



Conference of the States Parties to the United Nations Convention against Corruption

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Group on Asset Recovery**
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Draft report

Addendum

V. Thematic discussion on cooperation in confiscation: article 54 (Mechanisms for recovery of property through international cooperation in confiscation) and article 55 (International cooperation for purposes of confiscation)

1. Panellists from the United States of America presented their legal framework with regard to the provisions of the Convention relevant to confiscation, and the related experiences and challenges encountered. The findings were based on four high-level corruption asset recovery cases in which asset recovery had been requested from the United States. The enforcement of foreign judgments was the general avenue. However, it was not successful if a final judgment could not be obtained in the requesting country or it did not address foreign based property. Initiating national criminal procedures in the United States was an alternative but presented challenges when the accused person was not present in the territory, or the United States did not have jurisdiction. Positive experience was reported on the use of non-conviction based forfeiture. The United States could take restraint actions and keep assets restrained for 30 days. Based on the experience of challenges in asset recovery cases, the law had been amended so as to allow the enforcement of foreign seizure or freezing orders without court judgments in the requesting country. The panellists also presented a case where the United States brought an action against assets located in Singapore linked to a corruption case in Bangladesh, the link with their jurisdiction being that the funds had been transferred through a bank located in the United States. It was highlighted that according to United States law the statute of limitations was suspended when assets were not located in the United States.



2. The panellists further highlighted that the United States depended in these cases to a great extent on the information provided by the requesting country. In some cases, conduct had been legitimized in the requesting country because of the influence of corrupt officials, or the officials had been acquitted. Investigators or prosecutors had been unwilling to provide evidence due to fear of reprisals or evidence being difficult to evaluate, especially in cases of a regime change after a long time. Furthermore, where the official had been in power for many years, to ascertain with certainty the legal or illegal origin of the assets presented difficulties. Limited financial investigative capacity in the requesting country could also challenge the establishment of the nexus between the corrupt conduct and the assets. Dual criminality was considered a challenge, in particular with regard to the offences of false financial disclosure statements, malfeasance and illicit enrichment, which were not offences for which forfeiture could be ordered in the United States. Further, concerns about due process in the requesting country could undermine the enforcement of foreign judgments.

3. The panellist from France reported that the French legal system was based on criminal conviction, and confiscation was considered an additional sanction. However, confiscation could be carried out on the basis of requests for mutual legal assistance, following rulings by the Court of Cassation in 2003 and confirmed in 2009. A request for civil confiscation could be executed in France under two conditions: either, if the decision underlying the request for confiscation was final, binding and its execution would not be against *ordre publique*; or, if the proceeds could have been confiscated under similar proceedings under French law.

4. Forfeiture under French law can be divided into three main parts: first, the identification of the proceeds of crime, done by multidisciplinary structures including special police regional intervention groups and different administrative agencies; second, seizure, starting with setting up of special files at the investigative stage as a necessary preparatory step for forfeiture; third and last, confiscation itself which was very broad as this sanction was applicable for any criminal offence punishable by over a year of imprisonment and could cover any assets belonging to the concerned person as well as any assets at his/her disposal even without being the legitimate owner. A recent legislative development also enabled confiscation of the equivalent value of the assets.

5. In 2010 France had established a specialized agency for the administration of seized and confiscated proceeds (AGRASC) that had since dealt with 10,000 cases involving 400 million Euros worth of confiscated assets.

6. In practice, mutual legal assistance requests were received by the Ministry of Justice, as the central authority, and channelled through the Office of the Prosecutor of Paris. Challenges had been faced with regard to the time required for translation, which could take several months due to the complexity of requests and the information contained therein. The need to seek additional information for the identification of relevant persons and tracing of assets also caused delays and the assets were being moved. To overcome this problem, the Ministry of Justice had attempted to enhance informal communication and regular follow-up with different authorities involved. An automatic confirmation of receipt of the request would also be sent to the requesting States. Seminars on asset confiscation were organized for foreign authorities, as well as training for French practitioners. To illustrate the process, the panellist cited a recent case that resulted in confiscation of assets on the

basis of the money-laundering offence. With regard to the statute of limitations, the panellist noted that most corruption offences had a fairly short statute of limitations averaging three years but that the Court of Cassation had interpreted the point of departure of the limitation as the day where public action on the offence could reasonably begin, i.e. when elements of the offence had been discovered. The problem was further mitigated by the fact that charges were often brought for concealment, which, as a continuous offence, was not subject to the statute of limitations.

7. The panellist from Indonesia highlighted a number of difficulties relating to asset recovery. Particularly, the transnational nature of corruption and differences in legal systems. In view of the difficulties encountered, Indonesia had taken a more active approach by creating the Asset Recovery Task Force. Further plans included the creation of the Asset Recovery Office with more responsibilities and powers. Based on the experiences of Indonesia with various agencies being involved in the asset recovery process, the panellist highlighted the value of inter-agency coordination. Indonesia applied the measures contained in articles 54 and 55 in international cooperation for asset recovery. Mutual legal assistance requests could be communicated directly to the central authority (Attorney-General's Office) or by direct communication between prosecuting authorities. Indonesia provided mutual legal assistance on the basis of the principle of reciprocity.

8. The representative of Brazil shared the experience of the Office of the Attorney-General. It was highlighted that the general avenue for asset recovery taken by the Office was civil proceedings. Three specialized groups had been created within that institution: the International Affairs Group, responsible for initiating civil law suits abroad as well as the execution of the assistance requests received by Brazil; the Proactive Group on Combating Corruption, pursuing mainly the recovery of assets derived from public funds; and the Group of Asset Recovery of Major Debtors, focusing on situations involving federal authorities and public foundations. Examples of successful asset recovery from various jurisdictions to Brazil were presented. The panellist also described successful recent experiences with the tracing and freezing of funds pursuant to United Nations Security Council resolutions 1970 and 1973. In this last case however, the freezing order had been lifted once the institution had been removed from the list of entities subject to asset freezing under those resolutions. The panellist mentioned as a main challenge in asset recovery proceedings the delays in the Brazilian criminal procedures. Brazil had over 2 billion USD frozen in other States that could not yet be returned due to the lack of final court decisions in Brazil on these cases.

9. In the ensuing discussion, the growing trend towards non-conviction based forfeiture in a number of countries was recognized. Some speakers highlighted the positive experience with non-conviction based forfeiture, especially in organized crime and grand corruption cases. One speaker reported that the enforceability of foreign non-conviction based forfeiture orders had recently been extended to all foreign jurisdictions. Others reported about their countries' concerns with regard to non-conviction based forfeiture legislation, based on the right of ownership and the presumption of innocence. Reference was made to the ongoing negotiations within the European Union on the issue of confiscation. While the European Court of Justice in a recent ruling had found that non-conviction based forfeiture did not constitute a violation of the right of ownership or the presumption of innocence,

agreement to an EU wide directive had not yet been reached as views diverged considerably.

10. The importance of spontaneous disclosure of information on assets by the States where they were located was highlighted. It was recommended that measures to strengthen confidence and trust between requesting and requested States should be enhanced in order to encourage spontaneous disclosure. Some speakers highlighted the need for greater information sharing and coordination, regarding both information on assets and on the procedures and legal systems. Similarly, several speakers reported on their experience and highlighted the procedural obstacles they were confronted with in their countries, that resulted in lengthy procedures first for confiscation and then for the return of the assets.
