

The Importance of Non-Conviction Based (NCB) Regulations For Asset Confiscation in Illegal Investment

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Abstract

The purpose of this research is to find out the importance of Non-Conviction Based (NCB) asset confiscation management in illegal investment cases in Indonesia. NCB is a method of confiscating assets that allows the state to confiscate assets without a court order on past criminal convictions. This article argues that controlling the NCB is important to ensure the effectiveness of asset recovery in illegal investment cases and to prevent law enforcement officials from abusing

their powers. This research uses a qualitative approach and examines relevant laws and regulations, court decisions and academic writings along with a brief description of the situation in the European Union. The findings in this study indicate that the existing laws and regulations in Indonesia for implementing NCB are inadequate. Hence, asset expropriation in illegal investment cases cannot be carried out without a court order on past criminal decisions. This study recommends making a law on asset confiscation for illegal investment cases that can provide clear criteria and procedures in civil procedural law for the use of the NCB mechanism similar to those exist in a number of EU Member States.

Keywords

Illegal investment case, criminal, Non-Conviction Based (NCB) asset confiscation

Introduction

Law enforcement in Indonesia¹ faces numerous challenges, particularly those related to cybercrime.² Illegal investment is a type of crime with

¹ Law enforcement is consistent with the nation's development objectives, which include building an Indonesian society that is as good, just, prosperous, and peaceful as possible based on Pancasila and the Republic of Indonesia's 1945 Constitution. Muhammad Chairul Huda. "Strengthening Pancasila As National Ideology to Implementate The Balancing Values To Improve Law's Application in Indonesia," *Jurnal Pembaharuan Hukum* 5, no. 1 (2018): 1–12; Silfy Maidianti. "The Role of Legal Politics in Forming Legislation Regulations in Indonesia, As a Means of Realizing the State's Goals." *Journal of Social and Economics Research* 4, Issue 2 (2022): 3; Ahmad Syaifudin Anwar. "Urgensi Implementasi Nilai Pancasila dalam Perumusan Kebijakan Vaksin Sebagai Syarat Administrasi Pelayanan Publik Guna Mencapai Tujuan Negara Indonesia." *In Right: Jurnal Agama dan hak Azazi Manusia* 11, no. 2 (2022): 3; Kendry Tan. "Politik Hukum Pembentukan Hukum Yang Responsif dalam Mewujudkan Tujuan Negara Indonesia." *Jurnal Meta-Yuridis* 5, no. 1 (2022) : 61.

² The function of technology, especially technology in the field of information and communication, is increasing along with the rapid developments occurring in the world in this era of globalization. The vast majority of Indonesians have devices that allow them to access all forms of information and communication on the Internet. Rapid economic development has both beneficial and negative effects on citizens' access to information and ability to communicate with one another. One negative effect is that it can be used as a tool to commit crimes in the online world

national and global ramifications that has a large detrimental influence on society in a variety of areas, including social welfare, the economy, politics, government bureaucracy, democracy, and the environment. As well as law enforcement, illegal investment is also harmful to the state since it reduces investment, slows economic growth, promotes income disparity, and raises poverty while decreasing people's pleasure and wellbeing.³

Illegal investment losses are estimated to be similar to the cost of constructing thousands of schools and toll roads in Indonesia. According to data from the Financial Services Authority (OJK)⁴, public

(cybercrime). Cybercrime is any illegal or unlawful behavior that uses computer intermediaries and is conducted over a large-scale electronic network.

³ Illegal investment is simply defined as an economic activity that, in terms of investment, violates the laws and regulations. Fallahudin Tsauki Takalamingan, Abdurrahman Konoras and Frietje Rumimpunu. "Peran Otoritas Jasa Keuangan Dalam Melakukan Pengawasan dan Pencegahan Terhadap Pendirian Perusahaan Investasi Ilegal Ditinjau dari Undang-Undang Nomor 21 Tahun 2011." *Lex et Societatis* 9, no. 1(2021): 29. Investors strive to make money when they make investments. Business actors who engage in unlawful investing operations will convince investors that they will profit even while the business itself is losing money. There is a principle of high risk, high gain in investing. According to this theory, investors will make large investments with high returns but must be ready for large losses. It is therefore extremely odd for businesses to promise large earnings with little danger of loss, or even no risk at all. Aldikayafi Raharjo. "Pengembalian Kerugian Korban Sebagai Akibat Investasi Ilegal oleh Koperasi." *Jurist-Diction* 3, no. 6 (2020): 1963; Wayan Santoso. "The Rights of Victims of Illegal Investment Crimes Against Confiscated Goods." *Borobudur Law Review* 4, Issue 2 (2022): 67.

⁴ The Financial Services Authority (OJK) was established with the goal of ensuring that all activities within the financial services sector are conducted in an orderly, fair, transparent, and accountable manner, are capable of fostering the development of a financial system that grows in a sustainable and stable manner, and are capable of defending the interests of consumers and society. Financial institutions undoubtedly face unique difficulties in light of the liberalization of the financial industry. Financial institutions are currently working hard to protect the community from the emergence of fraudulent investments, false information, and several other hazards that are very harmful. Denia Maulani and Vera Dwi Octavya. "Peran Otoritas Jasa Keuangan (OJK) dalam Perlindungan Konsumen." *Moneter Jurnal Keuangandan Perbankan* 9, no. 1 (2021): 26; Ali Ismail Fahmi and Windo Yugo Vio Aero. "Peran Pengawasan Ojk Terhadap Kegiatan Kredit Pada Perbankan (di BCA KCU Indrapura Surabaya)." *Jurnal Sosial Humaniora Sigli (JSH)* 6, no. 1 (2023): 2; Ida Ayu Sri Kusuma Wardhani. "Peran Lembaga Otoritas

losses as a result of illegal investments were IDR 139 trillion from 2017 to 2023. However, in the case of illegal investment, the government cannot fully restore the community's losses. In fact, if the nominal loss is applied to the development budget, the value is equivalent to the construction of 12,600 new schools, 504 new hospitals, 1,260 km of toll roads equivalent to the trip from Medan to Palembang, and 3,200 km of new railroads equivalent to the trip from Balikpapan to Pontianak.⁵ This phenomenon demonstrates that law enforcement officials have not used asset confiscation to eliminate unlawful investments. Apart from jail, asset recovery, especially through rules and regulations in the investing industry, must be part of the approach.

The paradigm shifts from "*follow the suspect*" to "*follow the money*"⁶ stresses asset recovery in order to maximize the restoration of

Jasa Keuangan (OJK) dalam Mengatasi Perusahaan Fintech Lending Ilegal". *Vyavahara Duta* XVII, no.1 (2022): 35.

⁵ Mentari Puspadini, "Rugi Investasi Bodong Rp139 T, Setara Bangun 12.600 Sekolah", *CNBC Indonesia*, August 30,2023. Retrieved from <https://www.cnbcindonesia.com/market/20230830101259-17-467403/rugi-investasi-bodong-rp139-t-setara-bangun-12600-sekolah>

⁶ "Follow-the-money" approach seeks to find money/possessions/other wealth that can be used as evidence (object of crime), which is different from the conventional approach which focuses on searching for the perpetrator directly after initial evidence is found. In eradicating criminal acts, the principle of presumption of innocence has been applied to the perpetrators; therefore, evidence will be carried out by proving whether or not the perpetrator was involved in the crime of money laundering. If the source of crime can be detected and investigated by the state, the opportunity to reduce the crime rate will be even greater. Efforts to cut the chain of crime are relatively easy to do with a follow-the-money approach. The advantages of the follow-the-money approach include: (1). This approach prioritizes pursuing the proceeds of crime, not the perpetrators of the crime, so it can be carried out quietly, more easily, and with less risk because it does not deal directly with perpetrators, who often have the potential to fight back. (2). This approach pursues the proceeds of crime, which will later be brought before the legal process and investigated by the state because the perpetrator does not have the right to enjoy property obtained illegally. With the investigation of the proceeds of this crime, a person's motivation to commit a crime to search for property is reduced or lost. Yuni Priskila Ginting. "Pemberantasan Pencucian Uang dengan Pendekatan Follow the Money dan Follow the Suspect." *Mulawarman Law Review* 6, no. 2 (2021): 109; Dodik Setiawan Nur Heriyanto, et al. "The Urgency of Combating Transnational Bribery in Indonesia by Ratifying the OECD Anti-Bribery Convention", *Pakistan Journal of Criminology* 9, No. 1, (2017): 2

stolen assets while impoverishing the perpetrators, rather than simply punishing the criminals with the goal of deterring others. When a suspect in a crime is not present or flees, illegal investors are treated through the criminal justice system, and their assets are taken once a guilty verdict is made. However, what if the owner is absent or flees, despite the fact that the money or assets are clearly suspicious and are recognized to be the proceeds of a crime? Based on Indonesian Financial Transaction Reports and Analysis Center's (PPATK)⁷ analysis, NCB⁸ asset confiscation, namely confiscation of assets without criminal charges.

Article 378 of the Criminal Code and Article 28 paragraph (1) of Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Information and Electronic Transactions govern the legal protection that the government can provide to victims of illegal online investment crimes. Meanwhile, rules that can trap perpetrators

⁷ PPATK is a Financial Intelligence Unit (FIU) with the responsibility and power to collect financial transaction records, analyze such reports, and send the analysis's findings to law enforcement organizations. Arce Kalalo, Diana Darmayanti Putong. "Upaya Pusat Pelaporan Dan Analisis Transaksi Keuangan (PPATK) Dalam Mencegah Tindak Pidana Pencucian Uang Dalam Sistem Perbankan." *Jurnal Hukum To-Ra: Hukum Untuk Mengatur dan Melindungi Masyarakat* 8, no. 2 (2022): 149; Dedy Kurniawan and Rusdi Akbar. "The Evaluation of Performance Indicators Development: A Study on Indonesian Financial Transaction Report and Analysis Center (PPATK)." *Journal of Accounting and Investment* 22, No. 3 (2021): 426. See also Sukardi Sukardi. "Reconstruction of Financial Crime Investigation Methods in Law Enforcement in the Era of the Industrial Revolution 4.0." *Unnes Law Journal* 8, no. 1 (2022): 133-158.

⁸ NCB Asset Confiscation applies a method to trace the proceeds of crime (follow the money) by trimming the root of the act (head of the serpent), which is carried out through criminal and civil deprivation. Riskyanti Juniver Siburian and Denny Wijaya. "Korupsi dan Birokrasi: Non-Conviction based Asset Confiscations sebagai Upaya Penanggulangan Yang Lebih Berdayaguna." *Jurnal Penegakan Hukum dan Keadilan* 3, No. 1 (2022): 4; Guilherme France. "Non-Conviction-Based Confiscation as an Alternative Tool to Asset Recovery: Lessons and Concerns from The Developing World." *Transparency International* (2022): 3; Ana Fauzia and Fathul Hamdani. "Analysis of The Implementation of The Non-Conviction Based Concept in the Practice of Asset Recovery of Money Laundering Criminal Act in Indonesia from the Perspective of Presumption of Innocence." *Jurnal Jurisprudence* 11, No. 1 (2021): 61; Sahuri Lasmadi, et al. "Asset Seizure of Money Laundering Crimes Arising from Corruption in the Perspective of Legal Certainty and Justice." *Pandecta Research Law Journal* 18, no. 2 (2023): 352-374.

in unlawful gambling acts are governed by unlawful Code Article 303 bis, paragraph (1). The application of unlawful investment sanctions must begin with an examination of the criminal act committed, which means that the illegal investment act must meet the elements specified in the laws and regulations.

Returning assets resulting from illicit investment has become one of Indonesia's basic concerns and should be the primary priority in eradicating illegal investment. The legal vacuum in Indonesia regarding asset confiscation of illegal investment actors in efforts to recover assets, combined with the weakness of existing laws and regulations, particularly in efforts to recover assets of illegal investment actors, makes this issue critical, and regulations for asset confiscation resulting from illegal investment crimes must be implemented as soon as possible.⁹

Illegal investment is a type of robbery of a country's public welfare and should be regarded as a shared adversary of humanity. Illegal investment has evolved into a more complex and modern form over time, necessitating the creation of new and effective methods to eradicate it.

Illegal investment, also known as investment fraud, is a business activity that collects funds from the public in violation of banking law, as it violates Article 46 of Law No. 7 of 1992 in conjunction with Law No. 10 of 1998 concerning banking, as well as Article 59 of Law No. 21 of 2008 concerning Sharia banking, and is classified as a crime. Investment activities are criminalized in criminal law under Article 378 of the Criminal Code as investment fraud. Illegal investment is a crime that demands special efforts to eradicate since it undermines the social and economic rights of the wider community.

In Indonesia, the major goal of eradicating illicit investments is to protect people's wealth while also acting as a deterrent to those who engage in unlawful investments by enforcing criminal penalties. The

⁹ Dodik Setiawan Nur Heriyanto, "Diplomation as One of the Alternatives to Returning Corruption Assets Abroad" *Journal of Legal Ethical and Regulatory Issues*, 24, no. 1 (2021): 9. See also Sugeng Wahyudi, "Penal Policy on Assets Recovery on Corruption Cases in Indonesia." *Journal of Indonesian Legal Studies* 4, no. 1 (2019): 45-72; Ridwan Arifin, Sigit Riyanto, and Akbar Kurnia Putra. "Collaborative Efforts in ASEAN for Global Asset Recovery Frameworks to Combat Corruption in the Digital Era." *Legality: Jurnal Ilmiah Hukum* 31, no. 2 (2023): 329-343.

punishment specified in Article 25 paragraph (1) of Supreme Court Regulation Number 13 of 2016 Concerning Procedures for Handling Criminal Cases by Corporations is the primary and/or secondary punishment. A fine is the most serious penalty that may be levied against a corporation. Meanwhile, the additional penalties levied on firms are in compliance with legislative and regulatory standards. These initiatives, however, have not been fully executed.

In the Court's decision, the defendant is subject to the main punishment in the form of imprisonment and a fine, as well as additional punishment in the form of payment of compensation for the victim of an illegal investment, as much as possible equal to the property obtained from the illegal investment. However, most illegal investment actors do not pay compensation for victims of illegal investment but instead choose to undergo alternative punishment (prison as compensation) because they believe that the benefits derived from their illegal investment are greater than the risk of punishment they will face.

In many circumstances, illicit investment criminals prefer to flee and vanish without a trace. If this is the case, the outcomes of law enforcement may fall short of justice seekers' expectations. Of course, the court can continue the trial until a verdict is delivered in absentia. In this scenario, law enforcement officers might consider using the NCB asset confiscation strategy.

The basic idea behind NCB Asset Confiscation is to take the offender's assets without first going through a legal procedure, namely through civil confiscation, which targets the offender's assets without going through a criminal process.¹⁰ By shifting the burden of proof so that it is placed on the asset itself rather than the individual, this confiscation is accomplished. The parties who may have an interest in the assets of the action are the subjects of the NCD Asset Confiscation itself. Most significantly, the claim that the property is contaminated must be made in order to confiscation it.

¹⁰ There are two typical types of confiscation that are applied, namely criminal confiscation and asset confiscation without punishment (NCB asset confiscation). The basic concept of NCB asset confiscation is that tracing and confiscation of assets suspected of criminal acts of illegal investment must be possible, even if the perpetrator is declared free through a court decision because his actions are not proven, the perpetrator dies before the court decision has definitive force, and the perpetrator fled before the trial was finished.

Asset recovery is another name for asset confiscation, which is defined as "the forced taking of assets or property by the state that is believed to have a close connection to a criminal act. Asset confiscation serves several purposes, including preventing the offender from profiting from their crime, wiping out cash gained to protect victims, preventing other crimes through blocking, guaranteeing assets won't be used for criminal activity in the future, and prevention.

Common-law nations like the United States were where asset confiscation first appeared. In common law nations, there are three ways to forfeit assets: criminal confiscation, administrative confiscation, and civil confiscation. Criminal confiscation, formerly known as the confiscation of unclaimed property as a result of war, is the taking of property only through the application of criminal law. The taking of property by the state without the involvement of the courts is known as administrative confiscation. Contrarily, civil confiscation involves the confiscation of assets through the filing of a lawsuit against the assets owned by the criminal offender, allowing the assets to be confiscated even if the criminal case against the criminal offender has not yet been resolved. The principle of the reverse burden of proof is used in civil confiscation.

The European Union adopted Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the EU. The Directive only ensures Member States enable confiscation of instrumentalities and proceeds or the property of the same value subject to a final criminal conviction. While the Directive does not touch the issue of NCB confiscation, Member States are left to freely decide whether they adopt such measures. Bulgaria, Croatia, Cyprus, Czechia, Finland, France, Germany, Hungary, Ireland, Sweden, Spain, Slovenia, Romania, Portugal, Poland, Latvia, Lithuania and Italy have legal grounds that enable non-conviction based confiscation. Despite the lack of an EU harmonization in this field, a common core in the regulation of the above-mentioned EU Member States is to allow for NCB confiscation in cases the suspected/accused person is acquitted in the criminal proceeding (e.g. death, amnesty, lapse of the statute of limitation). In some Member States (Latvia, Lithuania, Czechia, Poland, Portugal, France, Slovenia), however, confiscation of illegally acquired property can be decided in special court proceedings that concern the property and not linked to a specific criminal conviction.

In the latter case, confiscation is possible in parallel to the main criminal proceeding as well as after such proceedings. It may also include the case when the person to be punished for the criminal offence cannot be determined.¹¹

Confiscation of assets without punishment is in line with international conventions or agreements, namely the United Nations Convention Against Corruption (UNCAC)¹², which was ratified through Law Number 7 of 2006. Following up on the Law on Confiscation of Criminal Assets is something Indonesia should undertake. Unfortunately, there are presently no outcomes from the legislative procedure used to produce the Asset Confiscation Bill.

The Law Number 8 of 2010 concerning the Crime of Money Laundering, fortunately, can offer a legal framework for asset confiscation. Investigators are permitted to make a request to the District Court under Article 67 of the regulation, and the court will decide whether to declare assets that are known or reasonably believed to be the proceeds of crime state assets or return them to their rightful owners.

¹¹ European Union (2021): Study on freezing, confiscation and asset recovery – what works, what does not work, Publications Office of the European Union, Luxembourg.

¹² The UNCAC 2003's Article 54, paragraph 1, letter c, provides the following interpretation of NCB asset confiscation: "...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 cases." Based on this article, UNCAC 2003 regulates the obligations of participating countries, in accordance with their respective national laws, to take action to allow the forfeiture of property obtained through or involved in the commission of a crime without a criminal verdict in cases where the perpetrator cannot be criminally prosecuted for reasons of death, flight, illness, or absence. For the record, even though the forfeiture of assets resulting from criminal acts of corruption has been carried out, this does not necessarily erase the criminal act. Fathin Abdullah, Triono Eddy, and Marlina. "Perampasan Aset Hasil Tindak Pidana Korupsi Tanpa Pemidanaan (Non-Conviction Based Asset Confiscation) Berdasarkan Hukum Indonesia Dan United Nations Convention Against Corruption (UNCAC) 2003". *Jurnal Ilmiah Advokasi* 9, No 1 (2021): 22; Yopi Gunawan, and Kristian. Pemberantasan Tindak Pidana Korupsi Pasca Ratifikasi The United Nations Convention Against Corruption (UNCAC) Dan Pembaharuan Hukum Pidana Indonesia. *Res Nullius Law Jurnal* 2 No. 1 (2020): 20; Tantimin. "Penyitaan Hasil Korupsi Melalui Non-Conviction Based Asset Forfeiture sebagai Upaya Pengembalian Kerugian Negara." *Jurnal Pembangunan Hukum Indonesia* 5, No. 1 (2023): 88.

The implementation of NCB Asset Confiscation enables all specific situations to satisfy a number of requirements, such as the criminal eluding capture or passing away, preventing the execution of the assets. The assets that are thought to represent the profits of crimes and whose locations are known are the keys. The pursuit of criminal assets associated with illicit investments has never been done using the NCB asset confiscation strategy up until this point. This strategy should have been used by the Investment Alert Task Force because there have been numerous unlawful investments to date whose offenders have fled but whose assets are still present, meaning that only the assets have been confiscated.

Confiscation of property as a result of a crime is regulated in a number of criminal provisions in the Indonesian legal system. Article 10 of the Criminal Code which regulates additional penalties such as confiscation of certain items is one of these laws. Article 10 of the Criminal Code does not explicitly state that the confiscation of certain goods is the result of an illegal investment crime. Apart from that, it is not stated whether the confiscation of assets resulting from criminal acts of illegal investment can be carried out without waiting for criminal proceedings as regulated in the NCB Asset Confiscation Regulations, or whether it must be preceded by criminal proceedings against perpetrators of illegal investments.

Philosophical, sociological, and legal perspectives are used in writing about the necessity of confiscating property without a court order. According to a philosophical viewpoint, punishment cannot be used as a means of retaliation for the penalty meted out to the crime's perpetrator. According to the retributive approach, criminals only face punishment for their errors. In accordance with this retributive legal theory, whoever does a criminal act must be punished; whoever steals money deserves to be punished; and whoever returning the money from the illegal investment does not necessarily eliminate the punishment for the crime.

This study will explain the distinctions between earlier research and the research to be undertaken by focusing on three elements that make up the State of The Art (SoTA) or current knowledge in the field of law. These three factors are as follows: From a legal perspective, there is a gap in the law that prevents asset confiscation from being criminalized; from a sociological perspective, society is the one who loses

money as a result of criminal conduct such as illegal investment. And based on the third factor, the philosophical factor, which is made up of the ontological factor, which describes the nature of asset confiscation without criminalization, the epistemological factor, which states that asset confiscation only entails a criminal process first, and the axiological factor, which supports asset confiscation without criminalization, concerning social justice.

Instances of unlawful investment have made it more challenging to recover people's assets because there are no legal restrictions on the confiscation of property that are not based on punishment. The goal of this project is to find a way to speed up asset recovery for all Indonesians while maintaining social justice.

The legal content and the legal framework are novel in this study. Legal substance describes the products of the legal system, including the rules and judgments that are applied by both the regulated and the controlled. In the context of this study, legal substance refers to legislation that addresses asset confiscation without a conviction, which is currently absent in Indonesia.

Legal structure refers to the institutionalization of legal bodies, such as the Indonesian court system, which is made up of district courts, high courts, and the Supreme Court, as well as the Integrated Justice System, which governs the application of criminal law. Due to the absence of clear legislation on this subject, law enforcement agencies now have sole control over the policy NCB asset confiscation in the context of this research.

It takes time to recover people's money since Indonesia's asset confiscation law requires that offenders of illegal investment be penalized before asset confiscation can be carried out. Therefore, the innovation in this research relates to the social justice-based legal framework for wealth confiscation in cases of illicit investment rather than punishment.

This study uses normative legal research as its methodology. In conducting legal research, there are four methods that are employed: the statutory approach, the conceptual approach, the comparative approach, and the historical approach. A combination of primary, secondary, and tertiary legal sources will be used in this study. The Republic of Indonesia's 1945 Constitution is a primary source of law, as is the 1848 State Gazette (*Staatsblad*) Number 16's listing of the Civil

Procedure Code (*HIR/Herzein Inlandsch Reglement*). The Criminal Code (KUHP), also known as Law Number 1 of 1946 regulating Criminal Law Regulations, was passed. The Criminal Procedure Code (KUHAP), also known as Law Number 8 of 1981, concerns the law of criminal procedure; Law Number 8 from 1999 concerning Consumer Protection; Law Number 39 of 1999 concerning Human Rights; Law Number 15 of 2019 concerning the Second Amendment to Law Number 12 of 2011 concerning the Formation of Legislative Regulations amendments; Law Number 8 of 2010 concerning the Prevention and Eradication of Money Laundering Crimes; Law Number 12 of 2011 concerning the Formation of Legislative Regulations; Law number 17 of 2014 about Trade and Law Number 10 of 1998 concerning amendments to Law No. 7 of 1992 about Banking; and the proposed law on the use of assets without committing crimes.¹³

All scholarly works pertaining to or discussing the law are considered secondary legal materials, including books and other literary works, academic manuscripts, scientific journals, research papers, and others. For the purposes of this study, scientific works addressing NCB asset confiscation are specifically included. The Oxford Dictionary,

¹³ Based on the academic manuscript of the Asset Confiscation Bill, the initial indicator is that there is improper ownership of assets, namely if the income or source of the increase in wealth and the origin of the acquisition of these assets are not known. It is sufficient for the public prosecutor to prove formally that the assets in question are the result of a crime (due to an imbalance between the assets owned and the source of the wealth), and then the owner of the asset is required to prove the untruth of the alleged public prosecutor (principle of reverse proof). In the Academic Paper of the Draft Law on Asset Confiscation, several issues in current criminal law are raised, including:

- 1) The confiscation of criminal proceeds only constitutes a crime addition and not a primary offense.
- 2) According to the concept of "investigation," the goal of an initial stage in the criminal procedure is to uncover evidence about a crime in order to identify a suspect, not to confiscate property or confiscate the proceeds of crime.
- 3) The scope of investigators' and investigators' authority is still restricted to following the trail of illegal activity, including locating and getting access to sources of information about property that may be polluted.
- 4) The criminal justice system in place today does not yet control this scenario. Assets that are impeded or limited during the stages of inquiry, prosecution, and court examination may be confiscated.

Black's Law Dictionary, and Fockema's Law Dictionary will also be used as tertiary legal resources.

The three legal resources gathered for this study are organized into an inventory and classification. While secondary legal materials are gathered, inventoried, and categorized in accordance with the legal concerns to be addressed, primary legal materials are collected, inventoried, and categorized based on hierarchy and the year of enactment. Through an examination of the literature, secondary legal resources are gathered, inventoried, and then grouped into archives in accordance with the legal topics under discussion.

Identification, processing, and analysis are all steps in the analysis process, along with the search for a theme in the accessible legal materials. The Theory of Justice, the Theory of Evidence, and the Criminal Policy Theory serve as the theoretical framework and the researcher's analytical tool, respectively.

The Criminal Code and the Criminal Procedure Code's Guidelines for Asset Confiscation Due to Illegal Investment Crimes

In Indonesia, illegal investment is a significant issue that is pervasive and needs to be addressed with unique rules. The many illicit investment methods include:¹⁴

1. Binary Options¹⁵ traders must forecast whether an instrument's price will rise or fall over the course of a specified period of time.

¹⁴ <https://www.cnbcindonesia.com/tech/20221121174446-37-389954/hati-hati-ini-macam-macam-modus-investasi-ilegal>

¹⁵ Comparatively speaking, binary options are a newer sort of transaction. In general, an option is a unique voucher that has a set expiration date, after which it can be decided if it is profitable or not. Although it seems complicated, everything is actually much easier. According to our understanding, a binary option is a wager on whether an event will end positively or negatively. This is an improvement or decline in the exchange rate between two currencies or a pair of stocks for traders. Whether or not the option's outcome can be foreseen determines the trader's profit. Some individuals liken these profits to winning at roulette since, if you ignore any predictions, the outcome is always either black or red. Oxana B. Novruzova, Yulia O. Pronina, and E.S. Vorobeva. "Binary Options as New Financial Instruments and Their Integration into the Financial Sector." *Advances in Economics, Business and Management Research*, Vol 138 (2020): 760; Daffa

2. Trading Robots.¹⁶ This strategy guarantees a predetermined profit split and referral bonuses. Additionally, trading is done automatically and without user input.
3. Cryptoassets.¹⁷ The value of investments in cryptoassets varies. Therefore, no guarantees of fixed returns are made. Deposits and interest payments for cryptocurrency trading are made in locally legal currencies and tokens.
4. Pig Butchering Scam¹⁸ Additionally, victims will be duped within a set time frame so that they can invest money and have their savings drained.

Faadihilah Suntari Putra, Fadhel Husien, Rianmahardhika Sahid Budiharseno. "The Effect of Binary Option Trading in Social Phenomenon: Indonesia Case." *Indonesian Scholar Scientific Summit Taiwan Proceeding* Vol 4 (2022): 64.

¹⁶ Trading robots are trading support systems that can innovate legitimate business lines and strengthen the rules of the executive game into computerized business models and frameworks that allow computers to run, replacing the role of humans in modern trading network systems. A trading robot or expert advisor (EA) is computer software that can work automatically to monitor the market, calculate entry opportunities, place transactions, and carry out risk management based on algorithms that have been embedded in the base program. This system cannot run alone. This system is controlled by someone behind it. The controller must have knowledge of trading robot operations and investment instruments tailored to user needs. Trading robots are tools that help in trading, so they don't need to be done manually. Trading robots contain mathematical algorithms that are embedded in making the robot execute. automation of buying and selling trading decisions where the system is created and controlled based on the market analysis approach and capabilities of the maker. Dewi Ekuwi Vina. "Tinjauan Hukum Pidana Terhadap Afiliator Robot Trading Ilegal DNA Pro di Indonesia." *Collegium Studiosum Journal* 6 No. 1 (2023): 226; Nikolay Lomakin, I. A. Popov, A. B. Shohneh, Maxim Maramygin, A. B. Gorbunova. "AI-System of Stock Exchange Trading Robot for Financial Risk Hedging." *Advances in Economics, Business and Management Research* 128 (2020): 3273.

¹⁷ Trading platforms for crypto assets are very popular among consumers since they assist participants in the financial market in terms of transaction costs and speed of execution. These advantages are fueled by cutting-edge technologies like distributed ledger technology (DLT) and the substitution of software code for third-party intermediaries in smart contracts. Theodore Pelagidis and Eleftheria Kostika. "Investigating The Role of Central Banks in the Interconnection Between Financial Markets and Cryptoassets." *Journal of Industrial and Business Economics* (2022) 49.

¹⁸ Scams involving the butchering of pigs Online dating used to encourage investment fraud and gambling is commonly referred to as "internet fraud" by

5. Illegal Investment Advisor¹⁹ or Unlicensed investment advisor
6. Money Game Scheme.²⁰ This scheme takes advantage of the idea that a hole should be dug to hide a hole. Everyone will be pleased that there are still individuals being defrauded, especially those who have been participating for a long time.

Law enforcement against criminal acts of fraud is governed by the Criminal Code's Article 378, which in this study focuses on instances of illegal investment. According to Article 378 of the Old Criminal Code, "Anyone who, with the intention of unlawfully benefiting himself or another person, by using a false name or false dignity, by deception or a series of lies, induces another person to hand over something to him or to give debts or write off receivables, is punishable for fraud by a maximum imprisonment of four years."

criminals. Fraudsters frequently link victims to "the pigs" in "pig-butcherer scams" to win their trust. The scripts and scripts that have been compiled are compared to "pig feed," and all forms of chat and private messaging software in the network environment are seen as "pig troughs. In this case, "pig raising" refers to the process of seducing the victim and earning their trust. And finally, "butcherer the pig" is when someone is defrauded of their money. Because pig butcherer scams" are more time-consuming than other types of Internet fraud, it can be challenging to recognize and categorize them in the criminal justice system. Lien-Wei Yu. "The Crime of "Pig-butcherer Scams" in the Securities Market and Legal Regulation." *Science of Law Journal* 2 No. 1 (2023); Hao-Nan Jiang, Chao-Hui Wang, Zhi-Zhuang Duan. "The Unpreventable Emotional Telecom Fraud — "Pig-Butcherer Scam"." *Schollars Bulletin* (2023): 1.

¹⁹ The rising trend of societal investment is not being supported by improvements in societal awareness of sound financial literacy. Due to these circumstances, several parties are taking advantage of the rise in investors who lack sound financial literacy in order to profit both legally and illegally. Dian Permatasari and Faiz Mufidi. "Peran Otoritas Jasa Keuangan dalam Melakukan Perlindungan Hukum Investor di Pasar Modal, terhadap Praktik Perencana Keuangan yang Melakukan Aktivitas sebagai Manager Investasi Ilegal." *Bandung Conference Series: Law Studies* 2, No. 2 (2022): 1298.

²⁰ The Ponzi scheme concept and the concept used in money games are quite similar; only the shape and appearance are different. The Ponzi scheme operates on the principle of enlisting new members as a base and providing financial circulation to existing members, followed by a lack of actual practice in the buying and selling of products and services by delaying the distribution of investor gains. Old investors are compensated with new investors' funds and new investors themselves. The hole-covering system is the name of this technique. Imam Wahyudi, Bambang Haryadi, Nur Hayati. "Uncovering the Dark Side of Ponzi Schemes Through Money Game." *Jurnal Ilmiah Akuntansi dan Bisnis* 17, No. 2 (2022): 202.

Consequently, the elements listed in Article 378 of the Criminal Code are as follows:

1. The "whoever" component the legal subject in this case is the person who committed investment fraud, but a legal subject is anyone who can be held responsible for a criminal event.
2. The "With the purpose of obtaining benefits for oneself or others unlawfully, in this way, the perpetrators of investment fraud have distributed all of the money to their victims before purposefully asking them to invest it. Then, all of a sudden, the perpetrators vanish with billions of dollars of the victims' funds.
3. The "Using a false name or false dignity, by deception or a series of lies" is a component. In this sense, the offender knowingly tells a number of lies to mislead the public and induce users to make a large investment in order to reap a large return on their investment.
4. The ability to "persuade others to give him something, forgive debts, or write off receivables. In this argument, the perpetrator deliberately persuades all users to bring in other investors, assuring them that they will receive further profits. However, in reality this is done so that the company's operations continue because if no one else joins then the illegal investment of the perpetrators will fail.

That all acts of fraud have been completed in accordance with the criteria in Article 378 of the Criminal Code. Article 378 of the Criminal Code should not be used to prosecute criminal crimes of illegal investment fraud committed online, nonetheless. This is so because fraud committed through electronic means is not covered by the criminal procedure code, whereas illicit investments use these methods to commit crimes.

Although Law Number 11 of 2008 and Law Number 19 of 2016 concerning information and electronic transactions do not directly address criminal acts of traditional fraud or criminal acts of online fraud, respectively, in their respective articles 28 and paragraph (1), there are several similarities between the elements in the two laws. Conventional fraud is governed by Article 378 of the Criminal Code and contains unique features, such as the acceptance of electronic media evidence and the expansion of the Information and Electronic Transactions Law's authority. Article 28 paragraph 1 of the Electronic Information and Transactions Law lists the following elements:

1. The component of "everyone".
2. The "intentionally and without right" component
3. Components of disseminating false or misleading information
4. Components "that cause losses to consumers in electronic transactions"

All the steps taken by the person who committed the criminal crime of illegal fraud serve as evidence that all the requirements of Article 28 Paragraph (1) of the Information and Electronic Transactions Law have been met. Article 28 Paragraph (1) of the Electronic Information and Transactions Law regulates criminal penalties based on Article 45 Paragraph (1) of the same law, which carries a maximum penalty of six (six) years in prison or a fine of Rp 1 billion.

The Information and Electronic Transaction Law further stipulates in Article 36 that any activity that is done on purpose, without authorization, or in violation of the law is considered an act as defined in Article 27. Article 36 of the law on information and electronic transactions is applicable if the act is related to Articles 27 through 34 of the Information Law and electronic transactions hurt other individuals. Instead of indirect, speculative, or immaterial losses, this article concentrates on material losses that directly affect human victims.

Article 51 paragraph (2) of the law on information and electronic transactions confirms that anyone who complies with the requirements outlined in Article 36 shall be subject to imprisonment for a maximum of 12 years and/or a fine of a maximum of IDR 12 billion.

Illegal investment criminal cases are in the spotlight and developing in Indonesia is:²¹

1. Doni Salmanan; The accused of fraud used binary options on the Quotex platform. The total loss experienced by Quotex participants was IDR 24 billion.
2. Indra Kenz; defendant in the binary option application case involving Binomo. There were 144 victims overall, and there were IDR 83 billion in losses.
3. Reza Paten; suspect in a scam involving the trading robot Net89. According to estimates, there were approximately 300,000 Net89 victims and IDR 2 trillion worth of losses.

²¹ <https://www.cnbcindonesia.com/market/20230822075446-17-464899/crazy-rich-di-kasus-investasi-bodong-bikin-rugi-triliunan>

4. Wahyu Kenzo; suspect in an investment scam involving the trading robot Auto Trade Gold, or ATG. In this case, there were 25.000 victims, and there were IDR 9 trillion in damages

The cases above are important because in the Doni Salmanan case, the public prosecutor ordered Doni Salmanan to pay IDR 17 billion in compensation for reparations to the victims. Even so, the judge acquitted Doni of these charges. The judge assessed that the acquisition of assets carried out by Doni Salmanan while serving as an affiliate of the Quotex binary options investment program was not the result of illegal activity. Apart from receiving a light sentence, the judge also decided that Doni Salmanan's assets were returned to the defendant, not confiscation for the state.

In the laws and regulations, illegal investors can be charged with violating Articles 372 and 378 of the Criminal Code, which regulate theft and fraud; Article 46 of the Banking Law, which prohibits raising money without government permission; and Law Number 8 of 2010 which regulates the prevention and eradication of money laundering crimes; Article 28 Paragraph (1), Article 45 Paragraph 1, Article 51 paragraph (2) of the Information and Electronic Transactions Law, all of which carry a maximum penalty of 20 years in prison.

Procedure for Asset Confiscation Without Criminal Punishment for Illegal Investment Crimes

In illegal investment cases, due to several obstacles, including the difficulty of collecting evidence and transferring assets abroad, the procedure for confiscating assets through criminal channels is quite complicated. As an alternative, a civil lawsuit system can be used. Even if there is not enough evidence to convict a suspect of illegal investment, investigators can still submit case files to the Public Prosecutor to file a civil lawsuit to compensate victims of illegal investment.

If the defendant dies during the prosecution or trial, his heirs can be the target of a civil lawsuit. Even if a criminal decision has eternal legal consequences, a civil lawsuit can still be filed against the convict or his descendants if the assets of the accused have not been confiscated by the state.

Civil prosecutions can be filed based on Article 67 of Law Number 8 of 2010 concerning the Crime of Money Laundering, which authorizes investigators to submit requests to the District Court so that the court decides that assets known or reasonably suspected to be proceeds of crime become state assets or returned to the rightful person.

Technically, asset confiscation starts when the Financial Service Authority cancels some or all transactions at the Financial Transaction Reports and Analysis Center's request. Additionally, within five working days, the Financial Service Authority fulfills the request from the Financial Transaction Reports and Analysis Center. Once the request has been granted a 15-day extension, The purpose of prolonging the temporary suspension of transactions is to finish the analysis's findings before submitting them to the investigators.

The Financial Transaction Reports and Analysis Center turns it over to investigators after 20 days have passed without any objections being made to the temporary freeze of transactions. Investigators must track down the crime's culprit within 30 days. If it is not located, investigators may ask the court to take the assets and give them to the state treasury.

This process complies with Supreme Court Circular Letter No. 3 of 2013 regarding Case Handling Instructions and Supreme Court Regulation No. 1 of 2013 regarding Procedures for Handling Assets in Money Laundering Crimes: Application Procedures for Asset Settlement in Money Laundering and Other Crimes.

The Urgency of Regulating Non-Conviction Based (NCB) Asset Confiscation

The urgency of NCB asset confiscation is a technique for confiscating assets obtained through criminal activity rather than prosecuting the offenders. According to the "taint doctrine," a criminal act is considered to "taint" an asset that was utilized in or produced by the crime.

The concept of NCB asset confiscation has been used for a long time in nations including the United States, the United Kingdom, and Australia, and these nations have been effective in confiscating assets linked to criminal activity worth billions of dollars. Contrarily, the

execution of asset confiscation in cases involving unlawful investment has been hampered by Indonesia's inadequate legislative framework and lack of international collaboration.

In criminal situations, the burden of proof typically rests with the government, although if sufficient proof exists to prove the crime, fines may still be applied. As a third party with the right to protect their property, the owner of the property is the one who is targeted by NCB asset confiscation. In conclusion, the theory of legal proof refers to the attempt to persuade others by providing appropriate evidence, whereas the system of legal proof is a collection of connected components that support one another.

Based on the explanation of the aforementioned phenomenon and concept, it can be concluded that the urgent need to regulate asset confiscation without actual criminal prosecution is actually the confiscation of assets resulting from criminal acts in the Indonesian legal system, and it has a foundation in its implementation. However, in order for Indonesia's legal system to effectively implement efforts to confiscation assets, modifications to the current criminal and civil systems are required. Three causes, including the ratification of UNCAC 2003, the emergence of new categories of crimes, and insufficient asset confiscation procedures, highlight the significance of Indonesia's Law on Asset Confiscation.

The Indonesian government must harmonize the provisions of the law currently in force with the provisions contained in UNCAC 2003 as a result of the country's acceptance of the convention. The increase in economically motivated crimes is another factor that underlines the need to implement asset confiscation laws in Indonesia. Due to technological advances, it is now easier for criminals to commit crimes and hide the proceeds of these crimes by using more modern techniques. For asset confiscation measures to be as successful as possible, this must be addressed with the proper legal provisions that can take into account both the present situation and any potential future developments.

The insufficient mechanisms are the final reason why developing an asset confiscation law is urgent. To efficiently carry out asset confiscation in Indonesia, adequate means for doing so are expected to be used in accordance with UNCAC 2003.

Conclusion

Several conclusions can be drawn from the discussion in the preceding section, as follows: The confiscation of an asset through *in rem*²² claims or claims against the asset through civil processes is known as NCB asset confiscation. The NCB asset confiscation process places more emphasis on the confiscation of property acquired via illegal activity than against an individual (*in personam*). Therefore, it is not essential for asset confiscation to occur for a person to be legally and persuasively proven guilty in court. It is anticipated that the confiscation of criminal assets will be more successful through the *in rem* system of confiscation, particularly in situations when the suspect or accused has passed away, fled, is permanently ill, is unknown, or has been exonerated of all accusations. In addition, asset confiscation can also be carried out against assets where criminal proceedings cannot be conducted or where

²² In general, the concept of confiscation of assets *in rem* focuses on assets resulting from the mistakes or crimes of the subject or owner of the assets. So, either way the subject has been determined as a convict, the subject is still in the process of being examined in court, or even the subject has, even if acquitted, confiscation of assets *in rem* can still be carried out. The principle used in the confiscation of assets *in rem* is that the holder of the object does not have the right to control assets obtained from unlawful actions. In plundering assets *in rem*, the accusation that the assets originate from acts against the law is completely neutral to the actions carried out by the holder or authority of the assets. This happens because asset confiscation *in rem* focuses on the origin of the assets. Therefore, asset confiscation will not depend on unlawful acts committed by the rightful owner of the asset or on errors attached to the assets involved in a crime. The idea of *in rem* asset confiscation was introduced in Indonesia through the Draft Law on Criminal Asset Confiscation. Where the draft provides a definition of confiscation of assets *in rem* as a legal action taken by the state to confiscate assets of a criminal offense based on a court decision that has permanent legal force without being based on punishment of the perpetrator. Meanwhile, another opinion states that confiscation *in rem* is defined as an action in which the state takes over assets through internal court decisions in civil cases based on stronger evidence that the assets are alleged to originate from a criminal act or are used for a criminal act. It is expressly stated here that regarding assets suspected to be from and for criminal acts heard in a civil court. Isnaini Nur Fadilah. "In Rem Asset Confiscation dalam Bandul Asset Recovery dan Property Rights." *Journal of Money Laundering* 1, No. 1 (2022): 90; Rika Kurniasari Abdulgani. "Urgensi Pengesahan Undang-Undang Perampasan Aset Tindak Pidana Dalam Mencegah dan Memberantas Tindak Pidana Pencucian Uang." *Jurnal Litigasi* 24, No. 1 (2023): 73.

criminal proceedings have been concluded but other criminal assets are discovered later. This mechanism is a solution or a judicial concept that can achieve the objective of asset recovery and confiscation of assets related to crimes, including illegal investment.

The Asset Confiscation Bill must be immediately passed in order to improve the legal system through the confiscation of assets without a court ruling. This is required by the legislative framework of non-conviction-based (NCB) asset confiscation in situations concerning illicit investments based on social justice. This system's mechanism has the power to confiscate any assets that are allegedly obtained through unlawful investing activities as well as other assets that are allegedly used as instruments of crime.

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