

RECOVERING PROCEEDS OF CORRUPTION

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I. INTRODUCTION

On November 7, 2009, United States Attorney General Eric H. Holder, Jr., in delivering opening remarks at Plenary VI Ministerial Global Forum on Fighting Corruption and Safeguarding Integrity in Doha, Qatar, said that “[C]orruption is condemned by all religions, all ethical codes, all legal systems. It hinders all development, slows all progress, impedes all advancement -- both within our own countries and across our borders. It strikes hardest at the poor and vulnerable, siphoning scarce resources away from those most in need. It advances the selfish interests of a dishonest few over the interests of the great many who work hard and who obey the law and our common traditions. Corruption erodes trust in government and private institutions alike; it undermines confidence in the fairness of free and open markets; and it breeds contempt for the rule of law. Corruption is, simply put, a scourge on civil society.” All countries, including the United States, struggle with corruption. The acknowledged amount of stolen funds by high ranking government officials throughout the world is mind boggling. Sadly, there have been only a relatively small amount of successful prosecutions of “grand corruption” cases¹ and limited success in the recovery and return of the related illicitly acquired assets. This paper explores some of the impediments to asset recovery that account for the dismal results in attacking a crime problem that receives worldwide condemnation and for which there is international consensus about its debilitating impact on rule of law, development and poverty. This paper also identifies needed tools for prosecutors to pursue successful asset recovery cases.

II. THE UNITED NATIONS CONVENTION AGAINST CORRUPTION (UNCAC)

The principal international instrument for dealing with asset recovery is the United Nations Convention against Corruption (UNCAC). It is the first globally negotiated anticorruption treaty that contains a framework for governments to cooperate to achieve the goal of returning embezzled public funds and other proceeds of corruption by providing the vehicle for countries to make requests to each other for legal assistance in the recovery of illicit assets. Chapter V of UNCAC (asset recovery) reflects a mutual aspiration of developing and developed states parties for more effective cooperation to recover the proceeds of grand corruption. The Convention sets forth mutual legal assistance procedures for countries to follow to enable them to partner in asset recovery cases. It imposes a binding legal commitment for parties to repatriate embezzled assets where the victim state has instituted proceedings and obtained a confiscation judgment which is then enforced by the state where the property is located. The Convention advocates the use of “mutually acceptable arrangements, on a case-by-case basis, for the final disposition of forfeited property.

Since the time that UNCAC entered into force on December 14, 2005, the Conference of States

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1. Grand Corruption, also referred to as kleptocracy, is large-scale corruption by senior officials in the executive, judicial, legislative, or other official positions in government, including senior executives of government-owned corporations, military officials, and senior politicians or senior officials from major political parties, who use their influence to steal, extort, and misappropriate large sums of money from their governments and citizens. In addition, kleptocracy involves the family members and close associates of senior government officials, as well as support networks of advisors, attorneys, and accountants.

Parties has met on an annual basis to discuss implementation issues. Most recently, the States Parties met in Doha, Qatar during November 9-13, 2009. The resulting Doha Resolution from COSP III acknowledges “the important progress made towards implementation of chapter V of the Convention, but recognize[es] that States parties continue to face challenges in asset recovery owing, inter alia, to differences in legal systems, the complexity of multi-jurisdictional investigations and prosecutions, lack of familiarity with mutual legal assistance procedures of other States and difficulties in identifying the flow of corruption proceeds. . . .” The Resolution notes that there are particular challenges posed in recovering the proceeds of corruption in cases involving individuals who are or have been entrusted with prominent public functions and their family members and close associates. To overcome these challenges to effective asset recovery, States Parties must, among other things: (1) take a proactive Approach to international cooperation in asset recovery; (2) timely respond to Mutual Legal Assistance Requests; (3) remove barriers to asset recovery; (4) study application of changes to legal frameworks including use of presumptions and illicit enrichment.

III. BARRIERS TO ASSET RECOVERY

Despite the existence of a framework to follow and a vehicle for jurisdictions to make requests to one another in UNCAC, there are numerous obstacles that continue to thwart asset recovery. The following is a list of many of the hurdles that jurisdictions face in undertaking asset recovery work:

- Lack of adequate legal framework (anti-corruption, anti-money laundering, and confiscation laws)
- Absence of an organizational structure, designated responsible government authorities, and implementing procedures and policies concerning asset recovery
- Lack of political will and government support to pursue asset recovery
- Unfamiliarity with how to investigate and prosecute corruption.
- Failure to appreciate or possess the skills required
- Scarcity of financial and human resources and inability to pay the cost of advisors
- Lack of capacity to conduct financial and money laundering investigations
- Impossibility of accurately conducting the time consuming process of tracing illicit proceeds, particularly where they have been concealed and comingled
- Inability to identify where the proceeds of grand corruption are on deposit
- Lack of independent prosecuting and investigating authorities and anti-corruption commissions
- Overly excessively protracted legal proceedings
- Inability to successfully prosecute the underlying corrupt conduct, particularly to overcome vigorous legal challenges raised by legal representatives for corrupt officials
- Inability of a victim state to obtain a confiscation judgments without a conviction in the victim state, including where corrupt official is dead, a fugitive, possesses immunity, or is too influential to prosecute
- Unfamiliarity with process of requesting mutual legal assistance and limited capacity to formulate executable assistance requests
- Failure of victim states to provide timely and sufficient evidence in support of mutual legal assistance requests
- Unfamiliarity with points of contact to assist in mutual legal assistance
- Incompatibility of legal procedures in proceedings in requesting and requested states, including dual criminality requirements, statute of limitations, and requirement of a final judgment as a condition of providing legal assistance
- Inability to secure assistance from non-responsive jurisdictions
- Inability for a jurisdiction where corruption proceeds are located to freeze and confiscate illicit property based on their own investigation or to have the statutory basis to recognize a foreign restraint order or forfeiture judgment
- Difficulties of states where proceeds of corruption are located to promptly execute mutual legal

assistance requests, including requests to enforce requesting states' restraint orders and forfeiture judgments

- Lack of confidence and trust between requesting and requested states
- Lack of transparent mechanisms for the use and disposition of recovered assets

IV. WHAT HAS PROVEN EFFECTIVE IN RECOVERING THE PROCEEDS OF CORRUPTION?

Rarely are corrupt officials pursued while they are still in office. Once the new government is installed and is sufficiently organized to pursue past cases of corruption, the corrupt former official typically has had ample time to conceal his illegal wealth, attempt to protect himself from accountability by obtaining immunity from prosecution, or to flee. Most jurisdictions do not allow for the confiscation and return of assets except on the basis of a criminal conviction, which of course, is unlikely where the corrupt official cannot be prosecuted. Increasingly, jurisdictions are recognizing that many of the challenges to successful asset recovery can be overcome through the adoption and use of non-conviction based (NCB) forfeiture statutes. NCB forfeiture, called "civil forfeiture" in some countries, is an action not against an individual, but against the property itself. Because it is against the property, an NCB forfeiture action is not dependent on a criminal conviction and may be pursued even if the corrupt official is dead, a fugitive, has been acquitted of a related criminal offense, is immune from criminal prosecution, or enjoys residual political influence making criminal prosecution not possible. Most NCB forfeiture statutes require proof by a preponderance of the evidence or balance of the probabilities whereas criminal forfeiture statutes require a conviction of the individual, usually by the higher "beyond a reasonable doubt standard", though in some countries the lower preponderance of the evidence standard governs the forfeiture phase of the criminal proceeding once guilt is proved by the higher standard. While a criminal prosecution is obviously a desirable law enforcement objective when dealing with corrupt officials who have undermined the public trust and stolen state funds, having the ability to strip away their illegal proceeds, particularly when a successful criminal prosecution is unlikely, is also an important law enforcement objective to achieve and helps to restore confidence in government.

In addition to adopting NCB forfeiture laws, other enumerated obstacles to asset recovery can be addressed through the enactment and implementation of effective, comprehensive, and flexible mutual legal assistance legislation that provides for the enforcement of foreign restraining orders and final forfeiture judgments. Corrupt officials frequently launder their illicit proceeds to places outside their own jurisdiction. Requesting and requested jurisdictions need flexible mutual assistance laws that will enable them to act speedily to freeze the illicit proceeds so they cannot be dissipated. In most cases, the requested jurisdiction cannot be expected to bring its own domestic case because the underlying corrupt activities will have occurred in the requesting state, which will possess that evidence, and it will be a rare occasion that the foreign corrupt official is located in the jurisdiction where the assets are located. Accordingly, in interests of judicial economy and practicality, jurisdictions need the ability to enforce one another's restraining orders and final forfeiture judgments. This includes one another's non conviction based judgments. In other words, the jurisdiction pursuing the underlying corruption case needs to have the ability to enter orders affecting property located beyond its borders, and the requested jurisdiction needs to have the ability to give effect to such foreign orders. This is consistent with the asset return framework set out in Article 57 of UNCAC, in which the binding legal commitment to repatriate proceeds of corruption applies to embezzlement proceeds where the victim state obtains a forfeiture judgment that is then enforced by the state where such proceeds are located.

Another improvement to the legal framework that can aid in overcoming challenges to asset recovery is the incorporation of presumptions in the law. Often times, corrupt officials, particularly those who have been in power from an extended period of time, have engaged in multiple schemes and have taken bribes and kickbacks from numerous sources and have commingled funds to such an extent that law enforcement may never be able to unravel the transactions and trace assets to particular corrupt activities. Presumptions will

essentially shift the burden of proof after the government has made an initial showing (based on a probable cause standard) that the property is the proceeds or instrumentalities of foreign corruption, and accordingly will require the corrupt official to demonstrate that his or her property has been legitimately acquired. Tracing is time consuming and in many cases, impossible. Thus, putting the onus on the corrupt official to establish that his or her property is lawful is not unjust or unreasonable since the official is in the best position to know how the property was acquired. An example of a presumption is that the government is entitled to presume that the property subject to forfeiture was derived from corruption where such property is held by or for the benefit of a foreign official and the value is inconsistent with his or her income and declared assets. Another presumption is that where an official has been convicted of corruption or money laundering in one state, then another state where his or her property is located is entitled to initiate forfeiture proceedings and have a presumption in its favor that the property is derived from corruption. Typically these presumptions are contained in non conviction based forfeiture regimes in which the government is not seeking to take the property owner's liberty interest away through a criminal conviction. Consequently, the presumption – which is rebuttable - should not run afoul of due process concerns and presumptions of innocence. Similarly, where such presumptions are applied in the context of a criminal prosecution, it will be in the forfeiture phase of the case following a conviction where guilt has been proved by the higher standard, and therefore, should not be considered a violation of the presumption of innocence.

Other impediments to identifying and tracing proceeds of corruption can be surmounted by adhering to Chapter V of UNCAC, which requires the financial institutions in the member states to apply enhanced scrutiny to accounts of politically exposed persons (PEPs) and requires states to develop effective financial disclosure systems. Many of the barriers to asset recovery stem from a lack of knowledge, skills, procedures, and training. Through the development of specialized prosecutorial and investigative units, anti-corruption task forces, and anti-corruption commissions, the creation of national strategies and internal integrity programs, and the provision of related training for relevant authorities, law enforcement authorities will be better able to detect, investigate and prosecute corrupt public officials and those who bribe and be better able to confiscate the property involved in corruption crimes.

V. U.S. LEGAL AUTHORITY

The U.S. has a strong interest in encouraging effective investigation and forfeiture of proceeds of corruption and the rendering of related mutual legal assistance. As a result of successful forfeiture cases brought by the U.S. Department of Justice, millions of dollars in forfeited corruption proceeds has been repatriated to victim states and hundreds of millions of additional funds are currently under judicial restraint subject to pending forfeiture proceedings. The U.S. legal framework that enables it to provide assistance in asset recovery cases stems from potent national laws, flexible mutual assistance authority, and a forceful commitment to combating grand corruption and assisting other nations in asset recovery efforts that is embodied in a consolidated national strategy. In August 2006, the United States issued a national Strategy to Internationalize Efforts Against Kleptocracy, which remains effective today, and in broad terms, strives to prevent kleptocracies and deny safe haven to corrupt officials, those who corrupt them, and their proceeds. To achieve these objectives, the United States undertakes to:

1. Launch a coalition of International Financial Centers exploited by kleptocrats and work with private and public sector partners in key international financial centers where illicit funds transit and/or are hidden and use financial and economic sanctions where necessary to stop grand corruption;
2. Vigorously prosecute Foreign Corruption Offenses and Forfeit Illicitly Acquired Assets. The U.S. Government will seek to expand its capacity to investigate and prosecute criminal violations associated with high level foreign official corruption and related money laundering, as well as to forfeit the proceeds of such crimes;
3. Deny safe haven so that kleptocrats and those who corrupt are denied entry to the United

States;

4. Strengthen multilateral action against the bribery of kleptocrats, foreign political parties, party officials, and candidates for office;
5. Facilitate and reinforce responsible repatriation and use when returning recovered assets so that they benefit of the citizens of countries victimized by grand corruption; and
6. Target and internationalize enhanced capacity by providing technical assistance and focusing international attention on building capacity to detect, prosecute, and recover the proceeds of high level public corruption while helping countries build strong systems to promote responsible and accountable governments.

The mechanism for confiscating corruption proceeds in the United States is based on flexible authority to institute legal proceedings either with or without a conviction through which title to property is vested in the government, following proof of criminal conduct and demonstrating that the property or its value was derived from or involved in the commission of a crime.² *See, generally*, 18 U.S.C. §§ 981 and 982 and 21 U.S.C. §§ 853 and 881. Critical U.S. legal authority relied on by American prosecutors in asset recovery cases includes:

- *Criminal forfeiture*: The United States must first prove beyond a reasonable doubt that the corrupt official is guilty of an offense for which forfeiture is available. Forfeiture is available for a wide array of corruption related and money laundering offenses. Following conviction, the defendant's interest in property constituting the proceeds of an offense or property used in the commission of the offense is forfeited to the United States as part of the criminal sentence. Because a criminal prosecution is an *in personam* action, the United States can also seek a forfeiture judgment for the value of property involved in the commission of the crime or forfeit property the defendant legitimately acquired in lieu of his or her tainted assets if the assets involved in the offense have been dissipated or hidden.
- *Non Conviction Based (NCB) forfeiture*: NCB or civil (or *in rem*) forfeiture actions are actions against property, rather than a criminal defendant, and do not require a conviction. In the United States, such actions are regarded to be quasi criminal because the authority is located in the penal code and the government must establish the existence of a criminal offense and the property's nexus to that offense, but the procedure utilized is civil. NCB forfeiture actions depend upon the government's ability to demonstrate the relationship between the criminal conduct and the particular property subject to confiscation, and, as a general rule, are limited to property somehow traceable to the offense such that it was used or acquired illegally. As already noted, NCB forfeiture actions are particularly useful in grand corruption cases where a criminal conviction is not possible, such as when the property is owned or controlled by a corrupt official who is a fugitive, has immunity from prosecution, or has died.
- *Restraint/Seizure for U.S. Forfeiture*: In both criminal and NCB forfeiture actions, United States courts have broad authority to order the seizure or restraint of property prior to trial to ensure that it remains available for forfeiture, provided there is probable cause to believe the property is traceable to the offense. *See, e.g.* 18 U.S.C. §§ 981(b), 983(j); 21 U.S.C. § 853(e).
 - *Restraint Based Upon Foreign Arrest or Charge*: Where a U.S. civil forfeiture action would

2. Relevant foreign crimes giving rise to forfeiture in the United States are enumerated in 18 U.S.C. § 1956(c)(7)(B) as predicates for U.S. money laundering violations and include foreign extortion, bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official. In addition, the United States may be able to reach corruption-related property if the conduct transcends national boundaries so as to violate United States law or if it occurred, in part, in the United States in violation of other U.S. laws, such as those prohibiting wire fraud, mail fraud, or transportation of property taken by theft or fraud. Forfeiture may also be possible for violations of U.S. statutes that provide for extraterritorial jurisdiction over United States nationals and residents, such as the Foreign Corrupt Practices Act.

be based upon evidence of a foreign crime, such as a corruption offense, the United States may seek preliminary restraint of assets based solely on a foreign arrest or criminal charge in order to allow foreign authorities time to provide sufficient probable cause evidence to enable the United States to file its own NCB forfeiture action. Such a preliminary restraint does not require a showing of probable cause and is of temporary duration that can be extended by the court upon a showing of good cause. 18 U.S.C. § 981(b)(4).

- *Enforcement of Foreign Forfeiture Judgments:* In addition to authority to initiate its own forfeiture actions, the United States has authority to enforce foreign forfeiture or confiscation judgments against property located in the United States. This provision covers assets that could be covered under a U.S. forfeiture judgment had the crime been committed in the United States, and therefore includes property involved in foreign corruption. In addition, the order must be issued by a court in a foreign nation that is party to a treaty or other formal international agreement with the United States providing for mutual forfeiture assistance and the foreign order must be certified for enforcement by the U.S. Attorney General. In enforcement proceedings, claimants cannot re-litigate substantive issues that have been adjudicated in the foreign court, such as guilt or forfeitability of the property. However, claimants can challenge the enforcement of a foreign forfeiture judgment in the United States based upon violation of procedural due process guarantees (such as failure to receive notice, lack of opportunity to participate, judgment procured by fraud etc.). See 28 U.S.C. § 2467. Enforcement of a foreign judgment would result in the forfeiture of the property to the United States, which would then control disposition of the assets.
- *Extraterritorial Reach of U.S. Forfeiture:* United States forfeiture authority extends not only to criminal proceeds and instrumentalities located in the United States, but also to property located *outside* the United States that is traceable to a criminal defendant prosecuted in the United States or criminal conduct occurring, in part, in the United States. See 21 U.S.C. §§ 853(l) (criminal forfeiture) and 28 U.S.C. § 1355(b)(2) (civil forfeiture). U.S. money laundering laws contain a grant of extraterritorial authority and numerous predicate offenses cover acts that occur outside the United States. Additionally, foreign corruption offenses are specifically designated as a predicate offense to money laundering. Where United States' treaty arrangements are insufficient to reach assets located abroad, the USA PATRIOT Act provides authority to restrain, seize and later forfeit funds from the U.S. correspondent bank account of the foreign institution(s) holding the forfeitable funds/assets located abroad in lieu of property located abroad. See 18 U.S.C. § 981(k).
- *Asset Return Provisions:* The United States is committed to the principles of disposition and return set forth in Article 57 and has ample authority through its asset sharing and remission statutes to execute the obligations under UNCAC. Where the United States successfully forfeits corruption proceeds, it is the policy and practice of the United States to repatriate the funds to the victim state and to encourage its use in effective programs to combat corruption and to dedicate recovered corruption proceeds to programs and institution building that will benefit the people who have suffered as a result of the corrupt activities. Pursuant to 18 U.S.C. §981(i), the United States can share the net forfeited proceeds with jurisdictions that cooperate to facilitate the successful forfeiture effort. This authority can be used in grand corruption cases where the victim country typically provides evidence to help establish the underlying corrupt activities. Under U.S. asset sharing laws, the United States is not limited to transferring any particular percentage of the assets, and for example, in the case of embezzlement and theft, the United States has the discretion to share all of the forfeited proceeds with the victim state. In addition to its broad asset sharing authority, the U.S. Attorney General has discretionary authority to restore forfeited property to innocent crime victims under the Department of Justice remission authority. Such authority is generally governed by regulations set out in 28 C.F.R. Part 9 (2008). The regulations define a "victim" as an individual, partnership, corporation, joint business enterprise, estate, or other legal entity capable of owning property, "who has incurred a pecuniary loss as a direct result of the

commission of the offense underlying a forfeiture.” 28 C.F.R. § 9.2(v).³ Thus, a victim can be a foreign state.

VI. CONCLUSION

We should all be striving for a world where there is no safe haven for stolen assets. Through vigorous enforcement of asset forfeiture laws, and in close cooperation with law enforcement partners in other countries, we can all do our part to ensure that corrupt officials do not retain the illicit proceeds of their corruption. However, prosecutors need to have an arsenal of weapons at their disposal in the form of legal authorities to prosecute domestic and foreign grand corruption and related money laundering offenses, and to confiscate the property involved in such crimes. Experience has shown that the linchpin to making the promise of asset recovery in UNCAC a reality is employing critical tools, such as non-conviction-based forfeiture or enforcement of foreign restraint orders or confiscation judgments. These powers, as part of a comprehensive domestic and international forfeiture regime, will enable effective implementation of the spirit of Chapter V of UNCAC and will increase the ability of nations to detect, investigate, and confiscate proceeds of grand corruption, as well as to provide mutual legal assistance to member states on asset recovery and return.

3. A victim does not include one who acquires a right to sue the perpetrator of the criminal offense for any loss by assignment, subrogation, inheritance, or otherwise from the actual victim, unless that person has acquired an actual ownership interest in the forfeited property. *Id.* Pursuant to 28 C.F.R. § 9.8(a), in order for a victim to receive remission, they must generally establish that: (1) they suffered a pecuniary loss of a specific amount directly caused by the offense underlying the forfeiture or a related offense, and the loss is supported by documentary evidence including invoices and receipts; (2) the loss is the direct result of the illegal acts and not otherwise lawful acts committed in the course of a criminal offense; (3) they did not knowingly contribute to, participate in, benefit from, or act in a willfully blind manner toward the offense; (4) they have not been compensated for the loss; and (5) they do not have recourse reasonably available to other assets from which to obtain compensation for the loss.