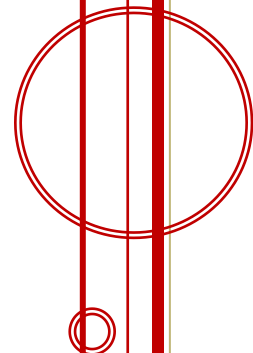


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**THE UNITED STATES’
PERFORMANCE IN
INTERNATIONAL ASSET
RECOVERY:
AN ASSESSMENT**

The present report assesses the United States performance in international asset recovery (AR) with the aim of contributing to the Global Forum on Asset Recovery (Washington D.C; 4-6 December 2017). It was prepared by Rick Messick, independent legal consultant specialized in anti-corruption & asset recovery (messickrick@gmail.com) and Ryan Basilacan, an LLM student at Harvard Law School (rh.balisacan@gmail.com) Section 6 of the report was prepared by Shruti Shah of Coalition for Integrity (sshah@coalitionforintegrity.org) and Stefanie Ostfeld of Global Witness, (sostfeld@globalwitness.org)



1. COUNTRY OVERVIEW

Legal Framework

US law concerning asset freezing, confiscation and recovery has deep roots in English law, especially English admiralty and commercial forfeiture laws that authorize in rem and in personam proceedings to confiscate fruits and instruments of criminal activities (primarily piracy and revenue-evasion schemes such as smuggling). Forfeiture, however, was not frequently availed of as a remedy until the passage of a series of laws initially aimed at drug trafficking offenses (1970s), followed by those targeting organized crime (1980s). From then on, similar laws were passed at the federal and state levels, signalling a renewed interest in forfeiture as a law enforcement tool and marking the advent of modern US forfeiture law. In this regard, it can be said that the US pioneered the approach of using asset forfeiture as a major (as opposed to merely an ancillary) tool for addressing crime.

No effort, however, has been undertaken to enact a unified and comprehensive forfeiture legislation; hence, what constitutes “US forfeiture law” today is essentially a collection of federal and state laws and procedural rules that provide the remedy of freezing and/or confiscation of assets in relation to various illicit activities. Given the number of laws across different US jurisdictions, with each law having its own distinct scope, features and procedures, the information, reviews, and assessments in this Report will only be confined to relevant federal forfeiture laws.

There is no single US federal law from which the authority to forfeit assets emanates. Instead, there are several laws enacted by Congress which contain provisions governing the authority, scope, limitations and procedure of asset forfeiture. Generally, assets can be forfeited if they satisfy any of the following characteristics: (1) they are proceeds or fruits of a crime, (2) they facilitate the commission of a crime, or (3) they are involved in the commission of a crime. Forfeiture can be done administratively, civilly or criminally. Depending on the circumstances of a particular case, and considering the distinct requirements and advantages of each mode (as discussed below), the government can resort to administrative, civil and/or criminal forfeiture at its discretion. These remedies are not mutually exclusive.

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In many cases, properties related to criminal activities are first seized through administrative forfeiture, governed principally by 18 U.S.C. § 983 (enacted by the Civil Asset Forfeiture Reform Act of 2000). If, during the course of an investigation, properties related to a crime are discovered, the same can be seized by investigating authorities pursuant to a judicial restraining order or warrant (except in some cases where, due to exigent circumstances, warrantless seizures are allowed). After a period of notice and in the absence of a contest filed by a concerned party, a declaration of forfeiture will be entered in favour of the government by the

seizing authority. If another person contests the administrative forfeiture, the next recourse will be for the government to commence judicial proceedings for civil or criminal forfeiture.

Criminal forfeiture follows from the conviction of a defendant in a criminal case. It is governed principally by 21 U.S.C. § 853 and the Federal Rules of Criminal Procedure (32.2). When a defendant is convicted, his sentence will not only state the penalty that will be imposed on him; it will also state the money judgment he is liable for and the “crime-tainted” properties that will be forfeited to the government. These properties are those that can be directly forfeited for being proceeds of the crime (or for facilitating it or for being involved therein); but in cases where such directly forfeitable properties can no longer be found or have already dissipated, the defendant can be held liable to substitute his own properties for those that the government is entitled to forfeit. In this sense, criminal forfeiture is considered a proceeding *in personam* because it is predicated on, and attached to, a judgment of conviction against a specific defendant.

In contrast, civil forfeiture is considered a proceeding *in rem* because it is an action brought against the seized properties themselves. It is an independent proceeding that can be brought at any time irrespective of whether there is already an ongoing criminal trial (and indeed even despite an acquittal). As a civil action, the government need only prove by a preponderance of evidence that the properties subject of the suit are proceeds from, or were used in connection with, a crime; it is not necessary to establish the guilt of any defendant beyond a reasonable doubt. The court hearing the case will deny the petition for forfeiture if the government fails to establish the nexus between the subject properties and the criminal activity, or if an “innocent owner” comes forward and successfully prove, through a preponderance of evidence, that he had no involvement, and had no knowledge of the use of his property, in the crime. Civil forfeitures are principally governed by 18 U.S.C. § 983 and the Federal Rules of Civil Procedure (Supp. Rule G).

Once forfeited in favour of the government, assets will be disposed in accordance with directives found in various laws. Contraband and illicit properties are, as a general rule, destroyed. Some forfeited assets are used to fund specific programs or are deposited in designated accounts as provided by statutes. Other forfeited properties can be returned to victims, or liquidated in order to compensate victims or pay rewards to informants and cooperators. By and large, however, the Attorney General and the Secretary of the Treasury enjoy a broad discretion to apply forfeited properties to purposes not specifically mandated in the statutes. These purposes include making use of forfeited properties to fund official activities, or equitably sharing them with federal, state and/or local law enforcement agencies in light of the latter’s respective contribution to the success of the forfeiture efforts. These transfers act as incentives and encourage further law enforcement cooperation in the future.

Overall, the legal architecture of the US asset forfeiture regime is comprehensive and robust. The existence of different modes of forfeiture that the government can avail of independently or alternatively ensures that for almost any given scenario, the government can devise and choose a strategy that can maximize its advantage. In addition, systems and procedures currently in place are highly favourable to the government and enable it to fully use asset forfeiture as an effective tool to immediately deprive criminal elements of the fruits and instruments of their illicit activities. From a broader perspective, this also means that US asset forfeiture law provides an additional deterrent against crime by signalling to criminal elements

that the chances of them benefitting from their crimes can be effectively minimized even before (or irrespective of) their conviction. Perhaps the only apparent weakness in the existing system (to be discussed more fully below) is that it benefits seizing agencies too much, to the point where it can incentivize even excessive or imprudent asset forfeiture.

The asset forfeiture law of the US is likewise fully compliant with its Chapter V obligations under the UNCAC. Through various laws, the US enforces strict standards and regulations aimed at preventing money laundering and preventing and detecting the transfer of illicit funds. Various issuances have also been promulgated to ensure transparency. The US court system has demonstrated its receptiveness to the prosecution of civil lawsuits for recovery of ill-gotten property by foreign states. In addition, US law recognizes foreign confiscation orders (pursuant to treaties such as the UNCAC) and can even issue restraining orders to preserve properties subject of foreign confiscation orders that are found within American jurisdiction.

Institutional strengths and weaknesses

The Attorney General who heads the US Department of Justice (DOJ) exercises overall control, supervision and policy-making authority relative to the enforcement of asset forfeiture laws and criminal laws in general.

Within the DOJ is the Asset Forfeiture Program, over which the Money Laundering and Asset Recovery Section (MLARS) of the DOJ Criminal Division exercises coordination, direction and general oversight powers. As a rule, activities concerning asset freezing, confiscation and repatriation are handled by MLARS except in cases falling within the specific competencies and jurisdictions of other units (enumerated below). MLARS is supported by the Asset Forfeiture Management Staff which performs administrative, financial and documentation functions, as well as interprets the Assets Forfeiture Fund statute. The section also houses the Kleptocracy Team which implements the Department's Kleptocracy Asset Recovery Initiative through investigation and litigation to recover the proceeds of foreign official corruption. The Initiative focuses on assets in the U.S. or which used the U.S. financial system.

The following DOJ component agencies exercise various roles under the Asset Forfeiture Program:

The Federal Bureau of Investigation, the lead investigative agency of the federal government, is in charge of investigating crimes. In the discharge of its functions, it utilizes asset forfeiture as a law enforcement tool, particularly when investigating white collar crime, organized crime and terrorism.

The Drug Enforcement Administration undertakes significant seizure and forfeiture activities in its investigation of drug offenses, while the Bureau of Alcohol, Tobacco, Firearms and Explosives is responsible for seizing and forfeiting firearms, ammunition, explosives, alcohol, tobacco, currency, conveyances and certain real property involved in violations of the law.

When the government resorts to civil and criminal forfeiture, its petitions will be brought and litigated before the courts by US Attorneys and their assistants. Offices of US Attorneys are

located in districts across the country; administrative coordination is facilitated by the Executive Office for US Attorneys, located at the DOJ main office.

Forfeited assets are primarily managed and disposed by the US Marshals Service, which acts as the primary custodian of all seized properties under the Asset Forfeiture Program.

Overall, the foregoing agencies are regarded as highly competent and professional organizations whose expertise in the technical aspects of asset forfeiture have been honed through years of training and practice. Among them, they have acquired and accumulated significant institutional knowledge that helps in the relatively consistent success of US asset forfeiture efforts. Financial and transboundary crimes, however, continue to grow in complexity, and one of the challenges being confronted by agencies and units in the Asset Forfeiture Program is the continuing upgrade of personnel's knowledge and skill sets (especially those related to new technology).

Overall assessment of political will

President Donald Trump, through Attorney General Jeff Sessions, has expressed his desire to strengthen the government's asset forfeiture efforts. AG Sessions has also made numerous public statements demonstrating his desire to maximize asset forfeiture's benefits as a law enforcement tool. Last July 19, 2017, AG Sessions issued a DOJ policy directive that highlights the indispensability of asset forfeiture to the broader Violent Crime Reduction Strategy of the Trump administration. Under Policy Directive No. 17-1, AG Sessions laid out new guidelines on the adoption by the federal government of assets seized by state and local law enforcement agencies for being related to violations of federal laws. Among others, AG Sessions articulated the administration's thrust to expedite and improve seizure procedures (*e.g.*, by prescribing a shorter period for probable cause review processes), while at the same time providing more opportunities for interested parties to contest seizures. He also exhorted law enforcement agencies to exercise caution in deciding whether to seize residences whose titles are under the name of persons not implicated in the subject crime.

Overall, it is expected that asset forfeiture, particularly the more expeditious civil forfeiture variety, will figure prominently in the incumbent administration's law enforcement initiatives, and there is ample evidence of political will on the part of the AG to push this agenda through.

Transparency and involvement of civil society

Ongoing debates about the merits of asset forfeiture as a law enforcement tool have revolved mostly around *civil* forfeiture. This is the area where CSOs' engagement is most evident. CSOs across the political spectrum have actively participated in lobbying and advocacy efforts to push reforms in civil asset forfeiture laws. They have scored a number of victories in this front, helping enact new policies and legislation aimed at curbing abusive and excessive use of civil forfeiture by law enforcers. Progressive groups like the American Civil Liberties Union have advocated and lobbied for reforms and safeguards against abuse using a "due process" and "civil liberties" platform; conservative CSOs like the Heritage Foundation, on the other hand, focus more on the protection of property rights of innocent owners. Aside from lobbying and advocacy, engagement also took the form of investigative journalism (from outlets like The

Atlantic and The New Yorker and public interest groups like ProPublica and the Institute for Justice). Through publicizing experiences and narratives of victims of excessive forfeitures, these groups bring to the fore of public discourse the need to rationalize the scope and use of the government's civil forfeiture authority.

In general, there is ease of access to information pertaining to asset forfeitures in the US. Case-level information on orders issued is available on-line through the PACER system. Aside from statutorily-mandated reports rendered by the DOJ and other law enforcement agencies (including the monetary values of seized assets and where funds are applied to), there are also numerous publications that summarize and analyse forfeiture data. If further information is needed, the same can be requested from relevant agencies pursuant to federal and state Freedom of Information laws.

2. DOMESTIC ENFORCEMENT OF FOREIGN CORRUPTION CASES

Resolved cases

1) Halliburton Case (2017)

This was a civil case brought by the SEC against oil company Halliburton for violating the Foreign Corrupt Practices Act (FCPA). Investigation commenced when the company received an anonymous allegation about possible FCPA violations arising from its contracts in Angola. Following receipt of the tip, Halliburton conducted an internal investigation and also alerted the DOJ. The Securities and Exchange Commission eventually took the lead in the investigation. It was discovered that Halliburton's Vice President, Jeannot Lorenz, circumvented accounting controls, falsified records and disregarded anti-corruption policies when he entered into several contracts with a local Angolan company. The purpose of the contracts was purportedly to satisfy local content regulations for foreign firms operating in Angola; but it was later on revealed that said local company had ties with the government official who was authorized to award the contracts that Halliburton was hoping to secure. As a result of contracting with the local Angolan company, Halliburton was awarded \$14 million worth of oilfield services contracts from the Angolan government. The case ended in a settlement, where Halliburton agreed to pay a total of \$29.2 million in penalty and to retain an independent compliance consultant for 18 months to review its anti-corruption policies and systems, especially as regards its business operations in Africa. Lorenz also agreed to pay a \$75,000 penalty.

2) Odebrecht and Braskem Case (2016)

This was a criminal case brought by the DOJ (in cooperation with the governments of Brazil and Switzerland) against two Brazil-based companies – construction conglomerate Odebrecht and petrochemical company Braskem – for large-scale bribery and corruption committed in various countries around the world. The companies were accused of paying millions of dollars in bribes (through a secret “special operations unit”) to government officials in parts of the world where the companies operate, and of also of using banking and financial systems in different countries

to facilitate the flow of illicit money. The investigation was spearheaded by the FBI and the case was brought by prosecutors from the DOJ Fraud Section and the Office of the US Attorney for the Eastern District of New York. Odebrecht and Braskem pleaded guilty to conspiracy to violate the anti-bribery provisions of the FCPA. Plea agreements and settlements were also entered into with the governments of Brazil and Switzerland. The combined total amount of penalties to be paid by both companies is at least \$3.5 billion, described by the DOJ as “the largest-ever global foreign bribery resolution.”

3) *Mikerin Case (2015)*

This was a criminal case brought by the DOJ against a Russian official (residing in Maryland) for money laundering. Leads were first gathered by a confidential FBI agent who investigated the Russian nuclear industry. Following the information, it was discovered that Mikerin received more than \$2 million in bribes from conspirators to influence him and to gain improper business advantages for US companies that did business with TENEX – a Moscow-based supplier and exporter of Russian uranium and uranium enrichment services and a subsidiary of Russia’s State Atomic Energy Corporation. Mikerin was a director of TENEX. He pleaded guilty to conspiracy to commit money laundering and agreed to the entry of a forfeiture judgment in the amount of more than \$2 million.

Other relevant cases

Early in 2017, the DOJ closed its investigation into alleged FCPA violations committed by Cobalt International Energy in connection with its operations in Angola. The investigation was prompted by allegations of a connection between top Angolan officials and Angola-based companies assigned to Cobalt’s exploration group in that country. The SEC had also previously commenced investigation into possible violations, but likewise dropped the case. Similarly, investigations for possible FCPA violations of Vantage Drilling International, IBM, and Net 1 UEPS Technologies, Inc. were also dropped by the DOJ and SEC. Reasons for the dropping of these investigations are not clear, as communications from the DOJ and the SEC informing subjects of the closure of investigations without further action do not typically contain the reasons therefor.

The DOJ under former AGs Eric Holder and Loretta Lynch was criticized for not responding to bipartisan requests made by former Florida Senator Bob Graham to take aggressive steps to investigate widespread public corruption in the state. The reason for the inaction also remains unclear.

In 2016, the SEC investigated FCPA violations committed by Massachusetts-based PTC Inc. and its Chinese subsidiaries for paying bribes to Chinese officials in an effort to win business. The case was settled after PTC agreed to pay more than \$12 million in penalties (a parallel DOJ case was also settled by the Chinese subsidiaries after payment of more than \$14 million in penalties and entering into a non-prosecution agreement). No sanction was imposed on Yu Kai Yuan, a former employee at one of PTC Inc.’s Chinese subsidiaries, after he entered into a deferred prosecution agreement with the SEC, committing to cooperate fully and truthfully for a period of three years. This marks the first time that the SEC entered into a deferred prosecution agreement with an individual.

In 2015, Louis Berger International, a New Jersey-based construction management company, was investigated for violating the FCPA. It was revealed that it bribed government officials in India, Indonesia, Vietnam and Kuwait to win contracts. Two of its Senior Vice Presidents pleaded guilty to the charges. The company, on the other hand, paid \$17.1 million in criminal penalties and was spared of other criminal liabilities after it satisfied the conditions of its three-year deferred prosecution agreement with the DOJ (during which period it committed to enhance internal controls and retain a compliance monitor).

Overall assessment of availability and ease of access to information

Information relating to domestic enforcement of corruption cases is accessible, and is mostly available online. This includes not only periodic press releases and reports from, primarily, the DOJ and the SEC, but also full-text copies of decisions and agreements. The only limitations to information availability are (1) details pertaining to ongoing investigations, and (2) as mentioned above, reasons for closure of investigations by the DOJ and the SEC, which are typically not stated in notices sent to the subjects.

3. FREEZING AND CONFISCATION

Overall picture

Based on the latest consolidated official report submitted by the US Attorneys Offices (current as of 30 September 2016), there are 1,895 pending civil cases and 6,212 pending criminal cases for asset forfeiture. There is no available data concerning the amount of assets subject of the cases, or whether foreign countries or governments are involved in the proceedings. Such information is typically not publicly accessible considering that the actions are still pending at various stages in different courts.

Based on the same report by the US Attorneys' Offices, there were 1,053 civil cases and 4,983 criminal cases for asset forfeiture that were completed as of 30 September 2016. The value of assets seized in civil forfeiture cases amounted to \$1,745,334,145.00, while assets seized in criminal forfeiture cases were valued at \$593,699,604.00. An amount totalling \$2,052,348,912.00 was deposited to the Asset Forfeiture Fund; \$164,434,037.00 was remitted to cooperating law enforcement agencies under the "equitable sharing" principle; \$159,689,477.00 was applied to the compensation of victims. Data for the four preceding years are as follows:

2012

Completed civil forfeiture cases: 1,807

Value of seized assets (civil forfeiture): \$8,717,501,929.00

Completed criminal forfeiture cases: 3,768

Value of seized assets (criminal forfeiture): \$426,377,451.00

2013

Completed civil forfeiture cases: 1,871

Value of seized assets (civil forfeiture): \$1,135,779,509.00

Completed criminal forfeiture cases: 4,221

Value of seized assets (criminal forfeiture): \$1,571,153,470.00

2014

Completed civil forfeiture cases: 1,720

Value of seized assets (civil forfeiture): \$3,869,769,234.00

Completed criminal forfeiture cases: 4,560

Value of seized assets (criminal forfeiture): \$678,505,511.00

2015

Completed civil forfeiture cases: 1,436

Value of seized assets (civil forfeiture): \$478,905,713.00

Completed criminal forfeiture cases: 4,815

Value of seized assets (criminal forfeiture): \$4,561,664,299.00

There are no data available in the aggregate reports indicating which cases involve foreign countries or governments.

Except for detailed information relating to pending cases (where confidentiality rules apply), information concerning stolen assets can be easily accessed by the public through reports and disclosures rendered by relevant DOJ agencies on a regular basis. Additional information may be requested by interested parties through Freedom of Information Act (FOIA) requests.

There are no data available in the aggregate reports indicating cases of unfreezing of assets.

Specific (freezing) proceedings (up to 5 years)

1. Chen Shui-Bian Case (2016)

This is a civil forfeiture case against the former President of Taiwan and his wife, brought by the DOJ under its Kleptocracy Asset Recovery Initiative (KARI). It was discovered that bribes were paid to the former First Lady by a securities company in Taiwan, to influence the President into facilitating the company's acquisition of a financial holding company. Through

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various money-laundering schemes, the First Family transferred the bribery proceeds to the US and used them to purchase two properties in New York and Virginia. In 2012, the US District Courts in the two states entered final forfeiture judgments against the properties in the absence of opposition from the owners of record. A total of \$1.5 million in proceeds was realized from the sale of the properties by the US government, and the same amount was returned to the government of Taiwan.

2. *Chun Doo Hwan Case (2015)*

This is a civil forfeiture case against the former President of the Republic of Korea, brought by the DOJ under KARI. In the late 1990s, Chun was convicted by a criminal court in Korea for bribery. In 2013, the Anti-Corruption Division of the Korean Supreme Prosecutor's Office opened a money-laundering investigation against Chun and his associates to investigate the possibility that some of the proceeds of his corrupt activities have been used to open bank accounts and purchase real estate in the US. KARI prosecutors initiated their own investigation, and were able to locate and seize real property, investments and cash traceable to Chun and attributable to his corrupt activities. The case was settled, with the US government forfeiting a total of \$1,126,951.00 in assets from Chun. The amount was turned over in November 2015 to the Minister of Justice of Korea.

3. *Obiang Case (2014)*

This is a civil forfeiture case against the Second Vice President of Equatorial Guinea, brought by the DOJ under KARI. Through embezzlement and extortion activities, Obiang raked in millions of dollars in bribes and kickbacks, then used the same to purchase luxury items and live a lavish lifestyle in the US. The case ended with a settlement, under which Obiang agreed to sell his Malibu, California mansion, luxury car and Michael Jackson memorabilia – all with an estimated total value of \$30 million. Of the proceeds, \$10 will be forfeited in favour of the US government, and the rest will be repatriated for the benefit of the people of Equatorial Guinea, through a charitable organization. Obiang was also prevented from using US banks and financial institutions to conceal his remaining ill-gotten wealth. One of the problems encountered in the case was the failure to seize a \$38 million Gulfstream jet, also purchased through illicit money, because it was kept out of US jurisdiction during the proceedings (Obiang was warned, though, that it will be immediately seized the moment it enters US territory). Obiang was also able to spirit away a Michael Jackson memorabilia (a bejewelled glove from the music icon's "Bad Tour") to his home country in violation of an existing court restraining order.

In general, access to information regarding asset forfeiture is not problematic. In a comprehensive assessment conducted by the Institute for Justice, the DOJ was given the highest possible grades in terms of the availability of aggregate forfeiture reports and accessibility of forfeiture records. The DOJ was also given the highest possible grade for subjecting its forfeiture accounts to financial audits. Reports rendered to Congress and made available to the public on a regular basis can be accessed online, and compliance to reporting duties is very high (if not perfect) despite the fact that there is no existing mechanism for Congress to sanction the DOJ (and particularly the MLARS) in case it does not file a report. One possible area of improvement is the systematization of information relating specifically to cases handled by KARI. Although regular reports and press releases are issued by the DOJ as new developments arise in particular cases, there is yet no centralized database of KARI-specific data.

4. REPATRIATION OF STOLEN ASSETS (AND/OR PAYMENT OF COMPENSATION TO VICTIM COUNTRIES)

Overall picture

The Stolen Asset Recovery Initiative (STAR) database of the World Bank and the UN Office on Drugs and Crime lists more than 20 completed cases of recoveries of assets located in the US, where forfeited assets have been repatriated to their countries of origin.

The countries involved include Philippines (5 cases), China (2 cases), Peru (2 cases), United Nations (2 cases), and one case each for Antigua and Barbuda, Argentina, Bahrain, Bangladesh, Brazil, Canada, Chile, Iraq, Italy, Kazakhstan, Nicaragua, South Korea, and Trinidad and Tobago.

The amounts involved vary. Some notable cases include the following:

In the case concerning the UN Oil-for-Food kickback scheme, repatriated assets came from payments made by parties involved in the scheme: Chevron (\$20 million), El Paso Corporation (\$5,482,363.00), Bayoil Corporation/ Oscar J. Wyatt, Jr. (\$11,023,245.91), and David B. Chalmers, Jr. (\$9,016,151.40). These amounts were to be used for projects and programs that will benefit the victims of the scheme – the people of Iraq.

In the case of the Philippines, victims of the human rights abuses of former President Ferdinand Marcos secured judgments for the recovery of the ill-gotten wealth of the Marcos family in the amount of \$10 million (in connection with a Monet painting spirited into the US after Marcos was ousted from office), and \$50 million (in connection with various real and personal properties identified as proceeds of the Marcos family's corruption). The US government has also turned over to the Philippine government, in connection with cases involving the family of a former comptroller of the Armed Forces of the Philippines, \$100,000 (cash seized from the comptroller's son upon entry to the US) and \$1.38 million (proceeds of New York bank accounts and the sale of a Manhattan condominium).

In the case involving Vladimiro Montesinos and Marco Antonio Rodriguez Huerta, both officials in the government of former Peruvian President Alberto Fujimori, \$750,000.00 has been repatriated by the US government to the government of Peru. The amount was forfeited from Montesinos' and Huerta's private US bank accounts, to which they diverted funds from the pension program that was supposed to benefit Peruvian military and police retirees.

In majority of the cases, the repatriation of forfeited assets is made through the government of the receiving state, without any specific agreement. In other cases, however, some conditions are attached. In the UN Oil-for-

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Food kickback scheme, the amounts repatriated, which were intended for the restitution of the victims in Iraq, were deposited to the Development Fund of Iraq. The Fund was established by the UN Security Council. It was originally overseen by the Coalition Provisional Authority, then

by the Interim Iraqi government with the oversight of the International Advisory and Monitoring Board for Iraq. As of July 2011, the Government of Iraq assumed full autonomy over the Fund. In the case of the Philippines, the distribution of the recovered ill-gotten wealth of the Marcoses was approved by a Federal Court in Hawaii. In the case of Peru's Vladimiro Montesinos and Victor Alberto Venero Garrido, around \$20 million of forfeited assets were repatriated to the government of Peru, upon the latter's commitment to the US government that such amount will be invested in anti-corruption efforts, and will be managed by the Special Fund for Management of Illegally Obtained Money against Interests of the State – a board comprised of representatives of Peruvian government agencies involved in the fight against corruption.

There is no existing mechanism to ensure accountability of returned assets. Even in cases where receiving governments commit to certain conditions and undertake to utilize returned assets for particular programs or purposes, there is no fixed enforcement, monitoring or accountability regime to ensure compliance. Perhaps the only notable exception is the model/approach used in the case concerning bribery, money laundering and corruption activities in the Kazakhstan oil industry. When the case was settled, around \$115 million was released to the BOTA Foundation, founded in 2008 by five Kazakhstans and the governments of Kazakhstan, US, and Switzerland (with support from the World Bank and Save the Children). The Foundation was specifically tasked to administer the utilization of the repatriated funds in order to help support poor children, youth and families in Kazakhstan. After five years of its operation, the Foundation rendered a Final Report detailing its accomplishments and was dissolved. This framework, which tracks and monitors the utilization of repatriated assets, as well as fixes a system of accountability by a multi-stakeholder and neutral non-governmental entity, has not been replicated since.

Asset recovery efforts were spearheaded by the DOJ (more recently, under its specialized KARI) with the substantial assistance and cooperation of the foreign countries and governments concerned. Civil society organizations help in bringing ongoing and concluded proceedings to the attention of the public. They also help foster vigilance, especially with respect to ensuring that repatriated properties are used for the benefit of the victims. DOJ informally meets with civil society organizations concerned with repatriation in a particular case to hear their views.

Information is generally easily accessible. Timely reports and press releases are released by the DOJ as developments arise. Official, full-text documents are also made available online most of the time. Additional information can generally be requested from concerned agencies without much difficulty. As noted above, however, there is a need to create a centralized and systematized information database for forfeiture cases specifically handled by the DOJ's KARI unit, to facilitate data analysis and research on cases that involve foreign jurisdictions.

Other cases

Abacha Case (2014)

Sani Abacha, former dictator of Nigeria, along with his confederates, embezzled and misappropriated public funds during their reign, and stashed them in bank accounts all over the world. Following a successful forfeiture case filed by the DOJ, the US government was able to forfeit \$480 million of stolen funds which, according to an official statement of the DOJ, "can be used for the benefit of the Nigerian people." The forfeiture process in itself illustrates the overall efficiency and effectiveness of the US asset forfeiture legal regime – asset freezing and forfeiture were completed within months. The challenge, however, was the repatriation of the

forfeited assets – half of the forfeiture equation, but arguably an equally important one. To date, three years later, the forfeited assets have not yet been repatriated to benefit the people of Nigeria. A Nigerian economic and social rights group had in fact written an open letter to President Donald Trump asking him to facilitate the return of the ill-gotten wealth, as the US government previously undertook. The difficulty, however, lies in the fact that a former government attorney of Nigeria challenged the forfeiture judgment, and the appeals processes is still running its course. There is, however, an additional complication: the DOJ is also concerned with the risk that forfeited assets will be returned to their countries of origin, only to be lost once again to corruption. This challenge underscores the need to come up with a framework for ensuring that repatriated assets cannot be used to feed the cycle of corruption anew.

5. CURRENT DATABASES

As discussed above, the Abacha case illustrates the most important issue being confronted by the US today with regard to the repatriation of forfeited assets. As a “destination country” of illicit properties, the US is expected to frequently confront issues of the same nature in the future. It is imperative to find the right balance between two competing interests: on one hand, the need to immediately apply the proceeds of successful forfeiture efforts to the benefit of victims; on the other, the need to ensure that such successful forfeiture efforts will not be wasted by taking care that repatriated assets will not make their way once more into the pipeline of corruption. The problem appears particularly acute in the case of countries where, despite the ouster of former kleptocratic leaders, improvements and reforms toward good governance have yet to take root. It is surely unacceptable for ill-gotten wealth forfeited from corrupt officials to simply be transferred to the hands of equally corrupt officials who succeeded them. On the other hand, it is also morally imprudent for assets already adjudged to have been stolen from the people to continue to be held in the US instead of being used for the benefit of victims. This is, without a doubt, a challenge that needs to be addressed sooner rather than later.

A related issue is the degree of discretion the U.S. government can exercise in deciding how to repatriate forfeited assets. When the forfeiture is the result of a final judgement, the DoJ’s discretion is limited by statute. While its discretion has been far broader when the forfeiture is the result of the settlement of

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litigation, on June 7 AG Sessions issued a memo cabining that as well. “Any settlement funds should go first to the victims and then to the American people,” the Attorney General explained.

Payments to parties not directly harmed by the conduct is expressly banned. How this might limit the Department's ability to enter into the kind of agreement it did in the Kazakhstan matter remains to be seen.

Aside from the foregoing issues, debates around asset forfeiture in general in the US revolve more closely around the need to temper the risk of abuse by law enforcers exercising forfeiture powers. Despite the passage of the Civil Asset Forfeiture Act in 2000, many observers still note that safeguards against abuse are still insufficient. The most recent policy issuance from AG Sessions is proof of the continuing problem – his exhortation to forfeiture authorities to exercise caution in seizing residences whose titles are registered under the names of parties who may not be involved in the crime is particularly telling. This demonstrates that the arbitrary and abusive confiscation of property – especially homes – which reform advocates have long been pointing out has not yet been addressed completely. It is expected that debates will continue with regard to effective measures to protect the due process and property rights of innocent owners and defendants. To date, the “default” stance of law enforcers is to seize every property that possibly relates to crime, and to simply sort out the “innocent” properties later on in judicial proceedings (i.e., assuming that a contest will be filed at all). There is now growing pressure for law enforcers to improve their efforts in more accurately *tracing* properties that proceed from crime and in *distinguishing* which ones actually bear a reasonable nexus to the illicit activities being investigated and prosecuted.

There is also the ongoing debate as to whether the asset forfeiture regime in the US has the tendency to create perverse incentives for law enforcers (particularly at the state and local levels). There is a continuing concern that non-conviction-based forfeiture is being used as the preferred mode of “fund-raising” because it is a relatively easy way for law enforcement offices to gain financial incentives. This “policing-for-profit” criticism to asset forfeiture laws is more evident locally, so reform and advocacy efforts are expected to be concentrated at that level; but the federal government can also be implicated because there are many cases in which federal and local forfeiture activities have an interface. Specifically, the incentivization of forfeitures bears a close relationship to the DOJ's “equitable sharing” scheme. Pressure is expected to mount on the DOJ, so that it can use its powers to curb what appears to be a growing and continuing “appetite” of local law enforcers to seize assets.

Other issues debated in the U.S. involve 1) the circumstances under which a defendant in a criminal trial can use frozen assets to pay for a lawyer. *Luis v. United States*, decided by the U.S. Supreme Court May 30, 2016 and discussed in a [case note](#) in the Harvard Law Review, and 2) how law enforcement authorities distinguish between assets that are result of criminal activities and those that are not?

6. LIMITING THE ABILITY OF THE CORRUPT TO HIDE THEIR ILLICIT WEALTH

The biggest obstacle to fighting corruption is the impunity enjoyed by corrupt public officials. Ending safe havens for kleptocrats and their stolen assets is essential to ending impunity. All kleptocrats need to move their illicitly obtained wealth to avoid scrutiny and they do so by opening companies in places where it is possible to hide the real owners, so-called anonymous shell companies. Once the company is formed, it can easily open one or more bank accounts, wire money, buy property and engage in activities that launder the tainted funds. There are numerous examples of bribe payments being made through anonymous companies to avoid scrutiny. Recent examples include IMDB, Petrobras, FIFA, and VimpelCom. Therefore, tackling anonymous companies and increasing transparency about their ownership and control (beneficial ownership) is key to reducing opportunities for corruption. A variety of studies have identified the US as a major provider of corporate vehicles, including anonymous, shell companies. The State of Delaware, known for its user-friendly incorporation rules, is home to thousands of anonymous shell companies. Nevada and Wyoming aren't far behind. In fact, it is possible anywhere in the US to set up a company without naming the true beneficial owner.

Additionally, it is also easy to spend millions of dollars on anonymous property transactions in the U.S. with essentially no questions asked by the real estate industry. While the U.S. Treasury has begun cracking down on real estate schemes through its [Customer Due Diligence rules](#), investors are still finding ways to mask the true ownership of property in the United States through anonymous companies. The effects of such secrecy go far beyond merely protecting the identities of the ultimate owners of real estate. Anonymous companies allow corrupt politicians and organized crime to transfer and hide illicitly acquired funds worldwide, and fuel an abuse of power and a culture of impunity. The real estate sector is well positioned to detect schemes that use purchases of land or buildings to conceal the true source, ownership, location or control of funds generated illegally, as well as the companies involved in such transactions.

The Financial Crimes Enforcement Network (FinCEN), the unit in the Treasury Department responsible for enforcing federal laws against money laundering, has issued and renewed [Geographic Targeting Orders](#) (GTOs) that temporarily require U.S. title insurance companies to identify the natural persons behind shell companies that pay "all cash" for high-end residential real estate in several major metropolitan areas. FinCEN found that about 30 percent of the transactions covered by the GTOs involve a beneficial owner or purchaser representative that is also the subject of a previous suspicious activity report.

Still, much remains to be done in the U.S. In December 2016, the global anti-money laundering body known as the Financial Action Task Force or FATF issued a **report** on the United States. While the report had a number of positive findings, it also highlighted [significant weaknesses](#), with the most important one related to gaps in access to information on the ultimate owners of companies (beneficial owners). FATF was also critical of the weak supervision and limited anti-

money laundering program requirements for gatekeepers such as company service providers, transactional lawyers and the real estate sector.

7. CIVIL SOCIETY RECOMMENDATIONS FOR GFAR

- i. Develop Guidelines for returning assets to countries whose governments are highly corrupt.
- ii. Require states or the federal government to collect information about the beneficial owners of companies upon incorporation, keep that information up to date, and at a minimum, make that ownership information available to state and federal law enforcement.
- iii. Require the real estate industry to carry out adequate background checks to determine where the money used to purchase luxury property comes from and to conduct adequate due diligence. Congress should lift the "temporary" exemption created in 2002 excusing certain categories of persons from complying with the 2001 law requiring them to establish anti-money laundering programs, including "persons involved in real estate closings and settlements." A deadline should be established to bring everyone into compliance with the law, which is now 16 years old. As a part of this effort, the Treasury Department should also require public disclosure of the beneficial owners who ultimately own companies purchasing real estate throughout the US.
- iv. Require lawyers who carry out real estate transactions for their clients or serve as company service providers to conduct due diligence and screenings of their clients and to alert the authorities to suspicious transactions. Despite claims by the lawyers' trade association, such a requirement would not compromise the attorney-client privilege as the experience in the U.K. and other industrialized nations has demonstrated.

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