until the trial.

Success in asset recovery requires strong political will to enable the introduction of effective legislation to confiscate criminal assets (with or without a conviction) and the provision of adequate resources so that cases can be properly investigated and heard within a reasonable period of time. The absence of effective legislation, the lack of court time and judges to hear cases, and the failure to manage cases robustly, as well as the intervention of corrupt actors, can create delays and reduce the effectiveness of asset recovery processes. Sometimes delay may be due to the sheer complexity of the investigation into corporate and financial structures created to thwart the asset recovery process. But however long the overall procedure, the freezing of assets at an early stage still has a significant disruptive effect on criminal activity by preventing their use in the commission of further offenses.

## What can I do?

Practitioners, policymakers, and donors may have different opportunities for action related to the use of asset forfeiture for addressing environmental crime and the corruption that enables it. In every case, it is important to make a careful assessment of the enabling environment for, and potential risks of, encouraging this approach. Then, depending on an actor's role and level of engagement, options include:

- » **Engage with law enforcement agencies and prosecutors** to establish what forms of asset forfeiture are available. Does the country have NCBF mechanisms? Which authorities are responsible?
- » **Promote the follow-the-money approach** in environmental crime cases to identify higher-level criminals and locate illicit assets that could be recovered.
- » **Ask whether money laundering, fraud, tax evasion, or bribery offenses** can be brought against an individual even if there is insufficient evidence to prosecute them for the environmental crimes they are suspected of.
- » **Encourage collaboration** and information-sharing between law enforcement, anti-corruption and environmental stakeholders, domestically as well as internationally in transnational cases.

## References

- AMLO. 2019. *Annual Report 2019*. Anti-Money Laundering Office of the Kingdom of Thailand. [https://www.amlo.go.th/amlo-intranet/media/k2/attachments/AMLOYEngY2019YBook\\_9004.pdf](https://www.amlo.go.th/amlo-intranet/media/k2/attachments/AMLOYEngY2019YBook_9004.pdf)
- APG and UNODC. 2017. *Enhancing the Detection, Investigation and Disruption of Illicit Financial Flows from Wildlife Crime*. Asia/Pacific Group on Money Laundering and the United Nations Office on Drugs and Crime. [https://www.unodc.org/documents/southeastasiaandpacific/Publications/2017/FINAL - UNODC APG Wildlife Crime report.pdf](https://www.unodc.org/documents/southeastasiaandpacific/Publications/2017/FINAL_-_UNODC_APG_Wildlife_Crime_report.pdf)
- CARIN. 2015. *Manual: The History, Statement of Intent, Membership and Functioning of CARIN*, Annex V. Camden Asset Recovery Inter-Agency Network. [https://6205d188-5e8e-4e98-976e-0b39bbb814e3.filesusr.com/ugd/d54f05\\_4ccdfc507cb44d3588354132a68af289.pdf](https://6205d188-5e8e-4e98-976e-0b39bbb814e3.filesusr.com/ugd/d54f05_4ccdfc507cb44d3588354132a68af289.pdf)
- Dornbierer, A. 2021. *Quick guide to illicit enrichment*. Basel Institute on Governance. <https://baselgovernance.org/publications/quick-guide-5-illicit-enrichment>
- ESAAMLG. 2016. *A Special Typologies Project Report on Poaching and Illegal Trade In Wildlife and Wildlife Products and Associated Money Laundering in the ESAAMLG Region*. <https://www.esaamlg.org/reports/TYOLOGIES-REPORT-ON-THE-WILDLIFE-CRIMES-AND-RELATED-ML..pdf>
- FATF. 2020. *Money Laundering and the Illegal Wildlife Trade*. [www.fatf-gafi.org/publications/methodandtrends/documents/money-laundering-illegal-wildlife-trade.html](http://www.fatf-gafi.org/publications/methodandtrends/documents/money-laundering-illegal-wildlife-trade.html)
- Haenlein, C. and Keatinge, T. 2017. *Follow the Money: Using Financial Investigation to Combat Wildlife Crime*. RUSI. <https://rusi.org/explore-our-research/publications/occasional-papers/follow-the-money-using-financial-investigation-to-combat-wildlife-crime>
- Laohong, K. 2021. Amlu poaches more of smuggler's assets. *Bangkok Post* (17 March 2021). <https://www.bangkokpost.com/thailand/general/2084739/amlo-poaches-more-of-smugglers-assets>
- Nairobi Law Monthly. 2020. Corrupt public officers: Unexplained Wealth Order. *Nairobi Law Monthly* (9 June 2020). <https://nairobilawmonthly.com/index.php/2020/06/09/corrupt-public-officers-unexplained-wealth-order/>
- Nellemann, C., Henriksen, R., Raxter, P., Ash, N. and Mrema, E. (Eds). 2014. *The Environmental Crime Crisis – Threats to Sustainable Development from Illegal Exploitation and Trade in Wildlife and Forest Resources*. A UNEP Rapid Response Assessment. United Nations Environment Programme and GRID-Arendal, Nairobi and Arendal. <https://wedocs.unep.org/20.500.11822/9120>
- Reid, A., Parry-Jones, R. and Keatinge, T. 2020. *Targeting corruption and its proceeds: Why we should mainstream an anti-corruption perspective into “follow the money” approaches to natural resource crime*. TNRC Topic Brief. <https://www.worldwildlife.org/pages/tnrc-topic-brief-targeting-corruption-and-its-proceeds>
- Shelley, L. 2020. *Why is money laundering a critical issue in natural resource corruption?* TNRC Introductory Overview. <https://www.worldwildlife.org/pages/tnrc-introductory-overview-why-is-money-laundering-a-critical-issue-in-natural-resource-corruption>
- Solórzano, O. 2021. *Case study: The Nun – Confiscating assets of the Shining Path terrorist organisation*. Basel Institute on Governance. <https://baselgovernance.org/publications/case-study-the-nun>

### About Targeting Natural Resource Corruption

The Targeting Natural Resource Corruption (TNRC) project is working to improve biodiversity outcomes by helping practitioners to address the threats posed by corruption to wildlife, fisheries and forests. TNRC harnesses existing knowledge, generates new evidence, and supports innovative policy and practice for more effective anti-corruption programming. Learn more at [tnrcproject.org](http://tnrcproject.org).

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