Why Asset Forfeiture?

- Deprive criminals of the profits of their crimes;
- Break up criminal organizations, and prevent the financing of further crimes;
- Recover stolen assets or provide restitution to victims or the government.
UN Convention Against Corruption

- **Article 31**: Each State to take measures to enable tracing, freezing, seizure and confiscation of proceeds of corruption, and property obtained with such proceeds.

- **Articles 54 and 55**: Each State to take measures to provide mutual legal assistance through:
  - The enforcement of foreign orders to freeze, seize and confiscate proceeds of corruption, and
  - The freezing, seizing and confiscation of proceeds of foreign crimes of corruption through the requested State’s own civil or criminal processes.
OVERVIEW

- I. Summary of U.S. Forfeiture Law
- II. Mechanisms for International Assistance by the United States
- International Sharing of Forfeited Assets
TERMINOLOGY

- Seizure/Preventative Measures
  - Temporary
  - Seize, Restrain, Freeze, Immobilize

- Final Forfeiture
  - Ownership
  - Forfeiture, Confiscation
I. United States

Forfeiture Law
UNITED STATES FORFEITURE SYSTEMS

- Criminal Forfeiture
- *In Rem* Forfeiture
- Executive/Administrative Forfeiture (by law enforcement agency, usually only with consent, assets in the United States)
U.S. CRIMINAL FORFEITURE

- Need personal Jurisdiction \((in personam)\) - - defendant must be present;
- Included in criminal case, need criminal conviction in the U.S.;
- ADVANTAGE: Government can forfeit criminal’s legitimate property if illicit assets cannot be found.
Criminalizes the movement of funds into or out of the United States with intent to carry on “specified unlawful activity;”

“SUA” includes many U.S. crimes, but also foreign crimes such as bribery of a public official, embezzlement of public funds, and fraud against a foreign bank;

Criminal and *in rem* Forfeiture
- The funds
- Facilitating property
Bulk Cash Smuggling
31 U.S.C. Section 5332

- Criminalizes Bulk Cash Smuggling
  - $10,000 or more
  - Into or out of United States
  - Intent to evade reporting
- Criminal and *in rem* Forfeiture
  - The Currency
  - Facilitating property
Criminal Forfeiture and Assets Overseas

18 U.S.C. Section 981(k)

- Where forfeitable funds are in a foreign bank, and cannot be seized, U.S. may seize funds in that foreign bank’s correspondent accounts at a bank in the United States;
- Correspondent account funds are deemed to be the foreign criminal deposits;
- **Practice**: Last resort, if mutual legal assistance not available.
Criminal Forfeiture and Assets Overseas (2)

- Court can order Defendant to repatriate funds to the United States;
- Failure to comply could increase sentence or lead to contempt of court;
- If failure to comply, assistance from foreign government necessary
U.S. IN REM FORFEITURE

- Need only *in rem* jurisdiction - court must exercise some control over the property;
- Only property derived from or involved in the crime in the U.S.;
- ADVANTAGE: Criminal conviction not necessary, can forfeit property from dead criminals or fugitives.
In Rem Forfeiture and Assets Overseas

- Basis for forfeiture as if property were located in the U.S.
- Other country takes action on U.S. request to give U.S. court control over property (ex. Freeze a bank account)
- Jurisdiction over foreign assets of terrorists targeting the United States
Obstructionist Litigants

- Sanctions for failure to produce bank records located in a foreign bank: can include dismissal of the party’s claim if the records are material and claimant could obtain the records or waive bank secrecy laws, but does not. 18 U.S.C. Section 986(d)

- Fugitive disentitlement doctrine: claim dismissed if party knows of *In Rem* forfeiture proceeding, but stays away from the United States in order to avoid criminal charges. 28 U.S.C. Section 2466
II. MECHANISMS FOR INTERNATIONAL ASSISTANCE FROM THE UNITED STATES
ASSISTANCE FROM THE U.S.

- Investigatory assistance/mutual legal assistance
- U.S. initiates its own forfeiture action
  - Criminal Forfeiture
  - *In rem* Forfeiture
- Enforce foreign forfeiture judgments
- Provisional restraint mechanisms
Investigatory Assistance and Mutual Legal Assistance

- Informal police to police assistance;
- INTERPOL;
- FIU information sharing through Egmont Group;
- Formal mutual legal assistance request (pursuant to treaty);
- Letter rogatory or other assistance request (where no treaty).
Tips on International Assistance in Asset Recovery

- Don’t publicize your investigation, or assets will be gone;
- Always find out as much as possible through informal channels first;
- Find out what can be obtained informally, and what requires formal legal assistance request;
- May need a first request for investigation, a second to seize, confiscate, or take other action.
Tips on International Assistance in Asset Recovery (2)

- If a formal request or other legal action is necessary, the prosecutor should speak directly with attorneys in the foreign country to learn what possible tools are available and practical for your case;

- In the United States, contact should be with the Department of Justice’s Office of International Affairs.
  - Office of International Affairs
    Criminal Division, Department of Justice
    1301 New York Avenue, N.W., 8th Floor
    Washington, DC 20005
Request to the U.S. for Evidence

- Purpose for which evidence sought;
- Summary of facts, including connection between the target and the evidence;
- Legal description of offenses charged or investigated;
- Detailed description of evidence;
- Identifying information on individuals;
Request to the U.S.
for Evidence (2)

- **Search/Seizure**
  - Affidavit establishing Probable Cause that evidence is:
    - Relevant to the investigation, and
    - Can be found at that location
  - Full description of the property to be seized.

- **Date by which evidence needed;**
- **Confidentiality requirements.**
Initiating a Criminal Forfeiture
Action Under U.S. Law
18 U.S.C. Section 1956(c)(7)(B)

- U.S. money laundering predicates include:
  - Foreign official bribery;
  - Embezzlement of foreign public funds;
  - Bank fraud (by or against a foreign bank);
  - Export control violations/Munitions smuggling;
  - Crimes of violence, narcotics, terrorism;
  - Any crime for which U.S. would be obliged to extradite under a multilateral treaty.
Initiating an *In Rem* Forfeiture Action Under U.S. Law

- Proceedings of foreign money laundering predicates - 18 U.S.C. Section 981(a)(1)(C);
- Property involved in money laundering transactions - 18 U.S.C. Section 981(a)(1)(A);
- Proceeds and instrumentalities of foreign narcotics offenses – 18 U.S.C. Section 981(a)(1)(B)
Enforcement of Foreign Judgments
28 U.S.C. Section 2467

- **Jurisdiction & Venue**
  - District Court in District of Columbia
  - Where property or defendant located

- **Can obtain Restraining Order**

- **Register & Enforce Foreign Judgment**
  - Offenses in Vienna Convention
  - Offenses for which forfeiture available in U.S.
  - Certification by Attorney General
Enforcement of Foreign Judgments
28 U.S.C. Section 2467

- Court bound by factual findings in foreign judgment;
- Enforce Judgment Unless:
  - System Incompatible with Due Process
  - No personal jurisdiction
  - No subject matter jurisdiction
  - Insufficient notice to Defendant
  - Judgment obtained by fraud
Request to the U.S. to Enforce a Judgment

- Complete description of the asset;
- Summary of case facts and description of forfeiture proceedings;
- Certified copy of judgment;
- Affidavit or sworn declaration stating:
  - Defendant received notice in time to defend
  - Judgment in force and not subject to appeal
- Additional information as required
Provisional Measures

- **Pre-Trial restraining order** – 18 U.S.C. 981(b)(4)
  - Person arrested/charged Abroad
  - Ex-Parte 30-day freeze to await evidence

- **Arrest/Seize on Probable Cause**
  - Seizure Warrant
  - Arrest Warrant *in rem*
Provisional Measures

- Register and enforce foreign Restraining Order – 28 U.S.C. Section 2467(d)(3)
  - Attorney General Must Certify
  - Treaty or Agreement Required

- Foreign Request
  - Affidavit describing foreign action and reasonable basis to believe property will be forfeited
  - Hearing upon notice
  - Treaty or Forfeiture Agreement Required
Request to the U.S. for Provisional Restraint

- If opening US forfeiture case:
  - Required info for opening U.S. case
  - Copy of arrest documentation or indictment (BUT need probable cause evidence within 30 days),

- If in anticipation of enforcement of foreign order:
  - Required information for enforcement of a Judgment
  - Affidavit or Certified copy of restraining order (BUT need evidence for hearing within 10 days)
III. INTERNATIONAL ASSET SHARING
International Asset Sharing

- To increase international cooperation;
- Since 1989 more than $188 million shared from Department of Justice to 35 countries;
- U.S. case in which other government must have participated in supporting forfeiture of assets directly or indirectly;
- Requires treaty or agreement authorizing sharing (can be case-specific).
International Asset Sharing

Guidelines

- Essential Assistance: (50% - 80%)
- Major Assistance: (40% 0 50%)
- Facilitating Assistance: (Up to 40%)
International Asset Sharing

Guidelines

- Essential Assistance: (50% - 80%)
  - Waive own forfeiture action
  - Repatriate w/o account signatory letter
  - Virtually all case evidence
  - Defending litigation
International Asset Sharing

**Guidelines**

- Substantial Assistance (40% - 50%)
  - Enforcing a US order and repatriating
  - Freezing/lifting freeze over assets
  - Repatriating via extradition request
  - Substantial foreign law enforcement resources
  - Physical Danger for foreign agents
International Asset Sharing

Guidelines

- Facilitating Assistance (Up to 40%)
  - Tip info
  - Providing bank, financial records
  - Helping convince foreign banks to repatriate
  - Service/witness interviews
International Asset Sharing

Limitations:

- Only the Deputy Attorney General or the Subsecretary of Treasury can approve;
- Secretary of State must concur;
- Congress can object;
- Sharing may be prohibited by law.
Questions?

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