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American States

Inter-American Drug Abuse Control Commission

BIDAL PROJECT

Best practices document on management of
seized and forfeited assets

(Final Draft)

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Introduction

Criminal organizations obtain huge profits from their illicit business. These illicit proceeds motivate criminal organizations and provide them with the resources to continue to prey upon our communities. For this reason, the international community, has recognized the importance of depriving these organizations of their criminal proceeds through seizure, restraint and forfeiture. However, as governments pursue the seizure, restraint and forfeiture of criminal property, proper management and accounting for the vast number and variety of assets presents additional challenges for law enforcement and judicial authorities.

We have observed through the analysis of CICAD/OAS Experts of the Sub Working Group on Forfeiture, the urgent need for the creation or strengthening of specialized government entities responsible for the management, maintenance and custody of seized and forfeited assets in order to preserve their value. Countries, particularly in the Americas and Europe, have opted for the creation of specialized asset management groups, sometimes known as Forfeited and Seized Asset Management Offices or Assets Recovery Agencies, responsible for the receipt and maintenance of assets.

These agencies include professionals and technicians dedicated to the identification, tracing, seizure, management and conservation of the instruments related to drug trafficking, organized crime and other offenses. The work of these agencies, coordinated with the work of investigatory, prosecutorial and judicial authorities, can be a cornerstone in the effort to deprive the perpetrators of illegal profits and assets. This effort should be made in order to ensure that crime as a lucrative activity is avoided.

The primary objectives of asset forfeiture are to disrupt and dismantle criminal organizations by denying them criminal profits and resources to commit further crimes, and where appropriate, to compensate victims.

The desired result may be more effective if the exchange of information between different agencies at national and international levels is increased and international cooperation in the area is strengthened.

General Objective

This document seeks to aid CICAD/OAS member states by offering relevant information in order to guide and improve the legal systems. This tool is designed to guide and improve the establishment and implementation of structures to promote transparency and accountability of asset management, based on the success in some countries with the management of seized and forfeited assets, in accordance with the Model Regulations. It also provides information drawn from laws and regulations of different countries which have opted for the creation of specialized units for managing seized and forfeited assets.

These principles are not intended to be binding on any state, but they offer to identify some practices that some nations have found useful in the administration of seized and forfeited assets.

CHAPTER I: Asset investigation and Precautionary Measures

1. Asset investigation as an indispensable tool of law enforcement

As part of the criminal investigation, should seek to identify criminal proceeds and instrumentalities at an early stage of the investigation in order to enable the timely restraint, seizure and forfeiture of criminal property by the court. Concurrent with the criminal investigation, these asset investigations should seek to demonstrate that the assets result from or were used in the commission of a crime, thus establishing the causal link of the assets and the offense to support forfeiture and to strengthen the underlying criminal investigation. In addition, the asset investigation should seek to identify nominees used to conceal the proceeds or instruments of the crime and strive to distinguish them.

For this purpose, the competent authority for this type of investigation should have access to sources of information that may allow the accurate and detailed identification of the assets of the criminal organization. Where appropriate and properly authorized in the course of a criminal investigation, access to information obtained through the use of special investigative techniques, such as: wire taps, undercover operations, follow up, controlled delivery, informers, etc., may also be beneficial for an asset investigation.

2. Pre-restraint Planning and Discretionary Authority

Where possible, prior to restraint or seizure, assets should be valued and analyzed by the SAA in order to anticipate the costs and means required for their future management and so that the competent authority may determine the appropriate type of preventive measure. This should be done according to criteria of reasonableness, discretion and objectivity.

The competent authority should not be required to seize every asset identified, and should have discretion to choose which assets to seize.

3. Seizure of assets of economic value

The law enforcement objective of taking the proceeds or instrumentalities of crime should be paramount. Consequently, there will be cases in which the competent authority should seize criminal proceeds and instrumentalities even though it will be unable to recover the resulting asset administration expenses, such as in cases of prohibited substances, evidence, or seizure for public health reasons.

In other cases, states should endeavor to seize assets that have economic value and for which the asset management unit can be responsible for care, custody, management, preservation and disposal. Therefore, assets should be appraised by experts in order to determine market value.

To avoid storage, maintenance and custody of assets of small value, some states use minimum value thresholds for determining whether to pursue forfeiture, subject to appropriate exceptions allowing for seizure of low or negative value assets in the public interest.



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4. Ex parte restraint or freezing of assets

States should ensure that they have adequate legal procedures to immediately, and without prior notice or hearings, ask the appropriate judicial or other competent authority for a precautionary restraint or freezing of assets in order to preserve the availability of assets resulting or used in the commission of illicit activities.

CHAPTER II: Seized and Forfeited Asset Management

1. Establishment of a central specialized agency dedicated to the management of seized assets

States should ensure the establishment of a competent national specialized unit responsible for receipt, identification, inventory, management, maintenance, preservation and custody of seized or forfeited assets, involved in illicit activities that generate large profits.

The agency's purpose is to ensure transparency in management and administration of seized assets. The asset management unit should have professional and highly qualified personnel in order to perform the specific tasks of the institution, which may include lawyers, business managers, accountants, appraisers, mechanics, computer engineers, inspectors. The specialized unit should also have the possibility to hire outside services in order to fulfill its mission.

Once the process is finalized, the person in charge should be responsible for managing the liquidation of forfeited assets through sale or auction.

Distributing the proceeds of seized assets and money should be made according to national law.

2. Legal provision for delivery to custody

Seized assets should be turned over to a central and specialized management agency under a legal provision that underlines the legal responsibilities for their management and custody.

The appointment of custodians or administrators, should be the exception to the general rule. Where such outside managers are appointed, they should be supervised by the Special Administrative Authority and should submit regular reports on the supervision, maintenance, and custody of assets.

3. Registry of seized and forfeited property

States should consider using software to maintain a registry of seized and forfeited assets, sometimes called Asset Management Systems (AMS). This technological tool will be used to record income, transfers, judicial proceedings, legal situation, identification of objects, and the location of each asset in custody, in order to permit quick verification of its current status.

An AMS also will permit the generation of reports on the amount of real estate and personal property, as well as the preparation of statistics on assets seized and forfeited, accountability, management costs, and financial statements.

It also seeks to promote transparency and good governance in management of seized and forfeited assets, because the data recorded in the system will be subject to public scrutiny.

4. Seized assets fund

The Special Administrative Authority should maintain a single and central account into which all competent judicial authorities deposit cash seized in connection with drug trafficking, money laundering, or other crime, as well as liquidated assets, when domestic legislation authorizes it. Exceptions should be permitted for evidentiary purposes.

In any case, when the competent judicial authority orders the return of the money, accrued interest should be included where applicable¹.

5. Forfeited money and assets fund

Likewise, the asset management entity should maintain a single and central fund of forfeited money to administer resources from judgments or final judicial rulings that specify the disposition of seized cash or the proceeds from the auction or sale of forfeited assets. Some countries have adopted the authorization through legal mandate, in order to acquire profits from seized money as a way to attain self funding.²

6. Appropriate resources for maintenance of seized assets

Funds allocated into the asset forfeiture funds should serve as an alternative source for financing the management of seized and forfeited property, as well as those resulting from the interests rents or profits of the corporations, they could be used to maintain such or other forfeited assets.

The Special Administrative Authority (SAA) should be adequately financed to ensure that it can properly carrying out its functions. National legislation should anticipate that external financing will be necessary, at least in the first years of operation, in order to sustain the asset management program. After said program is in operation, it is expected to be self sufficient. As such, it is desirable that the legislation ensure

¹ Some systems use interest accrued on cash deposits for administration, custody and maintenance of seized assets administration, as well as the strengthening of preventive or enforcement activities in the combat against drugs and others. The fund must be expressly authorized by law for the purpose of deriving maximum benefit and preventing corruption and diversion in its use and distribution.

² The asset administration agency may invest upon these resources so as to maximize the forfeited Money administration and disposal and distribute the capital according to the pertinent legal provisions.

that some of the forfeited assets are to be used to further support the asset forfeiture program and the functions of the SAA.²

7. Existence of controls

States should ensure strict controls over management of seized or forfeited assets, in application of transparent public administration principles.

There must be a clear division of tasks to ensure that no person has exclusive authority over management of the assets, and actions involving the assets should be supervised by a higher authority. To this end there should be an internal audit or external audit as applicable, as least once a year.

No person officially responsible for the seizure of assets should receive a personal financial reward connected to the value of a seizure, nor should funds from any mechanism for the administration of seized assets be used for personal purposes.

Some states may wish to require that decisions on alienation, lease, management, and end use of forfeited assets be made by a collective body rather than an individual.

²Some countries have adopted different approaches in assigning resources for maintaining these assets. Such approaches include a) providing an autonomous budget to the entity responsible for managing the assets, at least until the asset forfeiture funds are self-sufficient; b) using a percentage of the interests generated from seized cash c) designating a percentage of funds from forfeited assets; d) deducting or collecting from the owner and/or lawful third party at the time to order their return for the expenses in managing and keeping custody of the seized assets; e) when the seized assets are profitable through their own budget; f) and through different provisionary preventive measures, such as the immobilization, freezing or entry registration in a real estate registry. These approaches allow for authorities to avoid transferring assets without incurring costs for their maintenance.

CHAPTER III: Loss of the products or instruments of the crime

1. Legislative authority for prior alienation or auction of seized assets

Under its domestic law, each State may adopt legislation to permit the SAA to sell or auction seized perishable or livestock assets before judicial sentence. Legal authorization should be made through the competent authority and rely on the idea of preserving the value of assets whether forfeited or ultimately released by preventing deterioration of seized assets during the criminal procedure or loss of its commercial value due to depreciation, risk of loss or destruction, or because of its excessive or costly administration.

In such cases, the proceeds of the sale or auction should be deposited in the seized fund account until the competent authority orders its return or forfeiture.

2. Forfeiture by Default or Abandonment

States should establish clear legal procedures to order forfeiture if, after appropriate notice a person fails to claim the assets within the time period to protect his interest in the property.

The competent authority may issue a final decision ordering definitive forfeiture when:

- a) If after a reasonable period of time from the seizure of the asset, it has not been possible to identify the author or perpetrator of the act or that person has abandoned the assets.
- b) If after a reasonable period of time from the end of the criminal proceeding persons who might have legitimate legal interest in the assets have made no effort to claim the assets.

In any of these cases, due process of law should be followed in order to guarantee rights of persons with an interest in the property.

3. Forfeiture as a consequence of a crime

States may wish to consider establishing procedures for the forfeiture of property in the absence of a conviction where there is sufficient proof to demonstrate that the assets are proceeds of or involved in an illegal activity.

Some legislation has replaced the traditional definition of forfeiture as an additional penalty of the offense with the concept of forfeiture as a legal consequence of the act, which permits forfeiture of assets that have been proved to be proceeds or instrumentalities of criminal activities.

This being the case, the forfeiture of assets as a consequence of a criminal activity should be maintained through the following parameters:

- a) A forfeiture cannot be ordered when the assets, goods or instruments are the property of a bona fide third party not liable for the crime as set forth on Art. 7 of OAS/Model Regulations.
- b) The assets should be identified and individualized in a precise manner in the charge as proceeds or instrumentalities of criminal activity.
- c) The illicit origin or relationship of the asset to the criminal activity should be demonstrated.

A forfeiture order should only be issued by a competent judicial authority at the request of the Public Ministry or by the prosecuting authority.

Additionally, some states have adopted procedures based upon *in rem* jurisdiction to adjudicate the property rights in favor of the state, while others may wish to adopt procedures to extinguish individual ownership interests due to its origin as proceeds of or use as an instrumentality of an offense.

CHAPTER IV: Special provisions on seized and forfeited asset administration

1. Considerations on provisional use of seized asset

When seized assets cannot be reasonably preserved under the same conditions as when they were seized without being used by the State or their administration would be excessively onerous, the best practice is advanced liquidation, if permitted by national law.

Some States, as set forth in Article 7 paragraph 6 of CICAD/OAS Model Regulations, have adopted certain procedures that permit the provisional use of seized assets, and only permitting it in exceptional circumstances, when established by the domestic legislation.³

Some States believe that the provisional use of seized assets jeopardizes the integrity of the forfeiture system because it makes it more vulnerable to corruption and abuse, subjecting it to public criticism, additionally its use could be incompatible with fundamental rights, such as due process of law.

Under no circumstances should the personal use for private reasons of an asset be authorized.

2. Provisional Tax Suspension or exemption

When assets are seized, States may consider provisional suspension or exemption from taxes, stamps, or any contribution from the time of seizure. The assets should be considered covered by the principle of tax immunity, because in the case of

³ a) These conditions should include, in addition to what set forth in Art. 7, the contracting of insurance as necessary.

assets seized and pending criminal proceedings, the State is managing property it does not own.

States should not be liable for tax obligations incurred prior to the assets' seizure⁴.

3. Contracting Authority of the Special Administrative Unit

The Special Administrative Unit should have adequate contracting authority to appropriately and expeditiously administer external services when the nature of the asset goes beyond its capacity or expertise.

In order to do this, the unit could rely on expedited mechanisms for recruitment, when authorized by the supervising agency.

This is intended to allow more flexible and better and improved contracting in order to acquire an asset or service while protecting, maintaining, and safeguarding the seized and forfeited assets.

The above mentioned has an objective to guarantee that seized assets continue to be productive and preventing that its maintenance and custody generate expenditures to the public budget. Likewise the SAA should perform leasing contracts or others.

⁴In the experience of some asset management units unpaid taxes can be equal to or greater than the value of the assets, rendering them unproductive even if they are still in good condition.

4. Bona fide third parties⁵

States should establish procedures for bona fide third parties be notified in order to contest the liquidation of assets. Such procedures should include adequate advance notice, subject to appropriate exceptions for perishable and rapidly depreciating assets or assets with costly maintenance.

5. Assets subject to lien or foreclosure

It is recommended that when a seized asset is the subject of a lien or foreclosure proceeding in favor of a bona fide third party, the SAA unit may appear before the civil proceedings and request a stay, when the necessary measures or agreements in order to facilitate the claims of bona fide third parties.

In this regard, payment for guarantees and mortgages may be made to bona fide third parties, at least in the following circumstances:

- a) When forfeiture of the asset is ordered, the State may pay the borrower or mortgagee creditor the amount owed to remove the respective liens through the corresponding regulation.
- b) When the asset remains seized, the asset management entity, in application of the principle of sound resource management, may pay the amount due to bonafide creditors provided that there is a likelihood that the asset will be forfeited at the end of the proceeding.
- c) When anticipated auction or disposal of assets subject to deterioration or costly maintenance is ordered.

⁵ Art. 10 of CICAD Model Regulations refers to the sanctions and measures applied to bona fide third parties especially with respect to proper notification so that all those claiming a legitimate legal interest in property, proceeds or instrumentalities may appear in support of their claim.



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In any case, if the judicial authority orders return, the SAA may have the right to retain the asset until the sum paid by the SAA is reimbursed or the right to be executed.

CHAPTER V: Disposition of Forfeited Assets

1. Disposition of Forfeited Assets

Through the Special Administrative Authority, the member states should consider adopting regulations or legislation allowing for forfeited movable or immovable assets to be:

- a) Maintained to carry out their objectives.
- b) Disposed of in accordance to Art. 11 of the OAS/CICAD Model Regulations. Put up for public auction or sale according to the parameters defined herein.
- c) Shared with other countries where joint operations are conducted, in accordance with the principles that govern international legal cooperation or through the application of bilateral or multilateral agreements.

Securities, cash and proceeds from publicly auctioned or sold assets that have been forfeited should be:

- a) Assigned a portion to support and maintain the program for the administration of assets.
- b) Where appropriate, used to compensate victims of the crime giving rise to the forfeiture of the particular asset.
- c) In accordance with its national legal system, destined for strengthening agencies whose purposes are for: the prevention of crime, the control of drugs or consumption; the fight against money laundering, organized crime, the financing of terrorism and, when national legislation permits, a percentage for the financing of international agency projects in these areas.

d) Shared with other countries where joint operations are conducted, in accordance with the principles that govern international legal cooperation or through the application of bilateral or multilateral agreements.

Decisions regarding the disposal of forfeited assets should be made transparently subject to appropriate oversight and accountability.

2. Registration of forfeited assets

When forfeited assets are subject to corresponding registration, an order from the competent judicial authority is all that is required to register or transfer the asset to the Special Administrative Authority. The asset registration will be exempt from all taxes or contributions. The National Registry will lift all liens or corresponding notes in order to enter this record.

3. International Cooperation

International cooperation may be necessary for the identification and administration of assets located abroad.

The administration of seized property at the request of a foreign government, should be treated according to the principles governing international legal cooperation, or through the implementation of bilateral or multilateral agreements.

Pre-seizure planning and coordination through formal mechanisms or informal networks may be particularly important to ensure timely identification, restraint, and administration of assets located abroad.