

Confiscation under Money Laundering Law: A Comparison of Legal Measure between Thailand and the United States

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Abstract

This article shows the explanation of legal measure in confiscation related money laundering between the Anti-Money Laundering Act 1999 (AMLA 1999) of Thailand and the Money Laundering Control Act 1986 (MLCA 1986) of the United States to answer the research question that the confiscation under the AMLA 1999 is not the effective legal measure to handle money laundering anymore. By applying a comparative and descriptive method, this article shall be analyzed with two focuses such as (1) the definition of predicate offence under Article 3 of AMLA 1999, and (2) the method of confiscation under Article 51 of AMLA 1999. It has found that (1) Article 3 of AMLA 1999 does not have enough predicate offences definition to cover up all illegal activities which cause a risk of money laundering or financial crime, and (2) the method of confiscation under Article 51 of AMLA 1999 is the Property-based based confiscation which could not forfeit other assets not related to the offence. Therefore, the author suggests (1) adding the wide range of the definition under Article 3 of AMLA 1999 in predicate offences, and (2) adopting a value-based confiscation method into the AMLA 1999.

Keywords: Confiscation, Money Laundering, Anti-Money Laundering Act 1999, Money Laundering Control Act 1986

Introduction

Today money laundering is one of the major problems in the phase of economy and security of governments. Money laundering is one of the criminal crimes which negatively affects the global financial system. It has recently emerged on a massive scale in Thailand based on the globalization of the economy and the internationalization of organized crime. Money Laundering is a word used by criminal organizations in the U.S. which founded by Meyer Lansky (The IBA Anti-Money Laundering Forum, 2020). The principle of money laundering is to convert dirty money to be legal or clean money which is a method to conceal the benefit that comes from unlawful activities by financial transfer or procedures to make the said benefit become the legal money with the same amount (United Nations Office on Drug and Crime, 2020; Boonyopatt, 2004: 33). In order to combat the money laundering problem, Thailand officially enacted the Anti-Money Laundering Act 1999 (AMLA 1999), as well as the amendment in 2015 by the advice, provide by Financial

Action Task Force (the FATF Recommendations) (FATF, 2020). The AMLA 1999 consisted of eight parts with 66 articles that were targeted to combat effectively with money laundering in Thailand. Nevertheless, many money laundering lawsuits have been dismissed due to no prima facie because it is not under Article 3 of AMLA 1999 as the predicate offences. As well as the United States enacted the Money Laundering Control Act 1986 (MLCA 1986) which is one of the most outstanding legal standards in the area of money laundering due to the scope of the US forfeiture mechanisms has been broadened to include terrorism following the terrorist attacks of September 2001. These confiscation processes were used more than a decade later to punish white-collar criminals. The confiscation of criminal proceeds was also an important part of the war against drug cartels, organized criminals, terrorism, and white-collar criminals in the U.S. (Ryder, 2013: 767). Consequently, this article pointed out the MLCA 1986 as to compare with the AMLA 1999 to answer the key research question that why the confiscation under the AMLA 1999 is not the effective legal measure to handle money laundering.

Objectives

This article objective is (1) to study Article 3 and Article 51 of AMLA 1999 to explain the predicate offences definition and the confiscation method, (2) to analysis why Article 3 and Article 51 of AMLA 1999 creates the legal obstacle for the confiscation under the AMLA 1999, and (3) to suggest how to fill the gap of the mentioned legal obstacle under the AMLA 1999.

Research Questions

There are three main research questions to answer why the confiscation under the AMLA 1999 is not the effective legal measure to handle money laundering as follows;

- 1) What are the predicate offences definition and the confiscation method under the AMLA 1999? (RQ 1)
- 2) Why Article 3 and Article 51 of AMLA 1999 create the legal obstacle for the confiscation under the AMLA 1999? (RQ 2)
- 3) How Article 3 and Article 51 of AMLA 1999 would improve the confiscation measure under the AMLA 1999 to be more effective? (RQ 3)

Research Methodology

This article is qualitative research with a comparative and descriptive approach. Primary data consisted of the Anti-Money Laundering Act 1999 (AMLA 1999) of Thailand and the Money Laundering Control Act 1986 (MLCA 1986) of the United States. Secondary data consisted of pieces of information from the textbook, journals, reports, and newspapers related to Research questions. By a comparative and descriptive approach, the author analysis and apply secondary data into primary data to answer the mentioned Research questions.

The US Law (MLCA 1986) is considered as an appropriate comparative model of this research because the US presents and uses the high standard of confiscation because as a superpower in the world politics the US always facing the difficulty of confiscation from criminal especially the terrorist. However, this research is only focused on Article 3 and Article 51 of AMLA 1999 because Article 3 as the predicate offences presents the jurisdiction of AMLA 1999 while Article 51 presents the present confiscation method of AMLA 1999.

Findings and Discussion

According to the research objectives, the research result is fulfilled as follows;

Research objective 1, which is “to study Article 3 and Article 51 of AMLA 1999 to explain the predicate offences definition and the confiscation method”, is fulfilled by reviewing the predicate offences definition under Article 3 and the Property-based based confiscation under Article 51 of AMLA 1999 to answer the RQ1 on what is the predicate offences definition and the Property-based based confiscation.

It found that there are two factors to be discussed such as (1) what the predicate offences definition under Article 3 of AMLA 1999 is, and (2) what the confiscation method under Article 51 of AMLA 1999 is.

The first factor is what the predicate offences definition under Article 3 of AMLA 1999 is. Surapon Trivet, the money-laundering expert, described predicate offences as the offences that generate illegal income money for money laundering to the money laundering process (Trivet, 2005: 58). As same as Weerapong Boonyopap, the professor and expertise of financial crime in Thailand, explained that predicate offences are the criminal offences that are the causes or the sources of the illegal assets or money (Boonyopap, 2003). Article 3 paragraph one defined that predicate offence means any offences which are relating to crime ground under Article 3 (1) - (21) of AMLA 1999 (The Anti-Money Laundering Office, 2001). So, the definition of predicate offence is the criminal base specified in the AMLA 1999 which has a criminal punishment measure for the money laundering offender as well as a management measure for illegal money or assets from the offence. The second factor is what the confiscation method under Article 51 of AMLA 1999 is. The confiscation method under Article 51 of AMLA 1999 is Property-based confiscation which is aimed at tainted properties that are connected to, or found to be, the proceeds or instrumentalities of crime. This requires a link to be established between the identified assets and an offense (Brun & Gray, 2020). However, the Property-based confiscation cannot work when assets cannot be linked to an offense because the suspected offender has not directly participated in criminal activity, or the benefits are distanced from the crime through money laundering.

Research objective 2, which is “to analysis why Article 3 and Article 51 of AMLA 1999 creates the legal obstacle for the confiscation under the AMLA 1999”, is fulfilled by descriptive analyzing Article 51 of AMLA 1999 to answer the RQ3 on why Article 3 and Article 51 of AMLA 1999 creates the legal obstacle for the confiscation under the AMLA 1999 and the RQ2 on why the confiscation under the AMLA 1999 is not the effective legal measure to handle money laundering. It found that there are two factors to be comparative discussed such as (1) the predicate offence, and (2) the confiscation method between the AMLA 1999 and the MLCA 1986.

Figure 1 Discussion of the difference of confiscation under AMLA 1999 and MLCA 1986

Discussion Issues	AMLA 1999	MLCA 1986
Predicate Offense	21 predicate offences (Art.3)	more than 250 predicate offences which called “Specified Unlawful Activities” (SUAs)
Confiscation Method	Property-based Confiscation (Art.51)	Value-based Confiscation

As shown in Figure 1, the confiscation in money laundering offence in Thailand and the U.S. shares some similarity and differences of predicate offences and confiscation schemes.

For the predicate offences, Article 3 of AMLA 1999 is limited to only 21 predicate offences which do not cover the serious offense due to the narrow definition. In marked contrast, the predict

offences under MLCA 1986 are more than 250 predicate offences that cover all the illegal activities and have a broad definition of a serious offense.

Therefore, Thailand falls considerably short of international standard which requires each country to include all serious offences as predicate offences. It simply implies that only those people who launder the proceeds of each of the 21 predicate offenses applied to the above commit a money laundering crime. In marked contrast, under predicate offences of the MLCA 1986, the state will not regulate the law for a specific case, but it will broadly regulate the law to cover the money transfer generated from the crime and the offender has an intention to support the crime or acknowledge that the transfer is intended to conceal the money origin or owner or avoidance of financial report. All the aforementioned intention must be proof more than the suspicion. The MLCA 1986 specifies the predicate offences in many circumstances which cover financial transfer generated from the crime and the offender has an intention to support the crime or acknowledge that the transfer is intended to conceal the money origin or owner or avoidance of financial report. It enforces the law on several people involved such as banks, financial institutes, and normal citizens.

For the Confiscation Method, Article 51 of AMLA 1999 applied the Property-based Confiscation. This method aims at the tainted property which connected to the crime proceed and is very useful when identified assets can be linked with evidence to an offence. Then the difficulties of this method are when assets cannot be linked to an offense and when such properties are lost or transferred to others. In contrast, the MLCA 1986 applied the Value-based Confiscation which aims at the value of benefit derived from proceeding of crime and imposes a monetary penalty equal to an equivalent value. This method is both effective in law enforcement and legal protection and deprives the offender of any economic advantage from his criminal activity.

Therefore Article 3 and Article 51 of AMLA 1999 makes huge obstacles to exercise the enforcement of money laundering offense especially in predicate offenses and confiscation of asset which directly related to the property involved with the offence. From the problems of enforcement on the property related to the offence, it leads to the analysis for regulating the property forfeiture principles in the money laundering case by considering the principles of the value-based forfeiture to be a supporting principle for enforcement on the Property-based on the AMLA 1999 to achieve the objective of the forfeiture in the money laundering case by focusing on the property which is to suppress the criminal organization with economic punishment.

Research objective 3, which is *“how Article 3 and Article 51 of AMLA 1999 would improve the confiscation measure under the AMLA 1999 to be more effective?”*, is fulfilled by suggesting some recommendations to answer the RQ3 on how Article 3 and Article 51 of AMLA 1999 would improve the confiscation measure under the AMLA 1999 to be more effective.

It found that in order to suggest how Article 3 and Article 51 of AMLA 1999 would improve the confiscation measure under the AMLA 1999 to be more effective, there are two suggestions to be considered as follows;

1) Amend Article 3 in term of Predicate Offences under AMLA 1999: The problem of narrow definition and it is contained merely 21 predicate offences under Article 3 of AMLA 1999 should be solved by amending the extending of the scope of predicate offences in order to include all serious offences. When concerning the confiscation case as identify in Convention against Transnational Organized Crime 2000, which stated that the State party need to combine their confiscation cases into the case of anti-money laundering. In another implication, the State party should extent their law enforcement boundary to be covered all the illegal activity which related to international crimes as identified especially in *“Specified Unlawful Activities”* (SUAs) in the

MLCA 1986 under U.S. law, but they just identify as broadly law enforcement as “*serious offence*” is the confiscation case. Moreover, identifying the confiscation, which related to illegal asset broadly. It achieved the goal of the law process to protect and anti-money laundering truly. Therefore, Thailand should identify the serious offence case which meets the standard from specified unlawful activities in Anti-Money Laundering for State benefit to using as a potential material to Anti Money Laundering. For instance, the offence of counterfeiting currency, counterfeiting and piracy of products, environment crime, murder, grievous bodily injury, etc. Because of all serious offence has affected directly to Country economy. It can be used this legal broadly and affect the private sector for some point. In comparison, the outcome from its process, identifying the confiscation cases of money laundering broadly will be less in cost and less in crime activities as well.

2) Amendment Article 51 by Added Value-based Confiscation Method: Assets associated with criminal offences according to the AMLA 1999 include money that drug offenders obtain, there are no matters how many times assets have been changed or transferred to other people or registered as belonging to others. According to this Act, assets in connection with criminal offences can be confiscated. It can be seen that the extent of power of this Act is wider than that of the criminal code. Furthermore the Court may order confiscation of the right of claim, benefits, profits gained from assets, the third party’s debts which are due to be paid to offenders, including other assets related to the drug-related crime that they transfer within 10 years before the Court orders confiscation or asset freezing afterward.

However, the fact that the Court has the authority to order confiscation in accordance with the Act requires prosecution against defendants who are guilty of drug-related offences. Also the Court must deliver the verdict that defendants have truly committed a crime; then, the confiscation can occur in compliance with criminal procedure. Without this legal procedure, prosecutors have an absolute command in order not to sue, or there may be a prosecution but finally the Court case is dismissed. Therefore, confiscation or asset freezing cannot be made, and the assets have to be returned to the defendants. According to Court Judgment no. 2437/2515 of Thailand (Thailand Supreme Court, 1972), the plaintiff sued the defendants in charged with physical harm with a cricket, however in this case the defendants pleaded that they are not guilty. Even if the cricket was the property used in the offense, it cannot be confiscated in this case. This is the legal flaw that enables criminals to avoid confiscation.

As a result, the confiscation rule should be identified as “*Substitute Assets*” under the U.S. law to be the measurement from the main standard, as followed;

- (1) It has been sued in law process for the illegal asset as the first stage, and
- (2) If they cannot make any process for the illegal asset due to those assets has been used entirely or it means that the Anti-Money Laundering Office cannot trackback, therefore it the measurement of confiscation of “*Substitute Assets*” should be used for law enforcement as those assets has valued equally from the asset that it cannot be traced back. Moreover, it has been accepted that all of the money or asset that the defendant made illegal activity, has persuaded the offender to make the illegal activity the center of crimes. When the government knows the weaknesses of these criminal activities that most of the offender afraid to be in the law process, therefore they brought this measurement to use in this process, by the way, the detail has been identified in this part like how much for confiscation to cut down exactly for this crime process.

Later Thailand should improve its law by adding the substitute asset or value-based confiscation principle to enforce the law on the assets with no relation to the offence that has a value as equal to the lost illegal assets. When considering the purpose of the AMLA (No. 2), B.E.2551 (2008), it

is to stop the crime cycle of money laundering by forfeiting the assets because the assets received from the offence are what keeps the cycle of this crime. But the loopholes and limitations of Thai law make civil forfeiture difficult which links to an inability to stop the cycle. If Thailand can bring the substitute assets to enforcement, there will not be any problems in the practical aspect. In the case that the defendant refuse to pay the amount that the Court orders, the authority can enforce the law on other properties of the defendant based on the right given by the verdict of the Court to confiscate the property which enables the authority to choose to confiscate the property they surely know that it is the defendant's and it will reduce the risk of an impact of the enforcement on the property of other people. Consequently, the result of using a value confiscation in the money laundering case will be a supporting measure for filling loopholes and perfecting the effectiveness of the AMLA 1999. It is an improvement on an internal law to comply with the international convention which is an international standard.

Conclusion

To summarize, these proofs show the weaknesses of the confiscation under the AMLA 1999 and answer why it is not an effective legal measure to handle money laundering in Thailand because there are two legal issues under this research which are: (1) predicate offense, and (2) confiscation measure.

The first issue is that according to Article 3 of AMLA 1999 identifying only 21 predicate offences has not enough to concern nowadays after considering the criminal characters which have been critically changed from the past time. The examination of this asset sometimes has been found that it is not related to 21 confiscation cases as well even there are all illegal assets. This provision is significantly weaker than the international standard and narrows the scope and falls short of the U.S. counterpart, which covers more than 250 predicate offenses. So to solve this problem, Article 3 of AMLA 1999 should be amended to cover up all serious offences.

The second issue is related to Article 49 stated that “*under the provision of paragraph one of Article 48*” does not mean the “*asset*”, which the prosecutor will file, a complaint according to Article 49 paragraph one. However, the process must be required at the first stage for confiscation and seized on those assets by following Article 48 paragraph one. Nevertheless, if the case has the condition under Article 49 paragraph one which stated that the evidence has been occurred to believe that these assets have been raised from illegal activities. While the secretary-general has the authority to file this case to the prosecutor for submitting to the Court for judgment these assets for the state according to Article 49 paragraph one. Nonetheless, it can be noticed those assets still be possessed by the defendant all the time, if those assets have been destroyed or loosed, and after the Court process, the Court is conducted that the asset will be owned by the State according to filing this petition from prosecutor according to Article 51 paragraph one, then it can be occurred the problem from the law enforcement from the Anti-Money Laundering Office, by said how to handle the process of execution. So, to solve this problem, Article 51 of AMLA 1999 should be added the substitute asset or value-based confiscation principle to enforce the law on the assets with no relation to the offence that has a value as equal to the lost illegal assets.

References

- Anti-Money Laundering Office. (1999). *Translation of Anti-Money Laundering Act*. Retrieved from www.amlo.go.th/amlo-intranet/media/k2/attachments/AMLAZNoZ1-5Z2016_2.pdf.
- Boonyopatt, W. (2003). *The Research Report of the Specification of Predicate Offences about the Money Laundering Whose the Offender is an Transnational Crime Organization and*

- Joint Measures in International Stage to Prevent Money Laundering and Forfeit the Assets*. Bangkok: Chulalongkorn University.
- Boonyopat, W. (2004). *The Juridical Procedures and the Anti-Money Laundering Law*. Bangkok: Nititham: 33.
- Brun, J., & Gray, L. (2011). *Asset Recovery Handbook: A Guide for Practitioners from World Bank Publications*. Retrieved from https://star.worldbank.org/sites/star/files/asset_recovery_handbook_0.pdf.
- FATF. (2012). *FATF Recommendations on Combating Money Laundering and the Financing of Terrorism & Proliferation*. Retrieved from www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/fatf%20recommendations%202012.pdf.
- Ryder, N. (2013). To Confiscate or not to Confiscate? A Comparative Analysis of the Confiscation of the Proceeds of Crime Legislation in the United States and the United Kingdom. *Journal of Business Law*, 8, 767.
- Trivet, S. (2005). *The Description of Anti-Money Laundering Law: Problems, Facts and Explanations*. 3rd ed. Bangkok: Winyuchon.
- Thailand Supreme Court. (1972). *The decision of Supreme Court No. 2437/2515*.
- The IBA Anti-Money Laundering Forum. (2020). *History of Anti-Money Laundering*. Retrieved from www.anti-moneylaundering.org/Money_Laundering.aspx.
- United Nations Office on Drug and Crime. (2020). *The Money Laundering Cycle*. Retrieved from www.unodc.org/unodc/en/money-laundering/laundrycycle.html.