

## REPATRIATION OBLIGATIONS UNDER THE UNITED NATIONS CONVENTION AGAINST CORRUPTION

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### I. OVERVIEW OF OBLIGATIONS UNDER THE CONVENTION

Once it is finalized, the United Nations Convention against Corruption will impose important new obligations on nations to adopt measures to prevent, criminalize, and combat corruption. The draft convention has six substantive chapters, including chapters that would strengthen domestic infrastructures to prevent corruption, establish standards for criminalizing offences of corruption, provide for international cooperation, facilitate the recovery of the proceeds of foreign corruption, encourage exchange of technical assistance, and establish a mechanism for monitoring implementation. Chapter V is one of the most important chapters in the treaty dealing with the recovery and disposition of assets that corrupt officials placed outside their home countries. Chapter V, article, 61 will establish a framework for the disposition of assets that have been acquired through corruption and forfeited by one state as a result of a mutual legal assistance request from another state and will obligate states to return such assets to the requesting state in at least some circumstances. <sup>1</sup>

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<sup>1</sup> The current text of Article 61, *Return and Disposition of Assets*, is as follows:

1. Property confiscated by a State Party pursuant to article [...] [Freezing, seizure and confiscation] or [...] [International cooperation for purposes of confiscation] of this Convention shall be disposed of, including by return to its prior legitimate owners,<sup>82</sup> pursuant to paragraph 3 of this article, by that State Party in accordance with the provisions of this Convention and its domestic law.

2. Each State Party shall adopt such legislative and other measures, in accordance with the fundamental principles of its domestic law, as may be necessary to enable its competent authorities to return confiscated property,<sup>83</sup> when acting on the request made by another State Party, in accordance with this Convention, taking into account the rights of bona fide third parties.<sup>84</sup>

3. In accordance with articles [...] [International cooperation for purposes of confiscation] and [...] [Mutual legal assistance] of this Convention and paragraphs 1 and 2 of this article, the requested State Party shall:

(a) In the case of embezzlement of public funds or of laundering of embezzled public funds as referred to in article [...] [Embezzlement, misappropriation or other diversion of property by a public official] and article [...]

[Laundering of proceeds of corruption] of this Convention, when confiscation was executed in accordance with article [...] [International cooperation for purposes of confiscation] and on the basis of a final judgement in the requesting State

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Article 61 reflects a compromise of the competing interests of the victim states, typically developing countries, which wanted recognition of their “right” to the “repatriation” of the proceeds of corruption offences committed by their officials without facing excessive delays and overly technical mutual legal assistance requirements, and the interests of the requested states, typically financial centre countries, which frequently require evidence in conformity with their mutual legal assistance laws to support the recovery and return of the claimed proceeds of corruption.

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Party, a requirement that can be waived by the requested State Party, return the confiscated property to the requesting State Party;

(b) In the case of proceeds of any other offence covered by this Convention, when the confiscation was executed in accordance with article [...] [International cooperation for purposes of confiscation] of this Convention and on the basis of a final judgement in the requesting State Party, a requirement that can be waived by the requested State Party, return the confiscated property to the requesting State Party, when the requesting State Party reasonably establishes its prior ownership of such confiscated property to the requested State Party or when the requested State Party recognizes damage to the requesting State Party as a basis for returning the confiscated property;<sup>85</sup>

(c) In all other cases, give priority consideration to returning confiscated property to the requesting State Party, returning such property to its prior legitimate owners or compensating the victims of the crime.

4. Where appropriate, unless States Parties decide otherwise, the requested State Party may deduct reasonable expenses<sup>86</sup> incurred in investigations, prosecutions or judicial proceedings leading to the return or disposition of confiscated property pursuant to this article.

5. Where appropriate, States Parties may also give special consideration to concluding agreements or mutually acceptable arrangements, on a case-by-case basis, for the final disposal of confiscated property.

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<sup>82</sup> The travaux préparatoires will indicate that prior legitimate ownership will mean ownership at the time of the offence.

<sup>83</sup> The travaux préparatoires will indicate that return of confiscated property may in some cases mean return of title or value.

<sup>84</sup> The travaux préparatoires will indicate that the domestic law referred to in paragraph 1 and the legislative and other measures referred to in paragraph 2 would mean the national legislation or regulations that enable the implementation of this article by States Parties.

<sup>85</sup> The travaux préparatoires will indicate that subparagraphs (a) and (b) of paragraph 3 of this article apply only to the procedures for the return of assets and not to the procedures for confiscation, which are covered in other articles of the Convention. The requested State Party should consider the waiver of the requirement for final judgement in cases where final judgement cannot be obtained because the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.

The Convention itself recognizes that not all corruption offences result in a looting of the national treasury. Under paragraph 3(a) of Article 61, there is a mandatory return obligation with regard to embezzled public funds. The obligation to repatriate the assets to the victim country is imposed when a country chooses to enforce another country's forfeiture order for embezzled public funds. On the other hand, paragraph 3(b) contains a more qualified repatriation obligation in cases involving other convention offences where either the victim state can reasonably establish its legitimate ownership to the forfeiting state or when the forfeiting state recognizes damage to the victim state as a basis for repatriation. Despite its mandatory tone, paragraph 3(b) is not entirely mandatory in its application. As written, because the forfeiting state must be satisfied that the victim state has reasonably established its ownership of the assets, a requested state would be able to decline repatriation if the victim state were not able to establish to the satisfaction of the requested state that it is the owner. In addition, the convention establishes a basic principle for the disposition of forfeited assets in accordance with the convention and domestic law, requires states to be able to transfer forfeited assets to other countries, permits states providing assistance to deduct reasonable expenses, and includes permissive language allowing for States to conclude agreements on how to dispose of forfeited property.

Importantly, the mandatory return of forfeited assets category would only apply in a narrow set of cases and would be subject to important safeguards. First, the repatriation requirements of paragraph 3 are all to be made in accordance with the mutual legal assistance provisions of Article 53, which authorizes governments to deny legal assistance where it would conflict with its essential interests.<sup>2</sup> Consequently, a requested state would not be obliged to repatriate assets if it would mean transferring the assets to a government hostile to the requested state or even possibly one that the requested state believed was corrupt or otherwise engaged in conduct contrary to their important national or foreign policy objectives. Second, the repatriation requirement in the proposed text is triggered only in those cases where the requested state chooses to forfeit the funds by enforcing a foreign forfeiture judgment. This, of course, will be dependent upon the victim state having obtained a forfeiture judgment in the first instance. Not only are foreign forfeiture judgments rare in such cases due to death, fugitiveness, immunity, or evidentiary obstacles for the victim state, but, even were a judgment rendered, consistent with the mutual legal assistance exceptions, a requested state could choose not to enforce what it perceived to be a questionable foreign forfeiture order. Further, through paragraph 1, the whole article is made subject to the conditions of the convention and domestic law. This reinforces the ability of the requested state to deny repatriation on essential interest grounds or if it would conflict with its domestic law. Additional safeguards include the protection of bona fide third parties in paragraph 2 and the implicit ability to insist upon reaching agreement on how the funds will be disposed of through an agreement authorized in accordance with paragraph 5.

## II. REPATRIATION UNDER UNITED STATES LAW

The United States does not anticipate that it will be required to make changes to its law to comply with Article 61 because the obligations are in line with mechanisms already in place in the United States. Moreover, the repatriation of forfeited assets in state embezzlement cases or where the victim state can establish specific pecuniary loss as a result of the offence giving rise to the forfeiture would be consistent with U.S. law and the Department's preference for restoring forfeited assets to owner victims. The means

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<sup>2</sup> We are working with the State Department to determine whether there is a legal consequence between the chapter language "in accordance with" and our preferred language of "subject to" prior to the reference to Article 53 on mutual legal assistance.

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through which the United States will effect repatriation will be pursuant to the Attorney General's statutory discretion to restore assets to victims and the authority to share forfeited assets with foreign governments. In recent years, the United States has taken significant steps to facilitate the detection and recovery of the proceeds of foreign corruption and to assist in bringing foreign corrupt officials to justice. Legislative changes in the Civil Asset Reform Act of 2000 and the USA Patriot Act increased our ability to restrain and forfeit the proceeds of foreign offences. Other Patriot Act provisions established foreign official corruption as a predicate for money laundering and forfeiture including bribery of public officials and misappropriation of public funds. The law further requires financial institutions to provide enhanced scrutiny of private banking accounts of senior foreign public officials.<sup>3</sup> Similarly, where a victim can establish its pecuniary loss through the presentation of documentary evidence and that loss was the direct result of the offence that gave rise to the forfeiture or a related offence, our regulations require us to make restitution of the funds.

The United States has flexible authority to return assets that it confiscates based upon a request for assistance concerning a corruption offence against another country. Under 18 U.S.C. § 981(i) and 18 U.S.C. § 982(b)(1) (through reference to 21 U.S.C. § 853(i) referencing 21 U.S.C. § 881(e)(1)(E)), the Attorney General has discretionary authority to share forfeited assets to other countries as long as the other country assisted in the proceedings leading to the forfeiture. In order to establish the foreign corruption offence, we will almost invariably have to receive assistance from the victim state. In addition, under 18 U.S.C. § 981(e)(6), the Attorney General has authority to restore property to victims, including foreign governments. Both of these international sharing and restoration authorities should also extend to those cases in which the United States enforces a foreign forfeiture order, pursuant to 28 U.S.C. § 2467, on behalf of a foreign nation "as if it had been entered by a court in the United States."<sup>4</sup> In practice, the Department has sought to make victims whole to the extent possible. International asset sharing is a discretionary authority, and remission and restoration decisions are subject to more compulsory regulations promulgated under 18 U.S.C. § 981.<sup>5</sup>

In application, the repatriation obligations under article 61 are most likely to cause us difficulty in cases in which we have concerns about the integrity of the government seeking repatriation of the funds, where we disagree with the other country on how to use the funds, or where transferring assets would be inconsistent with our efforts to resolve other core obstacles to law enforcement cooperation with that country. In a current foreign official corruption forfeiture case and more frequently in some major narcotics asset sharing cases, we have confronted precisely these issues. In such cases, our general practice has been not to deny repatriation or asset sharing, but to defer the transfer until resolution of the complications. In the context of this convention, the provision allowing for the transfer of assets pursuant to an agreement may provide sufficient flexibility to enable us to defer the repatriation in official corruption cases if similar concerns arise.

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<sup>3</sup> Recent examples of Department efforts to combat foreign corruption include the arrest and indictment of former Ukrainian Prime Minister Pavel Lazarenko currently being prosecuted in San Francisco, the successful forfeiture of approximately \$20 million associated with former Peruvian intelligence chief Vladimiro Montesinos and his associates, direct case assistance to Nicaragua's investigation and prosecution of former President Aleman and his associates, the restraint of more than \$43 million in connection with Mexico's prosecution of a corruption scandal involving its state-owned oil company.

<sup>4</sup> While there is no express disposition language in 28 U.S.C. § 2467, enforcement of an order as if entered by a United States court also implies disposition in accordance with United States law, including asset sharing or restoration, remission procedures.

<sup>5</sup> Asset sharing authority has been delegated to the Deputy Attorney General. Remission decisions have been delegated to the Chief of the Asset Forfeiture and Money Laundering Section.

### III. CASE STUDY - VICTOR ALBERTO VENERO GARRIDO

#### A. Case Background

On September 14, 2000, a video tape aired in Peru showing presidential adviser Vladimiro Montesinos Torres, head of Peru's powerful and secretive National Intelligence Service, purportedly offering a bribe to an opposition Congressman. This publicity about Montesinos, widely regarded as the power broker behind then-President of Peru Alberto Fujimori, led Fujimori to appoint a special prosecutor and prompted numerous other Peruvian investigations into the illicit activities of Montesinos and other associates of the Fujimori government, including Victor Alberto Venero Garrido (Venero).<sup>6</sup> A Swiss investigation initiated in October of 2000 led Swiss authorities to freeze approximately \$48 million connected to Montesinos on November 3, 2000, and an additional \$22 million on November 29, 2000. These events eventually led to Fujimori's flight to Japan in November of 2000, and the fall of his government. Montesinos, a fugitive since September of 2000, was eventually captured in June of 2001 in Venezuela with the assistance of the FBI and extradited to Peru to face corruption, drug trafficking, illicit enrichment and other charges.

On January 26, 2001, prior to the capture of Montesinos, the United States arrested Venero in Miami on a provisional arrest warrant and request for extradition from Peru. Venero, a Peruvian citizen and close associate of Montesinos, later waived further proceedings and was extradited to Peru to face charges of crimes against the administration of justice, bribery (corruption of a public official), and criminal concealment, among other charges. Montesinos and his associates, including Venero, generated the criminal proceeds forfeited in this case through the abuse of Montesino's official position as advisor to former President Fujimori. Some of the principal fraudulent schemes involved the purchase of military equipment and service contracts as well as the criminal investment of government pension funds. At the time of his arrest, FBI Miami discovered several cashiers' checks and accounts related to Venero. The United States Attorney's Office for the Southern District of Florida, with assistance from the United States Attorney's Office for the Central District of California and the Asset Forfeiture and Money Laundering Section of the Criminal Division (AFMLS), restrained approximately \$17.3 million connected to Venero, ultimately forfeiting \$15.9 million plus interest accrued. During the course of the investigation, U.S. law enforcement agents identified and forfeited approximately \$4.3 million, plus interest accrued, in additional assets. The combined net forfeited amount from these two judgments was \$20,277,618.32.<sup>7</sup>

#### B. Role of Venero

Venero was involved in a huge kickback scheme that bilked both Peru's treasury and Peru's Military and Police Pension Fund. In 1994, Venero and others used pension fund money and their own money to buy a majority interest in a Peruvian banking institution, Financiera del Sur (FinSur), which in June 1999 was bought by Peru's Banco de Comercio. Venero was in charge of seeking investments on behalf of FinSur and identified construction and real estate projects for the bank and pension fund to finance. He

<sup>6</sup> Venero was the de facto head of the Peruvian military and police pension fund and took a cut of interest payments as kickbacks on the bank deposits he made resulting in the theft of approximately \$100 million in pension funds. Montesinos, once the top adviser to Fujimori, and Venero also allegedly set up their own companies to buy apartment complexes, hotels and other buildings to be sold to the pension fund at inflated prices. Venero also sold substandard arms and supplies to the Peruvian armed forces at highly excessive prices. Purchases included defective Soviet-made MiGs as well as arms from Belarus, Ukraine, and Bulgaria. In addition to his money laundering activities, Venero also directed death squads, engaged in influence peddling, and bribed opposition politicians.

<sup>7</sup> As noted previously, the investigation also forfeited an additional \$358,753.76. In addition, the FBI and SDFla's involvement in the investigation also contributed to the arrest of Montesinos and the direct return of additional assets to Peru, including at least \$14.1 million repatriated by Venero.

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also controlled the construction companies which built those projects. Venero established a pattern of inflating the actual cost of the pension fund investment projects by 25 percent and billed FinSur accordingly. Projects recommended by Venero were automatically approved by the board members at the police pension fund, as several of them received kickbacks. In just one project of this type, Venero constructed a mall as a FinSur investment. The \$25 million project was fraudulently inflated by \$8 million. Similarly, Venero covertly formed and controlled several front companies used to broker loans from FinSur in exchange for kickbacks from borrowers. When some loans defaulted, Venero would purchase the busted projects at extremely low prices for resale at a profit.

In addition, Venero and members of FinSur's board of directors were authorized by the Peruvian government to arrange the purchase of military aircraft for the nation. In just two aircraft deals in 1995 and 1998, the Peruvian government paid an extra \$150 million, because of a fraudulent 30 percent mark-up tacked on to the sale price. This illicit money allegedly was funnelled through FinSur and Banco de Comercio. From there, it flowed into numerous accounts under a variety of names in banks in the United States and elsewhere to conceal the origin of the illicit funds.

Venero consistently used a group of banks located in Peru, the Cayman Islands, Panama, the United States, and elsewhere to launder his and others' share of criminal proceeds. South American, Caribbean, and U.S. banks identified as funnels for their criminal proceeds include the following: Banco Banex, Banco Nenevo Mundo, Banco Industrial de Finanzas, Pacific Industrial Bank, Banco Exterior in Panama, Weise Bank, Bank of America International and Tribank in the Cayman Islands, Citibank, Bank of America, Prudential Securities, American Express Financial Services, Northern Trust Bank, Sanwa Bank and California's Hacienda Bank.

Cheryle Mangino Diaz, a California banker who is married to Venero's cousin, formerly was a member of the board of directors of Hacienda Bank. Since 1996, she helped Venero conceal more than \$20 million in the United States. For example, Mangino Diaz made several false statements to Hacienda Bank officials regarding the origin of the funds that appeared in her account at the time Fujimori and Montesinos fled Peru in September 2000. Venero also used the name of his son-in-law, Sandro Tafur Arevalo, to stash funds at the Bank of America and to conceal his ownership of a penthouse apartment at 8855 Collins Ave. in Surfside.

Venero and his activities were brought to the attention of the FBI by the filing of a Suspicious Activity Report by Citibank's compliance officer in Long Island City, New York. Venero opened a bank account at Citibank in Miami in 1998, and moved about \$15 million through it until he was arrested in January, 2001. Initially, the account opening did not raise any suspicion because Latin Americans often opened dollar-denominated bank accounts in the U.S. to protect their assets from inflation in their home countries. However, Citibank and other financial institutions holding bank and brokerage accounts owned or controlled by Venero, Cheryle Mangino Diaz, and others gradually noticed unusual activity in the accounts and filed SARs with the U.S. Government. According to bank officials, Venero's financial transactions had no apparent business justifications and the origin of the funds was suspicious.

### **C. International Sharing**

The United States Department of Justice has approved transferring \$20,277,618.32 in forfeited funds to the Government of Peru (GOP) in recognition of its assistance in the Venero case. The forfeited funds represent the proceeds of a broad range of fraud, corruption and money laundering offences committed in Peru and the United States that were connected to former Peruvian intelligence Chief Vladimiro Montesinos, his associate Victor Alberto Venero-Garrido, and other associates of Montesinos and former Peruvian President Alberto Fujimori. The statutory basis for the transfer under U.S. law is Title 18,

United States Code, section 981(i)(1) authorizes the Attorney General to transfer money laundering proceeds and instrumentalities forfeited under 18 U.S.C. § § 981 and/or 982 to a foreign country that participated directly or indirectly in acts leading to the seizure and forfeiture of the property.<sup>8</sup> Currently, discussions are underway between the United States and Peru regarding how best to effect this transfer.

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<sup>8</sup> Section 981(a)(1), which contains three subsections, provides for the civil forfeiture of (A) assets traceable to, or involved in, money laundering violations; (B) proceeds and instrumentalities of foreign drug felonies and other specified unlawful activities; and (C) property constituting, or derived from, proceeds traceable to certain bank fraud violations or any other specified unlawful activity. Section 982 provides for the criminal forfeiture of property involved in or proceeds derived from money laundering offences.