

THE CONDITIONS FOR CONSIDERATION AND PROCEDURES OF CONFISCATION OF PROCEEDS OF CRIME IN VIET NAM

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In Viet Nam, the activity of mutual legal assistance in criminal matters relating to the confiscation of proceeds of crime has been carried out on the basis of the provisions of the laws of Viet Nam and international treaties to which Viet Nam has signed or participated. Cooperation in tracing, distraint, freezing, seizure and confiscation of proceeds of crime is part of the activity of mutual legal assistance in criminal matters.

I. THE LEGAL BASIS FOR INTERNATIONAL COOPERATION IN DEALING WITH PROCEEDS OF CRIME

A. Domestic Law

The search, seizure, distraint, freezing and confiscation of proceeds of crime in Viet Nam shall comply with the provisions of the Criminal Procedure Code and other related legal regulations of Viet Nam such as the Penal Code, the Law on Mutual Legal Assistance, the Law on Anti-Corruption and the Anti-Money-Laundering Law.

The disposal of proceeds of crime in Viet Nam shall comply with the provisions of international treaties which the Socialist Republic of Viet Nam is a member, or as agreed case-by-case between competent authorities of Viet Nam and competent authorities of the foreign countries involved.

B. International Treaties

- (a) Multilateral Treaties: United Nations Convention against Corruption, United Nations Convention against Transnational Organized Crime, Treaty on Mutual Legal Assistance in Criminal Matters between ASEAN countries.
- (b) Bilateral treaties: Viet Nam has signed 23 bilateral treaties on mutual legal assistance in criminal matters with other countries. Most of these treaties have been signed recently, such as with Hungary, Cambodia, Spain, Kazakhstan and France, and they have provisions on tracing, distraint, freezing, seizure and confiscation of proceeds of crime. Accordingly, these treaties have the provisions on the order and procedures for investigation and verification, seizure, distraint, freezing, confiscation and return of proceeds of crime.

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II. CONTENTS OF REQUESTS FOR MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

A. Written Requests for Assistance

Written requests for assistance shall include the following:

- a) Date of and place of the request;
- b) Name and address of the agency making the request;
- c) Name and address or head office of the requested agency;
- d) Full name and address of residence or working place of the individual; name and address or head office of the agency or organization directly relating to the request; and
- e) Purposes of the request; a brief description of the criminal case and related circumstances, the applicable article and punishment; progress of the investigation, prosecution and trial; and time limit within which compliance with the request is desired.

It should be noted that a foreign request related to the search, seizure, freezing and confiscation of proceeds when sent to Viet Nam in addition to the aforementioned contents needs to add the following contents:

- A description of the proceeds sought and place where the proceeds may be found; grounds on which the requesting State believes that the proceeds of crime are located in the requested State and may be under the jurisdiction of that State; the implementation of the judgments and decisions of the Court for search, seizure or tracing and confiscation of proceeds of crime.
- Measures to be applied that can lead to the discovery or recovery of proceeds of crime.
- Requirements or procedures of the requesting state in order to ensure effective execution of the request, manner or form to provide documents and objects.
- Commitments and implementation (for instance, reciprocal commitment, confidentiality, limitation on use, and commitment to pay the costs or damages). Where a request for assistance from the countries without a treaty for mutual legal assistance in criminal matters with Viet Nam, the content shall include the undertaking of the principle of reciprocity.
- Documents and other information that may facilitate the execution of the request.
- Contact information of the case officials.
- In case of emergency, it must specify the time limit and the reason therefor (for example, the time of the upcoming trial).
- The requirement to keep confidentiality of the request (if any).

B. The Conditions of Form and Content

Requests for mutual legal assistance must be made in writing and must be accompanied by a translation into English or Vietnamese (Vietnamese translation prevails). Translation quality has been an issue as there have been several requests for assistance sent to Viet Nam, and the poor quality of the translation made it difficult to understand exactly what was requested, making it difficult to execute the request.

It should be noted:

- Send a certified copy or original order or decision of the court on the application of temporary measures or confiscation of proceeds.
- Requests for assistance may be refused if there is no commitment to reciprocity.
- Depending on specific cases, Viet Nam may ask the requesting State to undertake paying the costs and damages that Viet Nam may face in the process of executing the request for assistance.

III. THE MAIN ISSUES TO CONSIDER IN EXECUTING THE REQUEST FOR MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS OF A FOREIGN STATE

A. Nature of the Request

A request for assistance must be related to a criminal matter, whereas a request to seize, freeze or confiscate proceeds must have formal charges or a final order which has already taken effect.

B. The Legal Basis for International Cooperation

The content of the request for mutual legal assistance shall specify the legal basis for cooperation, which maybe based on: (1) international conventions which contain provisions on mutual legal assistance in criminal matters; (2) bilateral treaties on mutual legal assistance; (3) domestic law allowing international cooperation for criminal cases; or (4) the principle of reciprocity through diplomatic channels. Note that a request for mutual legal assistance can use one or more of the above-mentioned legal bases.

C. Jurisdiction of the Requesting State over the Proceeds of Crime

The requesting state must state that it has jurisdiction to handle criminal cases related to such proceeds, that there are ongoing criminal proceedings in a territory of the requesting state which are related to proceeds of crime in Viet Nam or that it has jurisdiction over the criminal acts committed by its nationals related to proceeds of crime in Viet Nam.

D. The Relationship between the Proceeds Requested to Be Seized and Criminal Activity

The requesting State shall give evidence to prove the link between the property and the criminal activity or prove that the assets are benefits which the subject gained from crime. For example, for an act of money-laundering, the requesting State should provide all information concerning the illegal origin of the assets, the path of the assets or analysis of bank statements, business records, financial documents, contracts; concealed acts of agencies or organizations to identify the ultimate beneficial owners of the assets etc.

E. Dual Criminality

The criminal offence that has been tried and specified in the request for assistance must be a criminal offence stipulated in the Penal Code of Viet Nam, but not necessarily the same criminal group or the same offence. In other words, the elements of the crime do not necessarily need to be identical. Competent agencies of Viet Nam will base their decision on the specific acts described in the request to consider applying the principle of dual criminality.

F. Grounds for Refusal of Assistance

Under the provisions of the Law on Mutual Legal Assistance, Viet Nam shall refuse assistance in the following cases:

- It is not in conformity with the obligations of Viet Nam under the international treaties to which Viet Nam is a party and Vietnamese laws;
- The execution of the request may jeopardize the sovereignty or national security of Viet Nam;
- The request is for prosecution of a person for criminal conduct for which that person has been convicted, acquitted or granted a general or special reprieve in Viet Nam;
- The request relates to criminal conduct for which the statute of limitations has elapsed according to the Penal Code of Viet Nam;
- The request relates to a law violation which constitutes a criminal offence under the Penal Code of Viet Nam.
- The execution of a foreign request for legal assistance in criminal matters may be postponed if the execution of that request would create an obstacle to investigation, prosecution, trial or enforcement of a judgment in Viet Nam.

In addition, the request for assistance may be refused in some cases provided for in international treaties to which Viet Nam has signed or acceded, such as requests related to military offences; requests related offences of a political nature; requests in which there are substantial grounds to believe that the request for assistance has been made with a view to prosecute, punish or discriminate against a person on account of race, religion, gender, nationality, ethnic origin, political opinions or any other similar reason, or that such person's position may be prejudiced for any of those reasons; requests for assistance related to the freezing, seizure or confiscation of proceeds of crime; the execution of assistance would create an excessive financial burden on the resources of Viet Nam, etc.

G. Commitment to Share the Proceeds of the Requesting State

The parties will agree on the division of property recovered on the basis of a requesting party's commitment to pay damages or costs incurred in execution of the request in Viet Nam.

III. THE PROCESS OF RECEIVING AND PROCESSING THE FOREIGN REQUEST FOR CONFISCATING THE PROCEEDS OF CRIME

- The Supreme People's Procuracy shall check its validity and transmit it to the competent agency of Viet Nam for execution. If the request is not valid or does not have sufficient information, the Supreme People's Procuracy shall request the competent authority of the requesting State to supplement information.
- The Supreme People's Procuracy performs the function of exercising the right to prosecution and supervise activities of mutual legal assistance in criminal matters to ensure the implementation of the contents requested on time and ensure the fastest possible implementation. If, during the execution of the request, additional information is necessary, the Supreme People's Procuracy shall request the requesting State to provide additional information.

In the process of execution of the request, the competent agency of Viet Nam will conduct the following activities:

- Collection of evidence, searching for the property requested to be confiscated: After identifying the assets at the location provided, based on information of the case and evidence provided by the requesting State, the competent agency of Viet Nam may issue an order or decision on the application of measures of proceeds to distraint or freeze the account to prevent the assets from being disbursed before being confiscated.
- After being distrainted or frozen, proceeds of crime will be delivered to the competent authorities to be preserved until a final decision on the confiscation.
- Confiscation of proceeds of crime: the requesting State shall send a final order of confiscation of the proceeds of crime and provide necessary evidence to the competent agencies of Viet Nam to consider issuing an order to confiscate proceeds.
- Return of proceeds: If the assistance was based on a convention or bilateral treaty between Viet Nam and the requesting State, the return of proceeds will comply with the provisions of these documents. Where assistance was based on the principle of reciprocity, the return or sharing of confiscated proceeds will depend on the agreement on sharing of proceeds between Viet Nam and the requesting State.

IV. DIFFICULTIES AND OBSTACLES

In practice, as the Central Authority on mutual legal assistance in criminal matters of Viet Nam, the Supreme People's Procuracy has received a number of incoming requests for mutual legal assistance, and Viet Nam also sent foreign countries some requests for mutual legal assistance in criminal matters involving the confiscation of proceeds of crime. However, the effectiveness of international cooperation in confiscation of proceeds is not high, mainly only in the collection and provision of documents related to the proceeds.

For instance, Viet Nam has sent several requests to confiscate proceeds of crime related to criminal cases being processed in Viet Nam. So far, some countries have responded by requesting Viet Nam to provide additional information or to confirm the information of the case. Still, most countries either have not responded or have failed to execute Viet Nam's requests.

In practice, international cooperation in asset recovery faces several difficulties and obstacles as follows:

- The legal obstacles include: the inadequacy of legal provisions on international cooperation in asset confiscation; the grounds of refusal of assistance such as the nature of punishment; legal proceedings are also being conducted in the requested State; insufficient time for execution of the request due to time limitations on investigation and prosecution in the requesting State; etc.
- Different countries use different legal terms: countries may use different terms to describe the same legal concepts (for instance, the concept of confiscation, some countries use the term "confiscation", while others use the term "forfeiture") or describe the same procedure (for instance, for frozen assets, some countries use the term "block", while others use the term "freeze").
- The differences between the systems for the confiscation of property could lead to enforcement problems. For example, some countries provide for the confiscation of

property in civil or administrative proceedings without any civil or criminal judgments, while Vietnamese law only permits asset confiscation after a criminal judgment has taken effect.

- Geographical distance and the difficulty of obtaining timely responses are also issues that interfere with the execution of requests. Some requests are never received by the requested State, or they may be responded to after the deadline that the requesting State needs to receive the results to meet the time limits of domestic proceedings.

V. SOLUTIONS FOR IMPROVING THE EFFICIENCY OF INTERNATIONAL COOPERATION IN CONFISCATION OF PROCEEDS OF CRIME

- Establish direct contact channels between the central authorities on mutual legal assistance in criminal matters between Viet Nam and other countries. This is an important factor to ensure the transfer and receipt of a request for assistance, to shorten the time for assistance, to exchange legal information and to resolve problems that arise during the execution of requests.
- When sending a request for mutual legal assistance in criminal matters, the requesting State should describe the purpose of the order issued, not merely the name of the order, in order to avoid confusion in the understanding of the term.