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Secretariat for Multidimensional Security

**XLVII MEETING OF THE GROUP OF EXPERTS
FOR THE CONTROL OF MONEY LAUNDERING
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Bogota – Colombia**

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**PRESENTATION
STUDY ON MIXED ASSETS AND ASSETS OF EQUIVALENT VALUE**

STUDY ON MIXED ASSETS AND ASSETS OF EQUIVALENT VALUE

XLVII MEETING OF THE GROUP OF EXPERTS FOR THE CONTROL OF MONEY LAUNDERING

Sub-Working Group on International Cooperation and Forfeiture



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STUDY
ASSETS OF EQUIVALENT VALUE
AND MIXED ASSETS

Strategic Plan 2018-2020

Line of Action :

- Conduct a study on forfeiture of assets of equivalent value and mixed assets
- (Substitute assets and commingled assets are equivalent terms in the USA)



STUDY



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ASSETS OF EQUIVALENT VALUE
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GENERAL OBJECTIVE



Identify countries in which legislation was developed that regulates cases involving the forfeiture of licit assets with an equivalent value. Likewise, identify countries that allow for the forfeiture of commingled assets and describe those States' practical application. The aim is to determine the necessity of incorporating these legal provisions in the legislation of countries that may have standards that are awaiting approval (and all other countries). With this, the aim is, furthermore, to identify best practices related to the application of adequate precautionary measures for these types of assets, as well as measures for their adequate management.



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METHODOLOGY

The Technical Secretariat will send out a questionnaire to the OAS Member States regarding the existing legislation to regulate cases of equivalent and mixed assets (substitute / commingled assets)





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METHODOLOGY

Questionnaire:

Through the observations received at the plenary meeting in June, the questionnaire was reformulated so the countries would contribute with typologies and practical cases regarding assets of equivalent value and mixed assets, as well as the explanation of the results of their management



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The countries that answered the questionnaire were Bolivia, Brazil, Costa Rica, El Salvador, United States, Honduras, Mexico, Panama, Paraguay, Peru, Saint Vincent and the Grenadines, and Uruguay





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ASSETS OF EQUIVALENT VALUE

In the doctrine, they have been defined as those of licit origin and similar value, for which the in rem forfeiture or confiscation is declared in substitution for assets with illicit origin or destination that have been disposed of, destroyed, concealed, disappeared, stripped or that for some reason cannot be found, identified, seized, frozen or materially apprehended in order to dictate a sentence, as long as they belong to the same owner.





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ASSETS OF EQUIVALENT VALUE

Saint Vincent and the Grenadines does not include the terms “assets of equivalent value” nor “mixed assets”. However, in the Law of Criminal Assets N° 38 de 2013, reformed by the Law of Criminal Assets (Amendment) N° 18 of 2017 ("POCA"), the forfeiture procedures are similar to the forfeiture of assets of equivalent value, where it is emphasized the value of the profit obtained from the criminal conduct of the person, since the forfeiture operates against the person (Part II of POCA).



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ASSETS OF EQUIVALENT VALUE

Disposition, Model Law on In Rem Forfeiture of the United Nations Office on Drug and Crime (UNODC):

- When for any reason the State cannot apply a material or legal precautionary measure over the assets subject of investigation.
- When the asset object of forfeiture has been consumed, destroyed or concealed.



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ASSETS OF EQUIVALENT VALUE

Disposition, Model Law on In Rem Forfeiture of the United Nations Office on Drug and Crime (UNODC):

- When the asset object of forfeiture has diminished its value in relation to the moment in which they were obtained.
- When the asset object of forfeiture has been legally acquired by a bona-fide third party not responsible for the crime.
- When the asset object of forfeiture has not been located.



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Peru points out that apart from the previously indicated dispositions, the legislation allows the possibility other cases, which the establish by:

“or for any other analogous reason”.





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CONSTITUTIONALITY

In sentence C-374, Colombia indicates:

“The in rem forfeiture is possible over these [assets] or over those that substitute them within one’s patrimony. This aims to promote the principle by which society cannot reward crime or immorality”.





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CONSTITUTIONALITY

Sentence 146 – 2014, El Salvador
indicates:

“The figure of assets of
equivalent value must be
harmonized with the principle
of proportionality”.





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MIXED ASSETS

The disposition for mixed assets (commingled assets) aims to avoid the evasion of the in rem forfeiture action when licit and illicit patrimony can be confused.





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MIXED ASSETS

Colombia, In Rem Forfeiture Code, disposes:

- “7. Those that constitute income, revenues, gains and other profits derived from the previous assets.
- 8. Those of licit origin, used to conceal assets of illicit origin.
- 9. Those of licit origin, materially or legally mixed with assets of illicit origin”.



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MIXED ASSETS

Mexico, In Rem Forfeiture Law, disposes:

“II. Those that have been used or destined to conceal or mix assets produced by the crime.

It will be understood as concealment, the action of hiding, dissimulating or transforming assets produced by the crime and the mix of assets, the sum or application of two or more assets.

This case contemplates those assets that are instrument, object or product of the crime, even when the sentence has not yet been dictated to determine criminal responsibility, but there are enough elements to determine that the illicit event took place”.



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CONSTITUTIONALITY

“The first norm establishes a disposition in which the in rem forfeiture is possible but not due to the illegitimate origin of the assets, but due to the lack of compliance with the social and environmental function of the property. That who has licitly obtained the ownership of some assets but does not destine them to the generation of national wealth, nor to the preservation of the environment, but to conceal or mix assets of illicit origin, breaches the function imposed by the constituent to the property and is incurring in a behavior that can lead to the in rem forfeiture of that asset”.

COLOMBIA



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CONSTITUTIONALITY

“If one or more assets are used to conceal or mix another or others of illicit origin, a link is presented between that conduct, the respective assets and the expected outcome, since the deceit committed by who intends to conceal the illicitness pretending to show as licit some assets that are really product of illicit activities hindering the differentiation of the origin of every and each one of them, affects the mass of assets that is hence illicit.” **COLOMBIA**



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MIXED ASSETS AND ASSETS OF EQUIVALENT VALUE PRECAUTIONARY MEASURES

- Bolivia, Colombia, El Salvador, Honduras, Mexico and Peru indicate that the seizure of assets of equivalent value and mixed assets is possible.
- The provisional registry annotation appears as another possibility in Bolivia, Colombia, El Salvador, Honduras, Mexico and Peru.



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MIXED ASSETS AND ASSETS OF EQUIVALENT VALUE PRECAUTIONARY MEASURES

Honduras indicates that one must present a request before the corresponding Judge, establishing the existing elements that indicate that the asset can be concealed, transferred or will not be available for the time in which the sentence could be dictated.

The seizure has a term of duration. Once that time is over, the prosecution or the request for forfeiture must be presented.





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MIXED ASSETS AND ASSETS OF EQUIVALENT VALUE PRECAUTIONARY MEASURES

According to article 316 of the Criminal Procedural Code of Peru, Decree N° 957, the effects produced by the criminal offense and the instruments with which it has been committed, as well as the objects of the crime allowed by the Law, as long as there is risk of delay, may be seized throughout the first judicial proceedings and the course of the Preparatory investigation, either by the Police or the Public Ministry. Right after, the District Attorney's Office will immediately request the Judge of the Preparatory Investigation the confirmatory resolution, which will be emitted, without any formalities within two days.

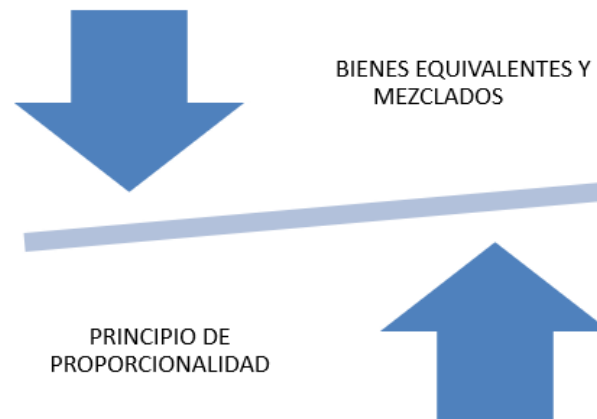


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MIXED ASSETS AND ASSETS OF EQUIVALENT VALUE PRINCIPLE OF PROPORTIONALITY

It refers to the sentence assigned to the commission of a crime, which must be proportionate to the seriousness of the damage caused in its commission. Its purpose is to avoid the excessive use of sanction that entail a deprivation or restriction of a right.





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MIXED ASSETS AND ASSETS OF EQUIVALENT VALUE

PRINCIPLE OF PROPORTIONALITY

Due to the reference to equivalence, it is clear that an asset of equivalent value can only concern an asset which has been impossible to locate or over which exist bona fide third parties exempt of guilt, which implies that the principle of proportionality has full application when dealing with equivalent assets. **COLOMBIA**



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MIXED ASSETS AND ASSETS OF EQUIVALENT VALUE ASSESSMENT

Due to the relevance of the principle of proportionality in relation to the assets of equivalent value and mixed assets, its assessment gains importance.





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ASSESSMENT

Bolivia: the expert report of the asset that cannot be located must be conducted on the basis of the available information in order to grant it a value and with that information seize or forfeit assets of equivalent value.

Honduras: the assessment is carried out by the valuing of expert named by the jurisdictional entity and the determination of the amount through a financial expert.





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ASSESSMENT

El Salvador, in a sentence of unconstitutionality, reference 146-2014, clearly stated the duty of the Attorney General of the Republic to carry out all the activities that tend to individualize the value that the assets had whether disposed of, destroyed, concealed, disappeared, stripped or that for some reason cannot be found, identified, seized, frozen or materially apprehended in order to dictate a sentence as long as they belong to the same owner.





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BONA FIDE THIRD PARTIES

Bona fide third parties count with procedural guarantees to protect their rights, exercising their right to material and technical defense. Therefore, they can appear in person to certify the legitimate origin of the assets, propose evidence, request expert reports, etc.





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CASE STUDY

- Uruguay, “Ruben Weizmann. Money Laundering. 2009.”

The forfeit for equivalence was order of two immovable properties valued in approximately 2 million USD, and the imposition of a fine of 4.5 million USD.

To ensure the recovery, the legal area of the Forfeited Assets Fund requested the freezing of such assets and other assets of the convicted party (assets aside from the criminal proceeding) until the coverage of the sum of the fine.



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CASE STUDY

- Uruguay, “Ruben Weizmann. Money Laundering. 2009.”

The Assets Fund reached an agreement for a voluntary payment on behalf of the convicted party in exchange for the lifting of the imposed precautionary measures. The agreement was accomplished handing into the accounts of the Assets Fund 4.5 million dollars as established in the sentence.





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CASE STUDY

- Saint Vincent and the Grenadines. Money laundering of Gellizeau
The accusation, among other things, was of concealing a yacht, around US\$1,733,463.00. The money was seized in the civil proceeding for asset recovery, depositing the cash in an account that generates interests and an administrator was appointed to sell the vehicles that were already devaluating.





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TYOLOGY

- Bolivia. Mixed assets.
- ✓ The companies that are established with illegal capital and then generate licit profits.
- ✓ Fixed-term deposits, where the deposited money is initially illegal, but the interests won are now licit.
- ✓ Immovable properties in co-ownership, where one of the co-owners has part of his/her asset confiscated.



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BASIC CONCEPTS

- Some countries go further, not only including cases specifically, but in countries like Peru there is the possibility that other cases exist from the statement “and any other analogous reason”.
- The seizing and forfeiture of assets of equivalent value find their essence in the enrichment generated by the commission of an illegal conduct that constitutes an intentional illicit crime.



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BASIC CONCEPTS

- The principle of proportionality is significant to avoid the excessive use of sanctions that entail the deprivation or restriction of a right, being fundamental for the constitutional validity of the analyzed figures.
- The identification of an asset complicates the authorities because in the majority of cases the assets are not in their estate, they are registered in favor of straw men.



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BASIC CONCEPTS

- The purpose of seizing mixed assets is the application of this precautionary measure in order to avoid the assets object of the action being negotiated, taxed, embezzled, transferred, deteriorated, lost or continue to be used or destined to the commission of the illicit activity.

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