

The Current Challenges of Asset Recovery



JUDICIAL PRACTITIONERS PERSPECTIVE

Situation Report



- International initiatives
- UNTOC
- UNCAC
- Number of successful cases of asset recovery...
- Versus the size of illicit proceeds in open and underground economies?

Translating Policy Into Action



- High policy goals must be translated into laws
- Laws must be effectively implemented
- Investment of resources including trained and competent personnel
- Barriers to effective cooperation at the operational level
- Policy goals become difficult to achieve in practice

Obtaining Confiscation Over Property



- Jurisdiction to confiscate property located abroad?
- Conviction based order or non-conviction based order?
- In personam or in rem against property
- Dead or absconding defendants
- Value based order (to pay a certain sum)
- Linkage of offending to property to be confiscated?

Freezing of Foreign Property



- Preservation measures
- Points of contact between requesting and requested jurisdiction
- Stage of the criminal proceedings – investigation or prosecution?
- Identification of the property
- High legal thresholds in the requested jurisdiction
- Matters of political sensitivity e.g. regime change

MLA Mechanisms



- Bilateral Agreements
- Multilateral Conventions
- Assistance based on reciprocity
- Availability of necessary domestic laws in both requesting and requested jurisdiction
- Use of Central Authorities
- Prosecutor to prosecutor assistance
- Priority / delay

Managing and Preserving the Property



- Available tools to preserve and manage assets pending confiscation
- Appointment of property manager or receivers
- Who pays the costs of management?
- Time limits on the freeze of property?
- Cases of serious delay and the running down of the property in value, etc

Challenges to the Freezing Order



- Resolution of issues of fact in the requesting jurisdiction by courts of the requested jurisdiction
- Resolution of issues of foreign law
- The court of the requested jurisdiction is not a rubber stamp
- Issues of due process, human rights and fundamental protections
- How to achieve the right balance?

Enforcing the Foreign Confiscation Order



- Direct enforcement of foreign confiscation orders
- Minimum procedural requirements
- Finality of proceedings, opportunity to defend
- Need to trace offending to property to be confiscated?
- Would enforcement be contrary to the interests of justice?
- Comity between courts
- Issues of mistrust

Sharing and Repatriating Assets



- UNCAC
- UNTOC
- Bilateral sharing mechanisms
- National asset sharing policies
- Question of costs
- Safeguards on repatriated funds to ensure they are put to proper use and not 're-stolen'.

Problems of Requesting State



- Developing countries
- Insufficient expertise and resources
- Breakdown of communication with requested state
- Assistance from StAR, ICAR, etc
- Civil versus common law systems
- Need to trace funds to the alleged offending?
- Inability to identify defendants e.g. internet scams
- Delay

Problems of the Requested State



- Mature economies or financial centers with sophisticated legal systems
- High demands e.g. to trace and identify assets
- Failure to receive adequate MLA requests
- Gap between what is required of the requesting state and what the requesting state can provide
- Novel solutions e.g. Swiss procedure to confiscate on basis the requesting jurisdiction is more or less a failed state

Overcoming High Barriers



- Keep dialogue going between the requesting jurisdiction and requested jurisdiction
- Enlist third party support, if necessary
- Engender a sense of trust and joint effort
- Encourage face to face meetings
- Forge a team
- Aim for victory
- It can be fun!

Conclusion



- Renewed efforts for effective implementation
- High level commitment by governments to adequately resource and give priority to such efforts as part of their national agenda
- Possible new solutions and options e.g. an asset recovery sanctions regime coordinated at the international level
- Good will all around.