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Effective management and disposal of seized and confiscated assets

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of seized and confiscated assets
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The draft study was widely disseminated among government representatives and experts at the eleventh meeting of the Open-ended Intergovernmental Working Group on Asset Recovery, in Vienna, 24–25 August 2017. Inputs, comments and proposals for amendments received thereafter were given thorough consideration in the finalizing of the study.

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CONTENTS

ACKNOWLEDGEMENTS	iii
ABBREVIATIONS	xiii
I. INTRODUCTION	1
A. BACKGROUND TO THE STUDY	1
B. COMPILING THE STUDY AND ITS STRUCTURE	1
C. DEVELOPMENTS AT THE INTERNATIONAL LEVEL	2
1. United Nations Convention against Corruption	2
2. Group of Eight guidelines	3
3. Stolen Asset Recovery Initiative	3
4. Financial Action Task Force guidance	3
5. European Union law	4
6. Organization of American States	6
D. EVOLUTION OF ASSET MANAGEMENT POLICY	7
1. Final confiscation	7
2. Interim measures	8
E. CONSIDERATIONS FOR CAPACITY TO MANAGE AND DISPOSE OF SEIZED AND CONFISCATED PROPERTY	9
1. Scale of asset recovery operations	9
2. Reliable data on assets subject to interim and final confiscation	9
3. Functions of the asset management office	9
4. Location of the asset management capacity	10
5. Availability of resources and cost-control measures	11
6. Transparency and accountability	11
II. INTERIM MEASURES TO PRESERVE ASSETS OF ALLEGEDLY ILLICIT ORIGIN	13
A. INTRODUCTION	13
B. TYPES OF INTERIM MEASURES	13
1. Freezing and seizure orders	13
2. Pre-confiscation sale or disposal	18
3. Interim use of assets	24
4. Destruction of unsafe, hazardous property	25
5. Abandoned property	25
C. PROTECTION OF BONA FIDE THIRD PARTIES	26
D. PRE-SEIZURE PLANNING	27
E. CONCLUSION	29
III. FINAL DISPOSAL OF CONFISCATED ASSETS	31
A. INTRODUCTION	31

B.	RECOVERY FROM OFFENDERS	31
1.	Value-based versus object-based confiscation	31
2.	Value-based enforcement procedures	31
3.	Enforcement of object-based confiscation orders	33
C.	BENEFICIARIES OF CONFISCATION ORDERS	33
1.	Payment to the State or the general revenue fund	33
2.	Payment to a special or dedicated fund	34
3.	Payment to law enforcement agencies	36
4.	Covering costs of the asset recovery programme	37
5.	Victim compensation	38
6.	Social reuse	41
D.	NO CONFISCATION ORDER	43
E.	CONCLUSION	44
IV.	INSTITUTIONAL ARRANGEMENTS TO SUPPORT THE MANAGEMENT AND DISPOSAL OF SEIZED AND CONFISCATED ASSETS	46
A.	INTRODUCTION	46
1.	Specialized asset management offices	47
2.	Private sector players and their roles	54
B.	FINANCIAL AND BUDGETARY CONSIDERATIONS	56
C.	ASSET REGISTRATION, DATABASES AND DATA MANAGEMENT	59
D.	SKILL AND CAPACITY REQUIREMENTS	61
E.	CONCLUSION	63
V.	INTERNATIONAL COOPERATION AND THE RETURN OF STOLEN ASSETS	64
VI.	CONCLUSIONS	66

Figure

Challenges related to implementing article 31 of the Convention against Corruption on freezing, seizure and confiscation of assets, as reported by countries, 2014	2
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Boxes

Box 1 Financial Action Task Force: Characteristics of an asset management framework	4
Box 2 Questions and procedure for pre-seizure planning	29
Box 3 The role of the Seized Property Management Directorate in Canada	52
Box 4 Types of partnership agreements the Agency for the Recovery and Management of Seized and Confiscated Assets (AGRASC) has signed with subcontractors for the sale of assets	56
Box 5 Recommendations of the Seized and Forfeited Asset Management Project of the Organization of American States	60

Tables

Table 1 Sample requests for a freezing or seizure order, by type of asset	17
Table 2 Allocations from the Criminal Assets Recovery Account in South Africa, 2006	35
Table 3 Payments to victims of a crime in France, 2013	40
Table 4 Source of revenue for the self-funded Agency for the Recovery and Management of Seized and Confiscated Assets (AGRASC) in France, 2013 and 2014	57

ABBREVIATIONS

AGRASC	Agency for the Recovery and Management of Seized and Confiscated Assets (Agence de Gestion et de Recouvrement des Avoirs Saisis et Confisqués) in France
BOOM	Criminal Assets Deprivation Bureau (Bureau Ontnemingswetgeving Openbaar Ministerie) in the Netherlands
CONABI	National Seized Property Commission (Comisión Nacional de Bienes Incautados) in Peru
COSC	Central Office for Seizure and Confiscation (Office Central pour la Saisie et la Confiscation) in Belgium
G8	Group of Eight countries
OABI	Office for the Administration of Seized Assets (Oficina Administradora de Bienes Incautados) in Honduras
RENABI	National Registry of Seized Property in Peru
SAE	Asset Administration and Disposal Service (Servicio de Administración y Enajenación de Bienes) in Mexico
SPMD	Seized Property Management Directorate in Canada
UNODC	United Nations Office on Drugs and Crime

Note: Unless specified, all \$ references are US dollars.

I. INTRODUCTION

A. BACKGROUND TO THE STUDY

The Conference of the States Parties to the United Nations Convention against Corruption, at its fifth session, in Panama City, in November 2013, adopted resolution 5/3¹ on facilitating international cooperation in asset recovery. Resolution 5/3 “encourages States parties and the United Nations Office on Drugs and Crime (UNODC) to share experience on the management, use and disposal of frozen, seized and confiscated assets, and to identify best practices as necessary, building upon existing resources that address the administration of seized assets, and to consider developing non-binding guidelines on this issue”. At the sixth session, in St. Petersburg, Russian Federation, in November 2015,² this mandate was renewed with the adoption of resolution 6/3 on fostering effective asset recovery.³

B. COMPILING THE STUDY AND ITS STRUCTURE

In line with resolution 5/3 of the Conference of the States parties, UNODC began to work in early 2014 with the government of Regione Calabria, Italy, in the management, use and disposal of seized and confiscated assets. In April 2014, an expert group meeting was initiated in Reggio Calabria, Italy, with 72 experts from 35 countries and seven international organizations with experience and expertise in the management, use and disposal of frozen, seized and confiscated assets. They were brought together to discuss good practices with a view to developing tools and guidelines for dealing with seized and confiscated assets, both at the domestic level and with international asset recovery cases.

The meeting produced a set of findings and recommendations on how to advance the work of the international community in: (i) international cooperation for identifying, seizing and confiscating criminal assets, particularly those of mafia-based criminal organizations; (ii) the domestic management, use and disposal of seized and confiscated assets; and (iii) the management of returned assets in asset recovery cases.

Building on the outcome of the workshop in Reggio Calabria, UNODC organized a meeting in Vienna in September 2015 to focus on domestic systems, with 35 experts representing 19 countries and three international organizations with experience on the effective management and disposal of seized or frozen and confiscated assets.

The discussions during the two expert group meetings became the genesis of the study reflected in this document, which UNODC initiated to consolidate important issues that countries should consider when designing their legal and institutional frameworks and building operational capacities for the management and disposal of seized and confiscated assets. The study incorporates written contributions from the experts who participated in the expert groups. A draft of the study was shared with those experts, and their feedback was integrated into an advanced version that was presented to the Open-ended Intergovernmental Working Group on Asset Recovery and published for comments on the website of UNODC.

This study presents the experience of 64 countries on the management and disposal of seized and confiscated assets. It captures experience from all geographical regions, different legal systems and countries of different levels of development. The study presents previous experiences to help anyone tasked with developing legal and policy frameworks and/or responsible for the day-to-day management of seized and confiscated

¹ See www.unodc.org/unodc/en/treaties/CAC/CAC-COSP-session5-resolutions.html.

² See www.unodc.org/unodc/en/treaties/CAC/CAC-COSP-session6-resolutions.html.

³ “Encourages States parties and the United Nations Office on Drugs and Crime to continue sharing experience and building knowledge on the management, use and disposal of frozen, seized, confiscated and recovered assets, and to identify good practices as necessary, building upon existing resources that address the administration of seized and confiscated assets, including with a view to contribute to sustainable development.” (para. 16).

assets on knowing how to either avoid or better manage the associated risks and challenges. Emerging trends of relevance are also highlighted.

The remainder of this chapter covers the regional and international developments on the management and disposal of seized and confiscated assets, the evolution of asset recovery policy and considerations for establishing institutional infrastructure to manage and dispose of seized and confiscated assets. The balance of the chapters extends to the mechanisms employed during an interim management phase and the disposal of confiscated property. The study then addresses the institutional arrangements adopted by States to manage and dispose of illicit assets and briefly touches on questions associated with the international co-operation and the return of stolen assets.

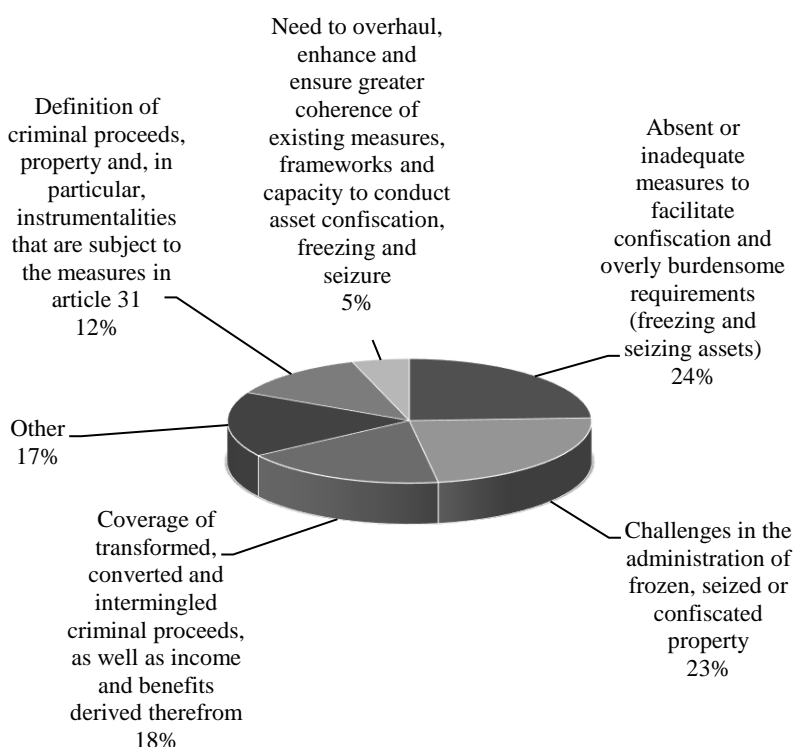
C. DEVELOPMENTS AT THE INTERNATIONAL LEVEL

1. United Nations Convention against Corruption

Article 31(3) of the Convention against Corruption requires States parties to adopt, in accordance with their domestic law, such legislative and other measures as may be necessary to regulate the administration by the appropriate authorities of frozen, seized or confiscated property covered by the Convention.

The Mechanism for the Review of Implementation of the United Nations Convention against Corruption revealed that several State parties face particular challenges with article 31. Among them, the administration of frozen, seized or confiscated property featured prominently (23 per cent of all challenges cited). The main issues were the absence of a body tasked with the management and disposal of seized and confiscated assets and the lack of an effective legal framework governing the administration of seized and confiscated assets, as the following figure illustrates.

Challenges related to implementing article 31 of the Convention against Corruption on freezing confiscation of assets, as reported by countries, 2014



Source: UNODC, 2014.

Following adoption of the Convention, several international organizations and regional bodies made recommendations and issued guidance on the management and disposal of seized and confiscated property.

2. Group of Eight guidelines

In 2005, the Group of Eight (G8) States issued the *G8 Best Practices for the Administration of Seized Assets* guide,⁴ which specifies overarching principles to be observed in the administration process, particularly during the seizure phase, when a final confiscation determination is still pending:

- Law enforcement objectives behind asset recovery should remain paramount, but good fiscal decisions are also important.
- Proper planning must take place before assuming responsibility for the management of seized assets.
- Administration mechanisms should be efficient and cost-effective.
- States must ensure that strong controls for the administration of seized assets are in place.
- Transparency in the management of seized assets is critical, such as by means of an annual examination of the asset management authority by independent auditors, including the examination and certification of financial records, which are made public.
- Accountability can be enhanced by putting in place information systems to track and manage inventory and costs.

The guidelines also add useful elements found in some G8 States for the administration of seized assets:

- the expressed designation of a competent national authority responsible for all aspects of the custody and management of seized assets
- the use of asset managers in particularly complex situations
- a dedicated fund for the deposit of seized and confiscated or forfeited assets.

3. Stolen Asset Recovery Initiative

The joint UNODC and World Bank Stolen Asset Recovery (StAR) Initiative developed a range of tools and guides to support international efforts to end safe havens for corrupt funds and to facilitate the systematic and timely return of stolen assets.⁵ Among the StAR Initiative publications, a few address the management and disposal of seized and confiscated property: *A Good Practice Guide for Non-conviction-Based Asset Forfeiture* (2009); *Towards a Global Architecture for Asset Recovery* (2010); *The Asset Recovery Handbook* (2011); *Barriers to Asset Recovery*, (2011). Additionally, *The Management of Returned Assets* (2009) addresses the recovery and return of illicit assets between jurisdictions.⁶

4. Financial Action Task Force guidance

A Financial Action Task Force guide, *Best Practices on Confiscation (Recommendations 4 and 38) and a Framework for Ongoing Work on Asset Recovery* (2012),⁷ singles out the following options as the best methods for managing seized assets:

⁴ See www.coe.int/t/dghl/monitoring/moneyval/web_ressources/G8_BPAssetManagement.pdf.

⁵ All these products are available at: www.track.unodc.org/assetrecovery/Pages/Star.aspx.

⁶ See www.unodc.org/documents/corruption/Publications/StAR/StAR_Publication_-_ManagementReturnedAssets.pdf.

⁷ See the section on management of frozen, seized and confiscated property, www.fatf-gafi.org/media/fatf/documents/reports/.

- competent authorities
- contractors
- a court-appointed manager
- the person who holds the property, subject to appropriate restrictions on use and sale.

That same guidebook proposes characteristics for an asset management framework (box 1).

Box 1

Financial Action Task Force: Characteristics of an asset management framework

- (a) There is a framework for managing or overseeing the management of frozen, seized and confiscated property. This should include designated authority(ies) who are responsible for managing (or overseeing management of) such property. It should also include legal authority to preserve and manage such property.
- (b) There are sufficient resources in place to handle all aspects of asset management.
- (c) Appropriate planning takes place prior to taking freezing or seizing action.
- (d) There are measures in place to:
 - (i) properly care for and preserve as far as practicable such property;
 - (ii) deal with the individual's and third-party rights;
 - (iii) dispose of confiscated property;
 - (iv) keep appropriate records; and
 - (v) take responsibility for any damages to be paid, following legal action by an individual in respect of loss or damage to property.
- (e) Those responsible for managing (or overseeing the management of) property have the capacity to provide immediate support and advice to law enforcement at all times in relation to freezing and seizure, including advising on and subsequently handling all practical issues in relation to freezing and seizure of property.
- (f) Those responsible for managing the property have sufficient expertise to manage any type of property.
- (g) There is statutory authority to permit a court to order a sale, including in cases where the property is perishable or rapidly depreciating.
- (h) There is a mechanism to permit the sale of property with the consent of the owner.
- (i) Property that is not suitable for public sale is destroyed. This includes any property: that is likely to be used for carrying out further criminal activity; for which ownership constitutes a criminal offence; that is counterfeit; or that is a threat to public safety.
- (j) In the case of confiscated property, there are mechanisms to transfer title, as necessary, without undue complication and delay.
- (k) To ensure transparency and assess the effectiveness of the system, there are mechanisms to: track frozen or seized property; assess its value at the time of freezing or seizure, and thereafter as appropriate; keep records of its ultimate disposition; and, in the case of a sale, keep records of the value realized.

Source: Financial Action Task Force, *Best Practices on Confiscation (Recommendations 4 and 38) and a Framework for Ongoing Work on Asset Recovery* (Paris, 2012), p. 9–10.

5. European Union law

At the regional level, the European Union has adopted secondary legislation to harmonize and guide the establishment and further development of relevant legal and institutional frameworks of its member States. Article 1 of European Union Decision 2007/845/JHA, adopted in December 2007,⁸ concerning cooperation between asset

⁸ See <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32007D0845>.

recovery offices of the member States for tracing and identification of proceeds of a crime provides that:

“Each Member State shall set up or designate a national Asset Recovery Office, for the purposes of the facilitation of the tracing and identification of proceeds of crime and other crime related property which may become the object of a freezing, seizure or confiscation order made by a competent judicial authority in the course of criminal or, as far as possible under the national law of the Member State concerned, civil proceedings.”

In their effort to comply with this framework decision, many European Union member States set up dedicated capacity to perform the following functions:⁹

- trace criminal proceeds
- encourage the use of asset recovery laws among investigators through improved coordination of law enforcement personnel
- train police, investigating magistrates, judges and prosecutors in asset recovery law
- influence government policy
- coordinate international cooperation in asset recovery.

In several European Union member States, the asset recovery office was assigned responsibility for managing seized and confiscated assets, at first assuming mainly a coordination function rather than taking physical control of seized and confiscated property.

In some cases, governments designated an existing structure to perform the functions envisaged by the framework decision. In the case of **Belgium** and **the Netherlands**, the prosecuting authority assumed responsibility for the functions. Other States set up an entirely new centralized office, such as the National Agency for the Administration and the Destination of Seized and Confiscated Assets from Organized Crime (Agenzia Nazionale per l’Amministrazione e la Destinazione del Beni Sequestrati e Confiscati alla Criminalità Organizzata) in **Italy** in 2010 and the Agency for the Recovery and Management of Seized and Confiscated Assets (Agence de Gestion et de Recouvrement des Avoirs Saisis et Confisqués, or AGRASC) in **France** in 2011.

With dedicated capacity in place to ensure more effective use of asset recovery laws at the domestic level and with improving cooperation between member States, the number of assets subject to seizure and confiscation began to increase. This progress, however, began to strain the institutional capacity to manage assets. The European Union responded with article 10(1) in Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime, which makes provision for even greater specialization for the management of seized assets:

“Member States shall take the necessary measures, for example by establishing centralised offices, a set of specialised offices or equivalent mechanisms, to ensure the adequate management of property frozen with a view to possible subsequent confiscation.”

In line with that 2014 directive, many more European Union member States have established institutions with specialist capacity to manage seized and confiscated assets. In October 2015, for example, the Asset Recovery and Management Office (Oficina de Recuperacion y Gestión de Activos) in **Spain** was set up within the Ministry of Justice. It is responsible for locating, retrieving, storing and managing effects, property, instrumentalities and proceeds of a crime. **Romania** also adopted a law in 2015 on setting up the National Agency for the Administration of Seized Assets, which took over asset recovery functions from the Ministry of Justice.

⁹ In the *Communication from the Commission to the European Parliament and the Council* (2008, p. 8), the Commission of the European Communities advocates for some of these functions to be performed by the asset recovery office.

Most member States in the European Union now have an office dedicated to asset recovery generally but with increasing specialization in the management of seized and confiscated assets.

6. Organization of American States

The Organization of American States adopted in 2003 model regulations concerning laundering offences connected to illicit drug trafficking and related offences. Article 7 of the model regulations deals primarily with the disposal of forfeited property,¹⁰ providing for a court or other competent authority, in accordance with the law:

- Retain forfeited property for official use or transfer it to any government agency that participated directly or indirectly in the freezing, seizure or forfeiture.
- Sell forfeited property and transfer the proceeds from such sale to any government agency that participated directly or indirectly in the freezing, seizure or forfeiture. It may also deposit the proceeds from the sale into a special fund to be used by the competent authorities in their fight against illicit trafficking, prevention of the unlawful use of drugs, treatment, rehabilitation or social reintegration of those affected by its use.
- Transfer the property, proceeds or instrumentalities or the proceeds from their sale to any private entity dedicated to the prevention of the unlawful use of drugs, treatment, rehabilitation or social reintegration of those affected by its use.
- Facilitate the sharing of the objects of the forfeiture or the proceeds from their sale with the country or countries that assisted or participated in the investigation or legal proceedings that resulted in the objects being forfeited, on a basis commensurate with their participation.
- Transfer the object of the forfeiture or the proceeds from its sale to intergovernmental bodies specializing in the fight against illicit traffic, prevention of the unlawful use of drugs, treatment, rehabilitation or social reintegration of those affected by its use.
- Promote and facilitate the creation of a national forfeiture fund to administer the objects of forfeiture and to authorize their use or allocation to support programmes for the administration of justice, training and for the fight against illicit drug trafficking, its prevention and prosecution, as well as for social programs related to education, health and other purposes, as determined by each government.

In 2008, the Organization of American States, through the Inter-American Drug Abuse Control Commission, developed the Seized and Forfeited Asset Management Project (known by its Spanish acronym BIDAD) to provide technical assistance to its members to help improve their internal systems associated with asset investigation and the seizure, confiscation and management of assets derived from unlawful activities and organized crime.

At its 40th regular session in Washington, D.C., in May 2010, the Inter-American Drug Abuse Control Commission adopted principle 45 of the Hemispheric Drug Strategy, which envisages the creation or strengthening of national agencies responsible for the management and disposal of seized and forfeited assets in cases of illicit drug trafficking, money laundering and other related criminal offences. This aspect was restated as a priority within the Hemispheric Plan of Action on Drugs 2011–2015. Under goal 12 in the section on control measures,¹¹ the following actions were proposed:

¹⁰ Organization of American States and Inter-American Drug Abuse Control Commission: *Model Regulations Concerning Laundering Offences Connected to Illicit Drug Trafficking and Other Serious Offences*, as amended in 2003. See also Group of Experts for the Control of Money Laundering: *Legal Aspects in the Establishment and Development of Entities Specialized in the Administration of Seized and Forfeited Assets* (Washington, D.C.: Organization of American States, 2012) and *Self-Evaluation Guide for the Forfeiture and Administration of Assets*, 2013. See also *OAS Hemispheric Drug Strategy* (para. 45) and its *Plan of Action 2011–2015* (objective 12).

¹¹ See www.cicad.oas.org/Main/Template.asp?File=/main/aboutcicad/basicdocuments/plan-

- Create or strengthen, in accordance with national legislation, competent national organizations for the administration of seized and/or forfeited assets and the disposal of forfeited assets.
- Promote specialized programmes to improve systems for the administration of seized and forfeited assets.
- Strengthen technical capacities for the administration and disposal of assets related to drug trafficking and other crimes.

The Seized and Forfeited Asset Management Project has since produced several publications to support Organization of American States members in following through with those actions:

- *Legal Aspects in the Establishment and Development of Entities Specialized in the Administration of Seized and Forfeited Assets*
- *Mechanisms for Sharing Forfeited Assets Between Countries*
- *Guide for the Management of Seized Businesses*
- *Analysis of Systems for the Collection of Data on Seized and Forfeited Assets of Illicit Origin in the Member States of the Organization of American States.*

In 2011, the Organization of American States carried out a study on Asset Management Systems in Latin America¹² looking at the institutional arrangements for managing seized and confiscated assets. Based on the findings, it appears that most member States in Latin America are moving towards establishing independent specialized asset management entities.

D. EVOLUTION OF ASSET MANAGEMENT POLICY

1. Final confiscation

The policy objectives to be achieved by asset recovery regimes have expanded over time. Asset recovery is first and foremost an important law enforcement tool for achieving the broader ends of justice, accountability and the rule of law. It is a powerful deterrent measure because it removes the incentive to commit crime and can help towards incapacitating the means by which criminals ply their trade. Although removing the proceeds and instruments of crime from the control of the perpetrator of that crime remains the primary objective of asset recovery law, other objectives are gaining significant prominence.

Using the recovered proceeds of crime to compensate individual victims (as defined under a jurisdiction's domestic law) and to support organizations and programmes that cater to victims of crime is becoming an increasing focus of asset recovery practice. Social reuse of the proceeds and instruments of criminal activity for the benefit of communities that have suffered the negative effects of a crime is also receiving greater priority than it used to. The aim of these programmes is to restore confidence in the rule of law undermined by criminal conduct. There is also more emphasis now on using the proceeds of crime, particularly of corruption, to contribute to sustainable development.

Using the recovered proceeds to fund an asset recovery programme more generally, including asset management activities and law enforcement initiatives, is also regarded as a legitimate objective of asset recovery. It has the symbolic value that the proceeds of crime are used to fight crime. With the proper safeguards in place and when appropriate, confiscated funds can be used to enhance law enforcement efforts.

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¹² Organization of American States: *Asset Management Systems in Latin America and Best Practices Document on Management of Seized and Forfeited Assets* (Washington, D.C., 2011), www.cicad.oas.org/lavado_activos/grupoexpertos/Decomiso%20y%20ED/Manual%20Bienes%20Decomisados%20-%20BIDAL.pdf.

Finally, ensuring that an asset recovery system is economically viable—at least self-funding, if not profitable—and operates in a responsible, accountable and transparent manner is important for ensuring public confidence in and public support for asset recovery.

2. Interim measures

The primary policy concern when dealing with criminal property prior to a final determination of the confiscation proceedings is to ensure that as much of the alleged instruments and proceeds of crime as possible are available when a confiscation order is ultimately made. The interim phase is thus concerned with mitigating the risk that the alleged criminal property may be placed beyond the reach of law enforcement, lost, damaged, destroyed or diminished in value in any other way, thereby frustrating the fulfilment of a confiscation order once it is made.

There also may be risk that while a criminal trial or confiscation proceedings wind their way through a court system, the property, unless taken into safe custody, will continue to be used in the criminal operations of its owner or a criminal enterprise. Interim measures may be needed to neutralize such use. The law enforcement objective of ensuring that unlawful activity is discontinued in such cases will take precedence over considerations relating to costs.

These law enforcement considerations must be balanced against the fact that liability of the asset to confiscation is still in dispute. A court may ultimately refuse to grant a confiscation order, and the asset must then be returned to its lawful owner in the condition when it was made subject to an interim order. While the lawful origin of the property is still subject to dispute, the lawful interests of the owner and relevant third parties must be considered regarding the management and maintenance of the asset, within reasonable limits.

The substantive and procedural rights of the persons with interests in a property must therefore be protected during the interim phase. Protections typically afforded such parties during the interim phase include:

- providing for the terms of the interim measure to be communicated to the affected persons as soon as possible after it has been executed
- ensuring that the interim measure remains in force only for as long as it is necessary to preserve the property
- affording persons affected by the measure the opportunity to challenge it before a judicial authority.

The financial burden on the State for the cost of preserving assets, such as storage, valuation and maintenance expenses, as well as the compensation and damage claims arising from the depreciation in value of an asset while subject to an interim measure, has the potential to bankrupt a nascent asset recovery programme. Failure to effectively conduct pre-seizure planning to determine which assets should be seized and to take adequate care of an asset to ensure that its economic value is preserved during this phase may ultimately undermine efforts to compensate victims for their loss and to repair the harm done by criminal conduct. It is thus increasingly important to ensure that assets are preserved at minimal cost and that they yield maximum return when they are ultimately realized.

Attempts to mitigate the costs of interim management in many jurisdictions have led to (i) increased reliance on measures that ensure retention of an asset under the custody and control of its owner, subject to restrictions on use, together with positive obligations to maintain its value; (ii) placing an asset in the hands of a third party (including the State and its institutions) who can ensure its productive use; and (iii) pre-confiscation sale of an asset.

Countries have designed a variety of measures to achieve these diverse policy objectives, which are explored in greater detail in the remaining chapters of this study.

E. CONSIDERATIONS FOR CAPACITY TO MANAGE AND DISPOSE OF SEIZED AND CONFISCATED PROPERTY

1. Scale of asset recovery operations

The stage of development of the asset recovery programme in a country will impact the institutional arrangements required. It will be less likely that an asset recovery programme in the early stages of development will require the establishment of an organization dedicated to this function. An asset recovery programme that has resulted in the seizure of a large number of assets and resulted in the confiscation of significant sums of money may be able to justify the investment of capacity and resources to set up an entity exclusively for this function. In such cases, a country will have built up experience in management and disposal of assets incrementally, and these experiences will inform the establishment of the asset management institution. In **Romania**, the formation of the asset recovery office within the Ministry of Justice in 2011 led to an increase of more than 300 per cent in the value of seized assets and more than 400 per cent in the value of confiscated assets in subsequent years. These successes prompted the adoption of a law setting up a specialized asset management office. **Canada** and **France** are examples of countries that have established self-standing specialized asset management entities to oversee the increase in seizure and confiscation orders.

2. Reliable data on assets subject to interim and final confiscation

Maintaining accurate and reliable data on the number, value, location and state of seized assets as well as the value and ultimate destination of confiscated assets is an important first step towards effectively managing them. Given the number of players involved in the asset recovery process (investigators, prosecutors, court personnel, etc.), it can be hugely challenging to collate the needed information, particularly in countries in which asset recovery capacity is dispersed over large areas and undertaken by a variety of institutions.

Establishing an accurate and reliable central database involves determining the repositories of required information, such as custodians of court orders, investigators, investigating magistrates or other bodies with physical custody of seized and confiscated property. Strict protocols on how data are to be captured must be adopted and enforced, and checks and balances must be available to verify the inputted data.

In **Brazil**, an important step in the designing of the system to manage seized and confiscated assets was the establishment of a centralized electronic database for capturing information on assets subject to restraint (freezing and seizure) and confiscation.

In **France**, the asset management agency, AGRASC, devotes considerable resources to improving the information-gathering process and ensuring reliability. Similarly in **Belgium**, the Central Office for Seizure and Confiscation (Office Central pour la Saisie et la Confiscation, COSC), via liaison officers from the police or from the Ministry of Finance, has access to various databases that can be used for asset tracing purposes, which it uses to coordinate the asset management activities of a variety of players.

3. Functions of the asset management office

After ensuring good recordkeeping on assets subject to seizure and confiscation orders, the next step typically is to identify all the functions the asset management capacity will be required to perform and then to conduct an audit of capacity and skills already available within government institutions. An evaluation of the strengths and weaknesses of existing capacity and strategies to redress the weaknesses and build on the strengths will provide a solid foundation for deciding whether to establish a new institution or

strengthen an existing one to carry out the necessary functions. It is important that the capacity to manage assets can grow as the demand for such services expands, culminating either in a central agency that merely coordinates asset management functions or in the establishment of an independent, professional asset management entity when critical mass is reached.

The function of managing property on an interim basis pending the final determination of each item differs from the function of disposing of property once entitlement to it has been finally determined. During the interim phase, the competing interests in the property must be carefully balanced; at this stage, the property could either be returned to its owner or declared forfeited to the State. Interim measures to preserve the value of property of allegedly illicit origin must take account of the interests of parties whose right to the property has not yet been finally determined.

Once property is declared forfeited, the key concern is compliance with the policy choices expressed in the legislation governing asset recovery and on executing a court's orders reflecting that legislation. This usually entails recovering from the subject of the confiscation order the full extent of the property or benefit specified in the confiscation order and ensuring that the beneficiaries specified in the confiscation order receive the full value of assets allocated to them or the maximum value of the money judgment made in their favour, be they the State, individual victims, victim organizations or other non-government players. It also includes monitoring beneficiaries to ensure that the property and funds allocated to them are used for the purpose they were intended.

In countries like **Belgium, Brazil and the Netherlands**, the interim management function is in the hands of a law enforcement organization or judicial authorities (investigating judges or prosecutors) or is outsourced to judicially appointed professionals. Government bodies traditionally responsible for the collection of criminal fines and the sale of government property deal with the property at the disposal stage. The primary role of the office managing assets is to coordinate the activities of the different players, primarily through the management of information about assets subject to seizure and confiscation orders (a central database). The asset management office takes physical control of assets only in limited circumstances.

In **Mexico**, the asset management office deals primarily with assets under interim management. When assets are finally confiscated, they are handed over to the entity designated in the court order, typically a fund for specific purposes. **Australia, Canada, France and New Zealand** have combined both interim management and final disposal functions within the same institution, with appropriate safeguards for each stage in the process.

For the management of finally confiscated property, countries typically choose to deposit the proceeds from confiscation orders into the general revenue fund or into a special fund for specific purposes. Special funds, however, tend to require additional capacity to manage, distribute and monitor the allocation of deposited proceeds.

Management of the budget for the interim care of assets and accounting for the use of allocated funds to this purpose is typically performed by an asset management office.

The provision of storage facilities, valuation services and managing disposal services, such as auctioneering services, are among the functions suited to centralized management due to advantages when procuring services in bulk.

4. Location of the asset management capacity

Some countries have located their asset management office within law enforcement. In European Union countries, like **Belgium and the Netherlands**, the asset recovery office was established to both support asset tracing and enforcement of asset recovery orders across national borders and perform other asset management training and policy development functions. It was also tasked to coordinate the management and disposal of seized and confiscated property. **Thailand** opted to locate the responsibility for

management of seized and confiscated property within its Anti-Money Laundering Office, which was established as an independent law enforcement and regulatory agency under the supervision of the Ministry of Justice. In the **United States**, the Marshal Service is a federal law enforcement entity responsible for the custody and management of property under the Department of Justice's Asset Forfeiture Program. In **Brazil**, the asset management responsibility remains with investigating judges who may appoint professional judicial managers to assist them.

Australia, Mexico and New Zealand also located the capacity to deal with criminal property within a public sector entity outside of law enforcement but with experience in dealing with the management and disposal of assets. In Australia and New Zealand, it is with the body responsible for regulating insolvencies and liquidations, while in Mexico it is the body tasked with managing the sale of public assets, including the privatization of State-owned enterprises.

Canada and France each created a stand-alone entity to deal exclusively with the management of seized and confiscated property derived from crime. **Colombia, Honduras and Peru** separated the asset management function from more conventional law enforcement functions and created an independent entity to deal exclusively with the management of assets.

Notwithstanding the institutional location adopted, most jurisdictions have found it necessary to rely, to some extent, on private sector players for some specialized skills required to manage certain types of assets. There appear to be two main avenues: (i) the use of court-appointed asset managers who are typically registered with the court and can, on a case-by-case basis, be appointed to handle the management and/or disposal of an asset; or (ii) the use of subcontractors who are procured by the entity responsible for the management and disposal of assets. In several jurisdictions, both options are available. The asset management capacity has an important role in procuring private sector specialists, managing their contracts and monitoring the performance of their functions.

5. Availability of resources and cost-control measures

With many competing claims to public funds, securing adequate funding to support asset management capacity is challenging for many countries. A variety of strategies to fund the operations of asset management have been adopted, with many striving to achieve self-funding status to reduce the financial burden on the State (see Chapter IV for details on funding mechanisms).

It is important to pay adequate attention to pre-seizure planning and decision-making to ensure that seized assets do not turn into liabilities while under the control of the State. Measures to ensure that the costs associated with the interim management of seized assets should be specified in the asset recovery law to ensure that they do not exceed the value of the asset upon realization. This could include leaving assets under the control of the owner subject to strict control measures, a pre-confiscation sale and productive use of assets.

State liability for damages arising from the destruction or deterioration in value of seized assets in cases in which a court declines to make a confiscation order is the risk of poor asset management. An asset management capacity must mitigate that risk.

Unless resources are dedicated to ensuring that confiscation orders are enforced or collected, recovery from such orders tend to be frustratingly low. Where a court orders that victims or communities are to benefit from such confiscation orders, it is all the more critical that sufficient capacity is in place to collect these funds (see Chapter III for discussion on mechanisms to improve recovery of confiscation orders).

6. Transparency and accountability

The institutional arrangements to manage and dispose of seized and confiscated assets must withstand intense public scrutiny. If a decision is made to remove tainted property

from the control of its owner, the mechanisms to take care of such assets must be beyond reproach. Equally, confiscated property must be dealt with in accordance with the law. Reports that expose poor management of seized property or illustrate that confiscated property is being dealt with contrary to a court order can seriously undermine the credibility of the asset recovery programme.

Meticulous recordkeeping, the adoption of transparent procedures and compliance with the policies, procedures, court orders and laws that govern the asset management process are critical for its transparency and accountability.

II. INTERIM MEASURES TO PRESERVE ASSETS OF ALLEGEDLY ILLICIT ORIGIN

A. INTRODUCTION

This chapter looks at measures that typically follow once an asset has been identified as liable to confiscation in accordance with domestic laws or a country's mutual legal assistance obligations. The focus is on the legal framework and institutional capacity that countries have to successfully manage frozen and seized assets of allegedly illicit origin during this interim phase.¹³

B. TYPES OF INTERIM MEASURES

Countries use a variety of measures to achieve the diverse policy objectives that govern the interim management phase discussed in Chapter I. This section discusses the most common of them:

- freezing orders that provide for restrictions to be placed on the use of an asset in the hands of the owner or possessor or in the hands of a third party, such as a bank
- seizure of the asset from the custody of the owner or possessor and its retention in the custody of law enforcement, a specialized asset management office or a court-appointed judicial manager
- pre-confiscation sale or disposal, in particular of perishable and depreciating assets, and preservation of the proceeds of the sale
- interim use by law enforcement, a government agency or a third party
- destruction of unsafe or hazardous property.

The trend is to find ever-more creative ways to ease the burden and the costs of managing assets, pending determination of the confiscation proceedings, while ensuring that the law enforcement objectives behind forfeiture are achieved and the rights of property owners are respected.

1. Freezing and seizure orders

a. Terminology

Article 2(f) of the Convention against Corruption defines “seizure” as “temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority”. In this study, a “seizure measure” ensures that custody and control of an asset is removed from the person or entity that holds it at the time the seizure order is made. The asset is transferred to the custody and control of a person or entity designated in the court order or in the law, which in most jurisdictions is:

- the law enforcement agency that applied for the order, such as the investigating or prosecuting authority
- a specialized asset management office
- a court-appointed receiver or judicial manager, trustee, *curator boni* or administrator.

The seized property remains the property of the person or entity that held an interest at the time of the seizure, and the designated person or entity who takes over possession,

¹³ The asset recovery process commences with identification and tracing of criminal property, which is beyond the scope of this study. For a detailed discussion, see the StAR Initiative's 2011 publication, *Asset Recovery Handbook*, pp. 75–76, www.unodc.org/documents/corruption/Publications/StAR/StAR_Publication_-_Asset_Recovery_Handbook.pdf.

administration or management thereof must do so with due regard to the terms of the court order and the rights of the owner or possessor.

The Convention against Corruption defines a “freezing order” as a measure “temporarily prohibiting the transfer, conversion, disposition or movement of property”. For this study, “freezing” refers to measures that permit the retention of an asset in the possession or under the control of the person or entity that held it prior to the freezing order, be it the owner, possessor, agent of the owner or a third party, such as a bank. Law enforcement, the asset management office or a court-appointed trustee or manager is typically authorized to monitor compliance with the court order. Non-compliance with the court-imposed restrictions is usually a criminal offence.¹⁴

“Restraint” refers to a variety of interim and management measures, depending on the jurisdiction. For example, in **Canada**, the Seized Property Management Act distinguishes between restraint and seizure by providing for two types of interim orders: The physical seizure of moveable assets into the custody of the Seized Property Management Directorate (SPMD) takes place under a “management order”. Assets that cannot be seized physically, such as real estate, bank accounts and businesses, are managed in terms of a “restraint management order”.

In **South Africa**, however, restraint refers to an interim measure used to transfer an asset to the custody of a court-appointed professional, referred to as a *curator boni*. The restraint term is also used to describe a combination of measures, for example, when the entire estate of a person is made subject to an interim management order requiring a mixture of freezing and seizure measures to preserve its value.

It is important to understand the features of a particular interim measure and not to rely on the label ascribed to it. In this study, “restraint” is used to describe a combination of freezing and seizure orders.

b. Freezing versus seizure

Many countries start out with seizure as the default interim measure, imposing freezing orders only if seizure is impossible or impractical. In the early stages of an asset recovery programme, there is often much enthusiasm within the law enforcement community for removing suspected criminal property from the control of the owner or possessor. Before a country has had experience with the challenges presented by maintaining rapidly deteriorating assets or assets that require special management expertise, the seizure of assets often takes precedence. But as the costs of maintaining seized assets mount and civil suits against the government increase as a result of poor management of seized property, alternatives to seizure are now more actively explored.

The key consideration during the interim phase is whether the asset will be available if a confiscation order is made.

Most countries examined for this study provide a choice between freezing and seizure orders—to suit the circumstances of a case. The key consideration is whether the asset will be available if a final confiscation order is made. The preferred option, it seems (to keep costs to a minimum), is to leave the asset under the control of the owner, subject to certain restrictions on use. Other considerations may involve the type of assets for possible seizure. For instance, an investment vehicle may be more appropriate for a freezing order rather than a seizure order, given the inherent complexities in managing the asset (due to investment decisions that must be made to preserve the asset’s value or distributions that may be required).

¹⁴ In **Italy**, pursuant art. 388 of the Criminal Code, non-compliance with restrictions in court orders concerning freezing and seizure of assets is punishable with a penalty of up to three years in detention. It is also a criminal offence to commit any acts intended to elude, destroy, damage or suppress the assets subjected to judicial seizure. In **South Africa**, sect. 75 of Act 121 of 1998 creates offences relating to misuse of information, failure to comply with a court order and hindering a *curator boni*, a police official or any other person in the exercise, performance or carrying out their powers, functions or duties under the Act.

Another approach is to specify in legislation or provide guidance in regulations on the circumstances when seizure is to be avoided and when it is to be encouraged, particularly as a means to avoid seizure when its costs will far outweigh the value that may ultimately be realized from the sale of the asset. The law in **Romania** required the establishment of the National Agency for the Management of Seized Assets as the custodian of seized mobile assets worth more than €15,000 at the time of the seizing order.¹⁵ By implication, this discourages the seizure and subsequent storage and maintenance of mobile assets worth less than €15,000. The Penal Code in **Sweden** is an example of a law that provides that if the value of real estate does not cover both the mortgage and the cost of the sale, no seizure measure should be imposed.¹⁶

c. Authority to freeze or seize

Most countries require a judicial or quasi-judicial institution that is independent of law enforcement, such as prosecutors or investigating magistrates, to authorize pre-confiscation measures, particularly seizure orders. In some jurisdictions, the authority to prohibit dissipation or movement of property (a freezing order) is granted to law enforcement agencies¹⁷ and even other non-judicial authorities. For example, in **Tanzania**, the Office of the Attorney General has the authority, if there is reason to suspect that any person has illicitly received or acquired an advantage or property in relation to a corruption offence, to issue a notice directing that person not to transfer or dispose of the property specified in the notice.¹⁸

In some cases, it may be necessary to take swift action to prevent the dissipation of movable assets, such as cash and other legal tender, without the delay occasioned by first obtaining judicial approval. Financial intelligence units typically have the power to prohibit financial institutions from moving financial assets under their control under certain specified conditions and for a specified duration, without judicial intervention. In such cases, the freezing instruction is usually of a specified duration, such as a five-day prohibition on movement of property, to permit authorities to obtain an interim order from the appropriate judicial authority. These measures are often of great assistance to investigative and prosecution bodies because they buy time to assemble the evidence needed to meet the requisite standard of proof in a court.

Article 8(4) of European Union Directive 2014/42/EU permits freezing orders by an authority other than a judicial authority, provided they are validated or reviewed by a judicial authority if challenged. This approach balances the law enforcement requirement for speedy action with the asset owner's right to due process.

While freezing orders aim to secure assets of allegedly illicit origin for subsequent confiscation, there are administrative freezing orders issued in the execution of legal acts of the European Union (these administrative orders can refer either to regulations imposing freezing measures that are directly applicable to member States or to additional measures imposed at the domestic level) against all assets of individuals or companies independently of their licit or illicit nature, with the purpose of preventing access to such assets, their use or dissipation. Such measures are also regulated in **Canada** and **Switzerland**.¹⁹ In the case of the Arab countries in transition, such administrative freezing orders were used extensively to secure assets of the members of the former regimes and their closest associates.

¹⁵ Law No. 318 of 11 December 2015 on the setting up, organization and activity of the National Agency for the Management of Seized Assets and on amending and supplementing other legal regulations.

¹⁶ See chap. 36 in the Penal Code.

¹⁷ StAR Initiative: *Asset Recovery Handbook* (Washington, D.C.: World Bank, 2011), www.unodc.org/documents/corruption/Publications/StAR/StAR_Publication_-_Asset_Recovery_Handbook.pdf.

¹⁸ Prevention and Combating of Corruption Act, No. 11/200.

¹⁹ Historically, in Switzerland, administrative freezing orders were based directly on the Constitution. Currently, they are adopted on the basis of the Foreign Illicit Assets Act or the Embargo Act.

These administrative asset freezes raise some legal issues. In particular, what are their implications for the asset recovery efforts by countries seeking the recovery and return of such assets? Governments might not necessarily become aware of the assets frozen in execution of such legal acts. The European Union law does not require authorities of an issuing country to investigate the origin of the assets, nor do they require European Union member States to inform countries with interests in the case of any procedures initiated by the respective owners for the de-freezing of such assets.

d. How freezing orders differ from seizure orders

Typically, interim management measures give judicial officers discretion to tailor appropriate orders to meet the exigencies of cases. The Proceeds of Crime Act, 256 (1991) in **Tanzania**, for example, provides for a court to order that the specified property is not to be disposed of or otherwise dealt with by any person “except in such manner and in such circumstances as are specified in the order”. Alternatively, a court may, “if it is satisfied that the circumstances so require, direct that the property...be taken into the custody and control of a trustee appointed for that purpose by the court” and “a restraining order against a person’s property may be granted, subject to such conditions as the court thinks fit....”

The Proceeds of Crime Act, 2002 in the **United Kingdom** also provides for a court to order that the property specified in the application for an interim order is not disposed of or otherwise dealt with by any person “except in such manner and in such circumstances as ... specified in the order”. A restraining order against a person’s property may be granted, subject to “such conditions as the court thinks fit”.

It is thus incumbent on the investigating and prosecuting bodies to specify in the application for an interim order any prohibitions on the use of the asset and the powers that should be granted to the person or entity designated to manage that asset.

Although laws that provide for freezing orders typically permit the imposition of restrictions of a prohibitive nature, such as a prohibition on the sale or movement of an asset, the legal framework in some countries permits the imposition of positive obligations on owners, such as compelling the owner to take out additional insurance on the asset or ensuring that loans secured against the property are serviced on the same basis as they were at the time of the freezing order.

In **Canada**, a restraint management order not only restricts any change in ownership, it may also set positive obligations that the accused must fulfil in relation to the property, such as paying property taxes, maintaining property in a good state of repair and paying utilities. A restraint management order also gives SPMD the authority to enter the property on 24 hours’ notice to appraise the property or to inspect it to ensure that it is being maintained. The focus remains on the retention of the property in the custody of the owner but with greater emphasis on enforcing fulfilment of the obligations relating to the management of the property contained in the court order.

Table 1 presents examples of the types of requests that have been included in an application for a freezing or seizure order in relation to types of assets.

Although the overriding consideration during the interim stage is preservation of the asset’s value (rather than making it more profitable), opportunity to increase the value of that asset arises in some cases. Whether the person or entity designated to manage the asset can be authorized to deal with the property and incur costs to increase its value or make it more profitable, is an issue that practitioners are grappling with.

Apart from ensuring that the legal authority to undertake such improvement is in place, a key consideration is cost. **Canada, France** and the **United States** each have a designated operating fund that can be used for covering such costs, although it is mainly used for increasing the realization value of an asset after a confiscation order has been made. In principle, these funds can be used during the interim phase, subject to a provision for the fund to be reimbursed if the asset is to be returned to the owner.

Table 1

Sample requests for a freezing or seizure order, by type of asset

Type of asset	Terms of a typical freezing order	Terms of a typical seizure order
Cash in a bank account*	<ul style="list-style-type: none"> • Permit the funds to be retained by the financial institution under the same arrangements between bank and customer in place at the time of the order. • Permit the financial institution to accept all incoming transfers. • Prohibit the financial institution from transferring funds from bank account. 	<ul style="list-style-type: none"> • Require that the funds be transferred from the financial institution where it was held prior to seizure to a bank account controlled by a court-appointed manager, the asset management office or other designated government-controlled fund.
Movable property—cars, boats, planes	<ul style="list-style-type: none"> • Direct the movable asset to be appraised to determine its condition and value. • Direct that it be retained in the custody of the owner or possessor. • Direct the owner or possessor to maintain the movable asset in the state of repair it was in at the time of the freezing order and conduct maintenance in the ordinary course for an asset in a similar condition. • Instruct the owner on how the asset may be used, such as prohibit its removal from a particular jurisdiction, require that insurance be put in place or maintained and require the asset to be made available for regular inspection and monitoring. 	<ul style="list-style-type: none"> • Direct that the asset be removed from the custody and control of its owner and placed in a storage facility, such as a safety deposit box, a garage, hangar or dry dock, managed by law enforcement, the asset management office or an independent court-appointed professional. • Alternatively, direct a court-appointed professional to take custody and control of the asset and maintain it in compliance with laws and regulations.
Income-generating immovable property and real estate	<ul style="list-style-type: none"> • Prohibit the owner and property (deeds) registration authority from selling or further encumbering the property. • Direct the owner to maintain the property in the state of repair it was in at the time of seizure and to maintain insurance, mortgage, utilities and tax payments that were in place prior to the freezing order. • Permit the owner to continue to conduct any income-generating activity on the property, such as administration of a lease agreement or collect rentals, subject to reporting requirements. 	<ul style="list-style-type: none"> • Direct that a court-appointed professional take control of the management of the immovable property. • Direct the court appointee to appraise the property and take over administration of lawful income-generating activity (collect rent, maintain the property). • Ensure that mortgage payments, utilities, rates and taxes are paid (from other assets subject to interim management if necessary).
Businesses	<ul style="list-style-type: none"> • Direct the managing director of a business to account, on a regular basis and in specified ways, for the running of the business. • Prohibit disposal of a business or any major assets of that business, and require the business owner or managing director to obtain consent for entering into transactions outside the ordinary course of that business. 	<ul style="list-style-type: none"> • Provide for appointment of a receiver or judicial manager to operate the business. • Direct the court appointee to ensure the business complies with the law, pays taxes and complies with health and safety or other regulatory requirements. • Direct the court appointee to retain the profit share due to the owner as part of seized assets.
Shares or other securities	<ul style="list-style-type: none"> • Retain in the custody of the agent of the owner, subject to court-imposed restrictions. 	<ul style="list-style-type: none"> • Place in the custody of court appointee to manage portfolio within defined parameters, including the input of the owner.

Note: In **France**, the law permits the seizure of money in bank accounts (deposit accounts only). The law authorizes the Agency for the Recovery and Management of Seized and Confiscated Assets, France's asset management office, to transfer the funds to a bank account controlled by it. Funds in the account earn interest at 1 per cent per annum. Savings or other investment accounts can only be frozen or blocked, and the funds are retained under interest rates that applied at the time of seizure.

e. Cost of freezing versus seizure

Placing assets in the custody and under the control of the owner or possessor, subject to restrictions on use and maintenance, is generally regarded as more cost-effective than seizing the asset. The cost of storage, maintenance and security associated with seizing movable assets can be considerable. Although the possibility of reducing the burden of storage and maintenance costs through freezing rather than seizure can be significant, there are also cost implications. For example, staff are needed to monitor compliance with court orders, ensuring that insurance on a vehicle is maintained, that rates, taxes and mortgage payments on real estate are kept up to date and that assets are inspected from time to time to ensure that they are being preserved in an adequate state of repair.

To make freezing more attractive as an interim measure, **France** introduced a legislative amendment to make provision for the owner who retains custody of an asset bear the maintenance costs.²⁰

Countries that had monitored the cost-effectiveness of seizure orders were able to control further expenditure by either returning the asset under strict conditions or applying to a court for authority to sell the asset.

2. Pre-confiscation sale or disposal

Because the final determination of an asset has yet to be made in the interim phase, some jurisdictions forbid the sale of assets prior to confiscation or limit the sale to perishable goods only. And because the costs of storing and maintaining deteriorating assets over long periods of time mount, more countries are making provision for the pre-confiscation sale or disposal (also referred to as interim sale, interlocutory sale, early sale or anticipated sale) of assets in defined scenarios. Attitudes to the sale of assets pending final confiscation are evolving to such an extent that many more countries now permit a sale in ever-increasing scenarios. In **Costa Rica**, for example, legislation permits the Costa Rican Drug Institute (the asset management office) to sell, auction or perform an anticipated alienation of movable and immovable assets without further limitation or restriction, other than the property must meet the requirements for seizure, following an expert report from the competent office in the Ministry of Finance.²¹

The costs of managing a seized asset can quickly exceed its value. To manage costs effectively, the Government of **the Netherlands** introduced a central registration system that allows for swift action to be taken when the costs exceed the value of the asset. In combination with an aggressive strategy of selling off assets pre-confiscation, the Netherlands reduced the cost of managing movable seized and confiscated goods from €23 million to €9 million a year.

A number of regional initiatives in recent years have encouraged countries to provide for the pre-confiscation sale or disposal of assets. Article 10 of Directive 2014/42/EU enjoins European Union member States to ensure the adequate management of frozen property, which may be confiscated, by including the option to sell or transfer property where necessary. The Organization of American States guide on *Asset Management Systems in Latin America and Best Practices Document on Management of Seized and Forfeited Assets* (2011) highlights pre-confiscation sale or disposal as a good practice, especially for perishable or rapidly depreciating assets. The *G8 Best Practices for the Administration of Seized Assets* also recommends the pre-confiscation sale for assets that are perishable, will rapidly decline in value (such as vessels and aircraft) or too

²⁰ Art. 706.158 of the Code of Criminal Procedure provides the magistrate authorizing seizure without dispossession to designate the person to whom custody of the property is entrusted and who should ensure the maintenance and conservation, the appropriate cost being incumbent to the owner or holder of the asset.

²¹ Law 8204, Law on narcotic drugs, psychotropic substances, unauthorized use of drugs, related activities, money-laundering and financing terrorism, modified by Law No. 9074.

burdensome to maintain.²² These initiatives have resulted in a significant increase in the number of countries that now provide for the pre-confiscation sale of assets in their law.

The following criteria on pre-confiscation sales emerged from the survey of countries' systems reviewed for this study.

a. Criteria for sale

i. *Perishable assets*

Most countries, including **Brazil**,²³ **Canada**,²⁴ **Czech Republic**,²⁵ **Peru**,²⁶ **Tanzania**²⁷ and **Thailand**,²⁸ permit the pre-confiscation sale or disposal of perishable goods; some of them apply the same criteria applicable to the pretrial sale of goods seized as evidence in a criminal case. In **Costa Rica**, the asset management office may sell, donate or destroy perishable goods, fuel, building materials, scrap, essential chemicals, precursors and animals before a final judgment is delivered in a criminal proceeding.²⁹ In **Honduras**, perishable goods are defined as assets that will become unusable in a short time, thus can be sold quickly.³⁰ The law in **Colombia** permits the asset management office—the Society for Special Assets (Sociedad de Activos Especiales—to alienate assets before a judgment if they are perishable, consumable or will deteriorate.³¹

ii. *Rapidly depreciating property*

Canada provides for the disposal of rapidly depreciating property.³² Although, there are disagreements about what the term means. Courts in one province regard vehicles as rapidly depreciating, while in other provinces, vehicles are not regarded as rapidly deteriorating and must be stored pending the conclusion of a trial. **Costa Rica** permits the pre-confiscation sale of assets when there is risk of depreciation, deterioration or rapid destruction. This category includes self-propelled assets (vehicles, boats and aircraft) as well as rapidly depreciating assets, such as animals and foodstuff.

In the **Czech Republic**, seized assets that will rapidly lose value may be sold, and assets can be sold when their storage or maintenance costs are disproportionate to their value or if the asset management requires special conditions that can only be met under disproportionate difficulties. In these circumstances, the law allows the sale of seized assets without approval of the owner.³³ In **Thailand**, assets may be sold even if the risk of depreciation arises from negligence or improper management.³⁴ **Brazil** permits pre-confiscation sale or disposal only in cases of considerable depreciation.³⁵

iii. *Storage or maintenance costs disproportionate to an asset's value*

In **Honduras**³⁶ and **the Netherlands**,³⁷ if storage costs are disproportionate to the value of assets, they may be sold before a confiscation order is issued. In **Costa Rica** and **Peru**,³⁸ if the storage and preservation costs of seized assets are assessed as too expensive, they may be sold or disposed of before a confiscation order. Similarly in

²² See general principle 11, *G8 Best Practices for the Administration of Seized Assets* (2005).

²³ Code of Criminal Procedure, book 1, chaps. IV and V.

²⁴ Seized Property Management Act, S.C. 1993.

²⁵ Amendment to Act No. 279/2003 Coll. and Act No. 86/2015 Coll., effective from 1 June 2015.

²⁶ Legislative Decree No. 1104 of 19 April 2012.

²⁷ Proceeds of Crime Act, 1991.

²⁸ Anti-Money Laundering Act, 1999.

²⁹ Article 32 of Law No. 8754, Organized Crime Act, 2009.

³⁰ Asset Forfeiture Act, published through Decree No. 27-2010, modified by Decree No. 51-2014.

³¹ Asset Forfeiture Code, created by Law 1708 of 2014 (*Código de Extinción de Dominio*).

³² Seized Property Management Act, S.C. 1993.

³³ Amendment to Act No. 279/2003 Coll. and Act No. 86/2015 Coll., effective from 1 June 2015.

³⁴ Anti-Money Laundering Act, 1999.

³⁵ Code of Criminal Procedure, book 1, chaps. IV and V.

³⁶ Asset Forfeiture Act, published through Decree No. 27-2010.

³⁷ Code of Criminal Procedure, title IV, third sect.

³⁸ Legislative Decree No. 1104 of 19 April 2012.

Colombia, seized assets may be sold if their management will result in a negative cost-benefit balance.³⁹

- iv. *Assets too difficult to administer or their management requires special conditions or expertise not readily available*

Brazil permits pre-confiscation sale or disposal when assets are difficult to maintain.⁴⁰ **The Netherlands** sells goods not suitable for storage, such as special machinery or motor vehicles.⁴¹ In **Thailand**, assets may be sold if they will cause an undue burden to the State because of their specific features.⁴² Examples of burdensome assets are things that can be easily damaged or are dirty, smelly, disturbing or of an irritating nature; a heavy item that is unsuitable for relocation; hazardous items (chemicals or inflammable objects); and assets that require storage in specific conditions to preserve their value or require special procedures. **Colombia** permits the sale or destruction of assets that could cause environmental damage.⁴³

- v. *Goods that are easy to replace*

In **Belgium**⁴⁴ and **the Netherlands**,⁴⁵ assets that are easily replaceable, whose replacement value is easily determined and whose seizure might cause depreciation, damage or disproportionate costs can be sold.

- vi. *To pay legal representation and expenses incurred for other seized assets*

In **Australia**, assets can be sold to pay a legal aid commission's costs.⁴⁶ In **Canada**,⁴⁷ **New Zealand**⁴⁸ and the **United Kingdom**,⁴⁹ seized property can be sold to defray the cost of maintaining the value of other assets, such as paying a mortgage.

- vii. *When the owner has absconded*

In **Romania**, the law makes special provision for the sale of seized vehicles whose owners cannot be determined.⁵⁰ In these cases, the prosecutor must prove all conditions for selling the seized vehicles, including inability to determine the owner. The court decides, based on the evidence presented, but the decision can be challenged.

- b. Procedure

- i. *Consent of owner*

Most jurisdictions permit pre-confiscation sale or disposal with the consent of the owner and the relevant agency responsible for enforcing the seizure order. If the consent of the owner is obtained, a pre-confiscation sale rarely requires any further judicial intervention, other than as a way of protecting the person or entity initially entrusted with management of the asset if the owner is later dissatisfied with the terms of the sale.

Pre-confiscation sale is increasingly relied on to reduce the costs for the interim management of seized assets.

³⁹ Asset Forfeiture Code, created by Law 1708 of 2014.

⁴⁰ Code of Criminal Procedure, book 1, chaps. IV and V.

⁴¹ Code of Criminal Procedure, title IV, third sect.

⁴² Anti-Money Laundering Act, 1999.

⁴³ Asset Forfeiture Code, created by Law 1708 of 2014 (*Código de Extinción de Dominio*).

⁴⁴ Law of 26 March 2003 (*Wet houdende oprichting van een Centraal Orgaan voor de Inbeslagneming en de Verbeurdverklaring en houdende bepalingen inzake het waardevast beheer van in beslag genomen goederen en de uitvoering van bepaalde vermogenssancties*); part of this law is incorporated within the Code of Criminal Procedure.

⁴⁵ Code of Criminal Procedure, title IV, third sect.

⁴⁶ Proceeds of Crime Act, 2002 (Cth).

⁴⁷ Seized Property Management Act, S.C. 1993.

⁴⁸ Criminal Proceeds (Recovery) Act, 2009.

⁴⁹ Proceeds of Crime Act, 2002.

⁵⁰ Law No. 28/2012.

Owners are more likely to consent to sell where the legal framework provides for pre-confiscation sale or where legal precedent authorizing a sale in similar circumstances has been established. Consent to sell tends to be more easily obtained when the owner is approached to sell by a third party that is independent of law enforcement, such as a trustee or management receiver, particularly during an ongoing investigation.

ii. *Absence of consent*

Most countries that allow for the pre-confiscation sale or disposal of assets without the consent of the owner require a court or other competent authority to authorize the sale. Where countries do vest the authority in other institutions, such as the prosecuting authority, an asset management office or other executive or administrative body, the owner usually has the right to challenge the decision in court.

In **New Zealand**, an official assignee, which is an independent court-appointed official, is authorized to sell property to preserve its value but with consent of the court.⁵¹ In **Australia**, a seized asset can be subjected to pre-confiscation sale or disposal if an official trustee thinks that the property is likely to lose value or that the cost of preserving the property is likely to exceed or represent a significant portion of the value of the property or to pay for legal aid costs.⁵² Even if the owner objects to the sale, the official trustee of the court is required to proceed with the sale.

A statute in the **Czech Republic** allows for the advance sale of seized assets without the approval of the owner under specific circumstances (as previously noted).⁵³ However, the owner has the right to appeal that decision. In **Belgium**, only the responsible magistrate can initiate the procedure to sell assets before a confiscation order.⁵⁴ The owner must be notified and has the right to appeal the decision. When the decision becomes final, the Central Office for Seizure and Confiscation proceeds with the sale, which is carried out by specialized units within the Ministry of Finance. In **the Netherlands**, the public prosecutor may authorize a pre-confiscation sale by the Criminal Assets Deprivation Bureau (Bureau Ontnemingswetgeving Openbaar Ministerie, or BOOM), subject to judicial approval if the owner objects.⁵⁵

In other jurisdictions, pre-confiscation sales are permitted with less onerous procedural requirements. In **Colombia**, a court-appointed administrator decides on the sale of perishable goods without court intervention, although the pre-confiscation sale or disposal of real estate requires prior authorization from a committee that consists of a representative of the president, a representative of the Ministry of Finance and Public Credit and a representative of the Ministry of Justice. The administrator, the Society for Special Assets, is the secretariat of this committee.⁵⁶ The Office for the Administration of Seized Assets (Oficina Administradora de Bienes Incautados, or OABI), in **Honduras**, is permitted to sell certain types of assets before a confiscation order, without judicial intervention under defined conditions.⁵⁷ The asset management office must inform the Public Prosecutor's Office and the judicial authorities of its decision.

⁵¹ Criminal Proceeds (Recovery) Act 2009. The Official Assignee Compliance Unit is authorized to manage and dispose of seized assets in New Zealand. A court may, on application, direct the official assignee (appointed to take control of property in terms of a restraining order) to sell restrained property (including, without limitation, a business) to preserve the value of the restrained property and may direct the official assignee to make mortgage payments or payments in respect of any other encumbrance from the restrained property.

⁵² The official trustee is a corporate body entrusted by the Proceeds of Crime Act, 2002 (Cth) to deal with restrained or confiscated property.

⁵³ Amendment to Act No. 279/2003 Coll. and Act No. 86/2015 Coll., effective from 1 June 2015.

⁵⁴ Law of 26 March 2003 (*Wet houdende oprichting van een Centraal Orgaan voor de Inbeslagneming en de Verbeurdverklaring en houdende bepalingen inzake het waardevast beheer van in beslag genomen goederen en de uitvoering van bepaalde vermogenssancties*); part of this law is incorporated within the Code of Criminal Procedure.

⁵⁵ Code of Criminal Procedure, title IV, third sect.

⁵⁶ Asset Forfeiture Code, created by Law 1708 of 2014 (*Código de Extinción de Dominio*), Law No. 1849, which modifies Law 1708, from 19 July 2017.

⁵⁷ Asset Forfeiture Act, published through Decree No. 27-2010, modified by Decree No. 51-2014.

In **Costa Rica**, like Honduras, the Costa Rican Drug Institute, which is the asset management office, does not require a judicial order to dispose of assets by sale or donation.⁵⁸ Once it has taken possession of property, it is responsible for its management, including the decision to sell. It then reports on what is done to the judicial authorities thereafter. The asset management office must publicize all sales and donations. In **Peru**, the National Seized Property Commission (Comisión Nacional de Bienes Incautados, or CONABI) must submit any sale proposal for approval to its Management Council,⁵⁹ which is chaired by a representative of the Council of Ministers and further comprises representatives from several public entities.⁶⁰ Decisions relating to the pre-confiscation sale of assets require a technical report from the CONABI Executive Secretariat. While the courts officially declare seizure, CONABI deals with the sale or public auction thereof and is required to document all action taken, together with the grounds for the decision.⁶¹

c. What happens to the proceeds of pre-confiscation sale or disposal?

The *G8 Best Practices for the Administration of Seized Assets* recommends that the resulting proceeds from pre-confiscation sale or disposal should be secured, pending a final determination.⁶² Countries that allow for pre-confiscation sale or disposal provide for: the proceeds to be deposited into a bank account controlled by a court (as is the case in the **Czech Republic**);⁶³ a consolidated judicial bank account (as in **Brazil**);⁶⁴ an account managed by the asset management office (as in **France**);⁶⁵ or a trust or escrow account in the name of the defendant, operated by a court-appointed trustee, pending confiscation (as in **Australia** and **New Zealand**).

In the **United States**, the Marshal Service operates the Seized Assets Deposit Fund, into which all proceeds of pre-confiscation sales are deposited.⁶⁶ In **Brazil**, there is a prohibition on investing the proceeds of pre-confiscation sale or disposal of seized assets.⁶⁷

If the law provides for the proceeds of a sale to be deposited into a bank account that will earn interest, the law should also determine who will receive the interest earned if no confiscation order is made and the property is returned to the owner. In **Belgium**, the proceeds of a sale are deposited into an account in the name of the asset management office (COSC), and the proceeds are reimbursed, together with interest earned, if no confiscation order is made.⁶⁸ Similarly in **Colombia**, if an asset is to be returned to its owner, the sale price is returned in addition to any interest earned on it.⁶⁹ However, in **France**, the proceeds are deposited into an account managed by AGRASC (the asset

⁵⁸ The powers of the Costa Rican Drug Institute are regulated by an internal Regulation (2012); see www.icd.go.cr/portalicd/images/docs/uid/informes/ReglamentoAutnomoICD_vigente.pdf.

⁵⁹ CONABI was established by Legislative Decree No. 1104 of 19 April 2012.

⁶⁰ CONABI is a multisector body; its Management Council is composed of representatives of different governmental powers and ministries: the judiciary, the Office of Public Prosecutions, the Ministry of Justice and Human Rights, the Ministry of Interior, the Ministry of Economy and Finance, the Ministry of Defence and the State Council of Legal Defence. This allows the supervising body to have the necessary proficiency and knowledge to understand the multifaceted reality of asset management and to take comprehensive decisions.

⁶¹ Directive No. 01-2014-SUNARP/SN.

⁶² See general principle 11, *G8 Best Practices for the Administration of Seized Assets* (2005).

⁶³ Act No. 219/2000 Coll.

⁶⁴ Code of Criminal Procedure, book 1, chaps. IV and V.

⁶⁵ Law No. 2010-768 of 9 July 2010, which is incorporated within the Code of Criminal Procedure; alienation of property takes place in accordance with arts. 41-1 and 99-2 of the Code of Criminal Procedure.

⁶⁶ Comprehensive Crime Control Act, 1984.

⁶⁷ Code of Criminal Procedure, book 1, chaps. IV and V.

⁶⁸ Law of 26 March 2003 (*Wet houdende oprichting van een Centraal Orgaan voor de Inbeslagneming en de Verbeurdverklaring en houdende bepalingen inzake het waardevast beheer van in beslag genomen goederen en de uitvoering van bepaalde vermogenssancties*); part of this law is incorporated within the Code of Criminal Procedure.

⁶⁹ Asset Forfeiture Code, created by Law 1708 of 2014 (*Código de Extinción de Dominio*).

management office); if the asset is ordered to be returned, only the capital is returned and the interest earned is retained by the asset management office to fund its operating expenses.⁷⁰

d. Method of sale and costs

A sale is effected either by public auction or through private treaty. The principles that typically govern pre-confiscation sale or disposal are: recovering maximum return on the sale at minimum cost, ease of disposal and ensuring that the process is transparently accounted for.

To ensure that assets to be sold achieve the best possible return with minimum expenditure, Finshop (a division of the Patrimonial Services in the Ministry of Finance in **Belgium**) manages the pre-confiscation sale of seized movable property by following strict guidelines.⁷¹ For Finshop, the first step in the process is to decide on the conditions of a sale that will apply and to determine whether the sale will be by public auction online (eBay), through written offers or direct sales (from its shop). Finshop then undertakes appropriate publicity measures, such as advertising on the website for Patrimonial Services, mailing to interested parties and advertisements in local, national and specialized media. Finshop arranges inspection visits and is open to the public twice a month. Conditions for visits are also published in sales catalogues.

In the **United States**, the Marshal Service engages marketing measures appropriate for an asset that is to be sold. It conducts regular public auctions online and advertises in specialized publications when assets will be of interest to a specialized market.

Some jurisdictions make funds available to ensure that assets are sold at maximum value. This may entail effecting cosmetic improvements or incurring expenses for marketing and other sale strategies to achieve better returns. **Canada** established a special fund from which expenses incurred for the sale can be defrayed. In the **United States**, the Department of Justice Assets Forfeiture Fund and the Treasury Forfeiture Fund are the repositories of forfeited currency and forfeited property sale proceeds and serves as the operating fund from which specified programme expenditures, such as asset management and disposal expenses, are defrayed. The Marshal Service will obtain appraisals to ensure that the asset is sold at its appropriate value. And there are limitations on who can buy an asset to ensure that nominees and associates of a criminal do not re-acquire such property at what may be less than market price, depending on the asset.

It is important that pre-confiscation sales be handled transparently to avoid exposing the asset management entity to unnecessary criticism, either from the owner or from the public. This can be achieved by ensuring that the decision-making process resulting in the decision to sell and the method of sale are clearly defined and accessible to the public.

e. Security in lieu of sale

In some countries, an interested party can avert a pre-confiscation sale by providing security against the return of the asset. The market value of the asset at the time of seizure will determine the value of the guarantee of payment. In **the Netherlands**, the owner or an interested party may transfer money (an amount equivalent to the value of the asset) or guarantee a payment method accepted by the Public Prosecution Service, to secure the release of the asset.⁷² The measure is aimed at avoiding storage costs and extra charges for the sale of the asset. In **Australia**, a court may revoke a restraining order

⁷⁰ Law No. 2010-768 of 9 July 2010, which is incorporated in the Code of Criminal Procedure; alienation of property takes place in accordance with arts. 41-1 and 99-2 of the Code of Criminal Procedure.

⁷¹ See www.finshop.belgium.be.

⁷² Section 118 A of the Dutch Code of Criminal Procedure: 1. The Public Prosecutor's Service orders the return against surety of an object seized based on art. 94a. 2. The surety implies the transfer of money by the party, subject to the seizure or a third party, or in relation to a third party, as a guarantee for an amount and payment method accepted by the Public Prosecutor's Service.

that covers a suspect's property or excludes specified property from a restraining order if the suspect or a third party gives security that is satisfactory to the court to meet any liability that may be imposed on the suspect under the Proceeds of Crime Act, 2002.

3. Interim use of assets

The interim use of seized assets is a controversial measure because of the inherent risk of the asset deteriorating over time and depreciating in value as a result of its use. There is also the concern that the fundamental rights of the owner could potentially be violated, particularly if a court later orders the return of the asset. Most countries thus do not permit the interim use of seized assets. However, where pre-confiscation sale is not possible or legally permitted, interim use is a productive way of dealing with seized assets.

Where interim use is permitted, countries mitigate concerns about assets deteriorating and losing value by requiring, as a condition of the temporary use of assets, that the recipient institution is required to provide an appropriate guarantee that the asset will be returned in a fit state. If assets are to be returned to their lawful owner after the entity permitted to use the asset has invested in its improvement, the value of such investment can be recovered from the owner.

In **Costa Rica**, the law provides that the Costa Rican Drug Institute may loan or donate seized assets to public interest entities for interim use, particularly those involved in the prevention or repression of illicit drug use.⁷³ Ensuring the return of the assets in a reasonable condition has presented numerous challenges. To address these challenges, preventive and law enforcement institutions are required to provide for all-risk insurance and allocate a budget to cover potential damage not covered by the insurance policy, before they can receive the asset. Where the asset must be returned, the law provides for compensation for any damage or reduction in value. Given these challenges, Costa Rica prefers pre-confiscation sale over interim use.

Concerns have been raised about law enforcement officers' interim use of seized assets. The concern is that law enforcement personnel may become motivated to seize assets for the purpose of benefiting from their use rather than prioritizing the genuine law enforcement concerns of the community. This concern led the G8 Lyon and Roma Criminal Legal Affairs Subgroup to recommend that, unless there is a compelling purpose (for example, when the asset is to be used in furthering the investigation), seized assets should not be used during the interim phase by law enforcement personnel involved in a seizure.⁷⁴ For these reasons, there has been a move away from permitting interim use by institutions and officers tasked with investigation in favour of use by other government departments and by non-profit organizations for social purposes.

For assets to be used prior to final confiscation in **Colombia**, they must be productive, self-sustainable and generate employment.⁷⁵ The Asset Forfeiture Code provides for three measures: contracting, provisional destination and provisional storage. "Contracting" permits the manager of seized assets to enter into a contract that enables and contributes to the efficient management of those assets.⁷⁶ An important requirement is the establishment of guarantees by the manager, which vary from case to case, in accordance with the nature of each agreement and the type of asset.

"Provisional destination" measures are specifically designed for the use of assets by public entities, non-profit organizations or legal persons.⁷⁷ The assets need to be covered

⁷³ Law No. 8204 – Law on narcotic drugs, psychotropic substances, unauthorized use of drugs, related activities, money-laundering and financing terrorism, modified by Law No. 9074.

⁷⁴ See general principle 10, *G8 Best Practices for the Administration of Seized Assets* (2005).

⁷⁵ Enshrined in Law 1708 of 2014 entailing the new Asset Forfeiture Code.

⁷⁶ Regulated by art. 94 of the Asset Forfeiture Code. See also Decree 2136, from 4 Nov. 2015, chaps. 4–6.

⁷⁷ Regulated by art. 96 of the Asset Forfeiture Code.

by bank security or insurance that covers against all risks. The provisional recipient will be liable for any loss, damage, destruction or deterioration of the received asset.

“Provisional storage” is the appointment of a natural or legal person who is required to satisfy the conditions necessary to manage a certain asset.⁷⁸ The eligibility for this kind of measure depends on the type of asset and the ability to manage, take care, keep custody of and ensure that the asset continues to be productive and generates employment. The rights and duties of the addressee and the manager must be clearly defined. The latter must inform the authorities responsible for the registration of property of the assignment. The addressee is incentivized to manage and maximize the asset’s productivity with an established fee, the amount of which depends on the productivity achieved.

In **Peru**, perishable seized assets can be assigned to public entities, with a priority of social programmes or to non-profit private institutions.⁷⁹ In addition, the use is granted only for a finite period of time, corresponding with the duration of the legal proceedings. In the case of acquittal, CONABI (the asset management office) requests the beneficiary organization to return the assigned asset. In the event of a conviction, CONABI requests the beneficiary organization to return the property to sell it through public auction. Organizations that enter into agreements for temporary use must respect specific obligations related to the maintenance and safeguarding of the asset—ensuring no deterioration other than that caused by normal use or wear, respecting the use for which the asset was assigned, taking responsibility for any expenses and implementing conservation activities (such as improvements or modifications to prevent deterioration). During the period of assignment for temporary use, the responsible authorities have the right to implement monitoring activities, even without prior notice, to verify compliance with the obligations. In cases of non-compliance or in cases of loss, damage or deterioration of assets, CONABI investigates non-compliance by the beneficiary organization. If non-compliance is established, the executive secretariat of CONABI formally notifies the beneficiary organization to file, within a fixed term, for the return of the asset; if the deadline is not respected, legal proceedings will commence.

4. Destruction of unsafe, hazardous property

Most countries make provision for the destruction of hazardous property or property that poses a threat to public safety. This includes property for which ownership constitutes a criminal offence, such as contraband and counterfeit goods. It may also include property that is likely to be used for carrying out further criminal activity, such as a laboratory used to manufacture drugs, and property not suitable for public sale, such as obsolete electronic equipment.

It is important from a cost-controlling perspective that the procedure for disposing of unsafe and hazardous property is speedy and efficient. The longer it takes to sell property that will ultimately be destroyed, the more money is wasted on storage and other maintenance costs. In **Belgium**, everything that cannot be sold or recycled for practical or legal reasons (because it is fake, dangerous or illegal) is destroyed.⁸⁰ Finshop (the Treasury division in charge) recovers the cost of destruction from the law enforcement entity seeking disposal of the property.

5. Abandoned property

Abandoned property represents two types of challenges. On one hand, if a final confiscation order is granted years after it was seized on the basis that the owner has failed to contest the matter, the storage and maintenance costs will have piled up, with

⁷⁸ Regulated by art. 96 of the Asset Forfeiture Code.

⁷⁹ Regulation to the Legislative Decree No. 1104 of 19 April 2012.

⁸⁰ Law of 26 March 2003 (*Wet houdende oprichting van een Centraal Orgaan voor de Inbeslagneming en de Verbeurdverklaring en houdende bepalingen inzake het waardevast beheer van in beslag genomen goederen en de uitvoering van bepaalde vermogenssancties*); part of this law is incorporated within the Code of Criminal Procedure.

no prospect of recovering those expenses from the sale of the property. The sooner that the person or entity claiming ownership is identified or that the property is officially classified as unclaimed, the sooner the property can be disposed—before incurring unnecessary storage and maintenance costs. Equally, problems arise when a judicial officer orders that a seized asset be returned and no person or entity claims ownership of the property. Some States have put in place procedures for dealing with assets for which, after appropriate notice and within an established time limit, no one claims ownership.

In **Costa Rica**, abandoned property is disposed after a certain period of time from the day of seizure and:

- It is impossible to establish the identity of the owner, perpetrator or accomplice.
- The owner of the asset, perpetrator or accomplice abandons the property.
- A claim of legal interest in the property is not made after completion of criminal proceedings or after the expiration of the ownership process.
- Nobody claims the property within a specified time period once a judicial order of return is issued.

In **Colombia**, the disposal of abandoned assets is regulated by the Asset Forfeiture Code. In cases in which no person or entity claims ownership of property within three years for movable assets and five years for real estate, the administrator commences a civil process to claim ownership. The Asset Forfeiture Code gives the administrator certain functions of the judiciary police, including the eviction of illegal occupants or trespassers through a swift administrative procedure. Cases of illegal occupancy of abandoned real estate has been identified as a particular challenge for asset management.

In **Honduras**, the management of abandoned assets is regulated as follows: If, after 30 days from the issuance of a communication declaring the seizure of a certain asset, no person or entity claims ownership, OABI, with the approval of the judicial authority or the Public Prosecutor's Office, publishes the notice declaring the seizure of the assets in a newspaper with national coverage. The notice must contain a warning stating that if, in 30 days, nobody claims the property, the OABI will declare it abandoned. Upon such a declaration, the OABI allocates the abandoned property, as provided for in the law.⁸¹

C. PROTECTION OF BONA FIDE THIRD PARTIES

Article 31(9) of the Convention against Corruption enjoins States to ensure that confiscation measures do not prejudice the rights of bona fide third parties. The *G8 Best Practices for the Administration of Seized Assets* recommends that there should be mechanisms for persons or entities with a legal interest in seized property to apply to a court to modify a seizure order to permit the release of the property, subject to adequate controls, including mechanisms to inform potential bona fide third parties about the seizure or confiscation of an asset.

Historically, third parties with an interest in restrained property were left with little option but to wait until the conclusion of the confiscation proceeding to see what would become of their interest. The trend is increasingly to provide the greatest protection possible to bona fide third parties.

Legislation in most countries establishes the rights of bona fide third parties in relation to property that is subject to a restraining order, including allowing a person to carry on a legitimate trade or business that would otherwise be subject to seizure or allowing tenants to continue to occupy commercial real estate. Several countries provide for expedited procedures for bona fide third parties (banks, vehicle financing companies, etc.) so that their interests can be acknowledged at an early stage of the confiscation

⁸¹ Asset Forfeiture Act, published through Decree No. 27-2010, modified by Decree No. 51-2014.

proceedings. The law in **Canada** permits legitimate third-party lenders to exercise their ownership rights should an interested party fall behind or breach the mortgage contract in any way.⁸² SPMD, the Canadian asset management office, takes an oversight role, ensuring that the property is sold at fair market value. Any proceeds of a sale left over after the mortgage has been paid, are remitted to SPMD, pending conclusion of the court case.

In **South Africa**, creditors with secured rights against seized assets are specifically protected.⁸³ In cases in which an accused person's entire estate is placed under restraint, unsecured creditors, particularly those who have suffered a direct loss as a result of the accused person's alleged criminal conduct, also have the right to approach a court during the interim phase to have their interests protected. If, however, there is doubt about whether a creditor is bona fide or transacted at arm's length with the accused person, the determination of the creditor's claim is deferred for adjudication as part of the process of realizing assets after final confiscation.

In the **Dominican Republic**, the law provides that any seizure of proceeds from a crime is done without prejudice to the rights of the bona fide third parties.⁸⁴ It provides that within 30 days of the seizure, the Public Ministry is to publish, once a week for three consecutive weeks, notice of a seizure of assets in a newspaper of national circulation. This should allow individuals who could legitimately claim an interest in the seized asset to enforce their rights. If this is the case, individuals need to prove they were not involved in the offence, that they were not aware of the illegal use of the asset, did not consent to it or they engaged in all possible measures to prevent the illicit use of the asset.

Thailand addresses the issue of bona fide third parties by providing them the right to establish ownership through the Asset Management Division.⁸⁵ If third parties prove that they were not involved in any offence or that they had received the asset without being aware of its illicit source, the Division will not issue an initial freezing order.

However, during the interim stage, it is not always possible or easy to distinguish legitimate third parties from persons associated with the suspect or acting at the suspect's behest. When considering intervening or supporting a third party in protecting their interest in restrained property, the following factors need to be assessed.

- Did the third party take action to prevent the offence?
- Is the third party implicated in any other related offence?
- Does the third party have a legitimate interest in the property and have an arm's length relationship with the suspect?
- Did the third-party act diligently according to the law in the creation of the interest in the asset?

There does not appear to be consensus on how these concerns should be taken into account in practice at the interim stage, when full consideration of the issues is yet to take place.

D. PRE-SEIZURE PLANNING

Pre-seizure planning is the process of evaluating assets and confiscation scenarios prior to freezing or seizing of property. The potential for interim use or pre-seizure sale of the asset is also considered in this context. If a trustee or judicial manager is to be appointed, pre-seizure planning assists in framing the terms of the order sought and in determining the skills required to manage the asset. If the asset is left in the custody of the owner,

⁸² Seized Property Management Act, S.C., 1993.

⁸³ Prevention of Organised Crime Act, No. 121, 1998.

⁸⁴ Act No. 72-02 (Against the Laundering of Assets Derived from the Illicit Trafficking of Drugs and Controlled Substances and Other Serious Offences).

⁸⁵ Act on Measures for the Suppression of Offenders in an Offense Relating to Narcotics, 1991.

pre-seizure planning assists in devising the kind of restrictions that ought to be placed on the use of the asset as well as the measures needed to monitor compliance with such restrictions. If the asset is to be seized, pre-seizure planning will focus on determining the best way to avoid high costs for storing it and to manage legal liabilities as well as reputational risks. The objective is for law enforcement to fully assess the options available for securing an asset in a way that best preserves its value and to evaluate and mitigate the risks associated with the freezing or seizure of that asset.

In the **United States**, the Marshal Service defines pre-seizure planning as a process of “anticipating and making a collaborative, informed decision about what property to seize for forfeiture, how and when it is to be seized and, most importantly, whether it should be seized or targeted for forfeiture at all”. As the first step of a complex process, pre-seizure planning is essential for the success of the subsequent steps, including for limiting future liability, judicial review and providing for an economically viable model. The degree and nature of pre-seizure planning will vary, depending on the circumstances and complexity of each asset. For example, the pre-seizure planning required for routinely seized assets, such as vehicles or cash, is minimal, while the analyses and formal planning required for the seizure of a group of businesses requires extensive research, evaluation and detailed discussion.

Countries increasingly acknowledge the importance of an early assessment of options for preserving assets as part of a cost-effective management system. Those with extensive asset management programmes and vast experience have focused on getting this phase right. In several jurisdictions, it appears evident that increased attention to pre-seizure planning is the result of dire and costly lessons learned. Despite the differences characterizing domestic systems, pre-seizure planning seems typically to address several issues, as box 2 explains.

In some countries, pre-seizure planning is considered so important that it is required in legislation or regulations. In **Canada**, section 9(a) of the Seized Property Management Act provides for the asset management office (SPMD) to offer consultative and other services to law enforcement agencies in relation to the restraint of any property. Legislation in **Colombia** makes explicit reference to the importance of carrying out a cost-benefit analysis prior to obtaining a seizure order.⁸⁶

In the **United States**, formal pre-seizure planning discussions are required for several asset categories: residential and commercial property and vacant land; businesses and other complex assets; large quantities of assets involving potential inventory and storage or security problems (multiple vehicles, high volumes of drug paraphernalia to be seized from multiple locations on the same day or inventory of ongoing businesses, such as jewellery stores); assets that can create difficulties or unusual problems (animals, perishable items, leasehold agreements, intellectual property or valuable art and antiques); and assets located in foreign countries.⁸⁷

Although **France** has a similar policy, the approach is not defined in legislation; rather, it is part of the day-to-day work of AGRASC and the Criminal Asset Identification Platform. At the investigation stage, Criminal Asset Identification Platform officers collect and cross-check information related to illicit assets, properties or financing flows. They are to anticipate matters that could arise upon seizure of assets and thus conducts a complete investigation of licit and illicit assets, particularly in seizure cases, in anticipation of a value-based confiscation order. Once the assets are identified, the officers contact AGRASC to evaluate the opportunity and possibility of seizing them. AGRASC is also often consulted by judges on the viability or feasibility of seizures, especially in cases of immovable assets. After judicial decisions have been made, AGRASC provides information to magistrates to seek pragmatic approaches in cases in which seizures are unlikely to lead to the successful liquidation of the asset in the future.

⁸⁶ Asset Forfeiture Code, created by Law 1708 of 2014 (*Código de Extinción de Dominio*).

⁸⁷ For information about the United States Department of Justice Asset Forfeiture Program, see: www.justice.gov/afp.

Box 2

Questions and procedure for pre-seizure planning

1. What is being seized? Perform a basic assessment of the condition of the asset (for example, arrange to drive by immovable property to evaluate the state of repair and occupants and any observable challenges, such as security concerns).
2. Establish the location of assets and evaluate transport, security, storage, maintenance (as well as the expected duration of maintenance requirements) and management requirements, including costs and resources to be invested if the asset is seized.
3. Determine who owns the asset. Conduct open-source ownership and title investigations to identify owners (both nominal and beneficial owners) and other interests in the asset, including potential or existing liabilities against the property and interests of bona fide third parties.
4. Ascertain the most up-to-date value of the asset, including whether it has a particular value to the owner and whether it could be replaced easily if liquidated. Consider if the asset has a negative or marginal net equity at the time of seizure, and assess if the asset is likely to depreciate to a negative or marginal value. Consider the value of the asset relative to the costs associated with seizure; avoid seizure of assets with a negative cost-benefit ratio. Avoid seizing assets that are not worth maintaining or will represent a burden for the responsible agency.
5. What law enforcement benefits are to be derived from seizure? Are there possible alternatives to seizure?
6. Consider law enforcement resources available to take custody and manage the asset?
7. What entity is best placed to take responsibility for managing the asset, pending the confiscation decision? Should a judicial manager or trustee be appointed?
8. Will the asset require significant amounts of management resources and oversight, specialist expertise or considerable investment of funds? Can any potential monetary losses be mitigated by careful planning? What management and disposal problems are anticipated (such as logistical issues involving maintenance and management)?
9. In cases in which pre-confiscation sale is not permitted, consider methods of disposal and alternatives to taking custody of the asset if seizure will become too cumbersome and costly.
10. How and when will the asset be seized or forfeited? Do immediate steps need to be taken to secure the asset? Is immediate seizure necessary, or will a freezing order be sufficient? Prepare a logistical plan for the day of seizure of the asset.

E. CONCLUSION

The following trends in dealing with property prior to a final confiscation judgment emerged during the survey of country practices.

- Most countries provide for a court or other judicial authority to authorize interim measures to ensure that the requirement of preserving the value of property is balanced against the procedural rights of affected parties, usually at a lower standard of proof than applies to confiscation orders. Increasingly, countries provide for an initial freezing order by a competent authority other than a judicial authority, particularly when there is a need for urgent action. Such orders, however, must be validated or reviewed by a judicial authority if challenged. This approach balances the law enforcement requirement for speedy action with the due process rights of the owner of the asset.

- Most national legislation provides a choice between freezing and seizure orders and for wide discretion for judicial officers to tailor appropriate orders to meet the exigencies of the cases before them.
- A number of countries have introduced and increasingly use value-based forfeiture and related seizure provisions to avoid some of the challenges posed by the need to manage complex assets.
- Some countries have dedicated capacity to assist law enforcement with pre-seizure planning, particularly with access to advice and expertise to evaluate the costs, risks and constraints attendant upon seizing assets. They have reported positive experience with the decision-making on the appropriate interim management measure, the preservation of the value of the alleged illicit property and the cost-effectiveness of the measure as a whole.
- Where the law provides for assets to be left under the control of their owner, subject to certain restrictions on use and coupled with effective monitoring of compliance with the court order, freezing orders can be a viable way of keeping the costs of interim management to a minimum.
- Most jurisdictions permit pre-confiscation sale or disposal with the consent of the owner and that of the agency responsible for enforcing the seizure order. Cost considerations have increasingly compelled those making the decision to seek the seizure of assets to first obtain the consent of the owner to sell.
- As the costs of storing, safeguarding and maintaining the value of seized assets over long periods of time escalate, more and more countries make provision in the law for pre-confiscation sale of assets in defined circumstances, even without the consent of the owner, particularly in the case of perishable or rapidly depreciating assets. A trend in favour of pre-confiscation sale or disposal as the preferred interim management measure to control costs is emerging.
- The interim use of assets is a controversial measure because of the inherent risk of depreciation in value and deterioration of the asset over time. Most countries, therefore, do not permit interim use. But where pre-confiscation sale or disposal is not an option, interim use is often relied upon to ensure the productive use of assets. Countries that provide for interim use seek to mitigate the risk of depreciation by providing for a guarantee of compensation or a damage claim if an asset's value deteriorates as a result of interim use.
- There is a trend to provide third parties with the greatest protection possible during the duration of an interim order. However, it is not always possible or easy to distinguish legitimate third parties from persons associated with the suspect or acting at their behest. There seems to be no consensus on how these concerns should be taken into account.

III. FINAL DISPOSAL OF CONFISCATED ASSETS

A. INTRODUCTION

This chapter discusses the final phase of the asset recovery process. The starting point is when a court or other competent authority orders the permanent deprivation of property and ends when the order is executed—when the property or proceeds reach the beneficiaries designated in the confiscation order.

A confiscation order is the generic term used in this study to describe a variety of measures, both conviction and non-conviction based, aimed at depriving owners or other interested parties of their interest in property that constitutes:

- (a) proceeds of crime derived from offences or property, the value of which corresponds to such proceeds
- (b) property, equipment or other instrumentalities used in or destined for use in criminal offences.

Extended confiscation is applicable in situations in which property associated with a specific crime is seized along with additional property that a court is satisfied has derived from related criminal conduct. In such cases, the court, usually on the basis of circumstantial evidence, concludes that the property, although not derived from a particular offence, nevertheless is derived from unspecified crimes. For example, where evidence is adduced that the value of the property owned by the convicted person exceeds the value of property derived from the lawful income of that person, all the property that cannot be accounted for from legitimate sources is included in the extended confiscation order.⁸⁸

B. RECOVERY FROM OFFENDERS

1. Value-based versus object-based confiscation

Different procedures govern the execution of value-based as opposed to object-based confiscation orders. In a value-based confiscation order, a convicted person is ordered to pay an amount of money equivalent to the value of the criminal benefit that was derived. The order thus takes the form of a value-based judgment. Object-based confiscation orders address specified property as the proceeds (either direct or indirect) or instrumentality of a crime.

Value-based confiscation orders are usually regarded as a debt owed to the State, executable in favour of the State. Even if the court order makes provision for the recovered proceeds to be paid to a victim or other beneficiary, the State will be responsible for the recovery process. Objects declared forfeit to the State become government property and can either be recorded as such in the government inventory or sold, with the proceeds deposited into a government account, unless the court order specifies that the property be handed to the victim or other beneficiary. Again, it is the State that is responsible for handing over the proceeds and instruments to a beneficiary.

2. Value-based enforcement procedures

Recovering the full extent of a value-based confiscation order has proven to be notoriously difficult. This is particularly the case where the value of the order sought is based solely on the value of what the convicted person was found to have misappropriated and a realistic assessment of what can actually be recovered has not been done. It is important, as far as possible, to identify the assets in advance of making the order so that the prospect of recovering assets as per the order is on a more solid footing.

⁸⁸ See article 5 of Directive 2014/42/EU.

In the **United Kingdom**, default of payment of a value-based confiscation order can result in an additional period of imprisonment. The convicted person may, however, apply for a reduction in the value of the order if they show that they have no other assets from which to pay.

If the convicted person refuses to pay or claims they have no assets from which to pay, apart from an additional period of imprisonment being levied, the following enforcement mechanisms are typically available for the collection of unfulfilled value-based confiscation orders:

- The confiscation order has the status of a civil judgment, and the government becomes a judgment creditor. The debt can be collected through ordinary civil law enforcement mechanisms, such as insolvency or bankruptcy proceedings.
- Special realization procedures are provided in the asset recovery law.

Both options are available in **South Africa**.⁸⁹ The asset recovery law provides that a confiscation order has the effect of a civil judgment payable to the State. The debt may be enforced through ordinary civil recovery proceedings, such as execution against the property of the defendant and sequestration proceedings, at the instance of the authority responsible for debt collection on behalf of the State, which is the State Attorney Services.

The law also makes provision for special realization proceedings in which a court, on application by the prosecutor, may order that property of a defendant be sold to satisfy the confiscation order, after affording all persons known to have any interest in that property the opportunity to make representation to it.⁹⁰ All persons who have suffered damage to or loss of property or injury as a result of an offence to which the order relates and all persons likely to be directly affected by the confiscation order are given opportunity to be heard before the property can be sold.

In **Belgium**, prior to the enactment of the law that established the asset management office (COSC), only part of the value-based confiscation orders was executed. When COSC was eventually established, new procedures were introduced to find and recover assets after a confiscation order is made. The government receiver deals with the execution of confiscation orders, which take place in the name of the public prosecutor. The Receiver of Estates has the power to execute a confiscation order, and the Receiver of Criminal Fines has the power to execute criminal orders. Unlike freezing and confiscation proceedings, which happen within the context of criminal procedure, the execution of these orders is by civil procedure.

To support the civil execution of confiscation orders, COSC may require all administrative services of the Government, including the Financial Intelligence Processing Unit, to provide information deemed useful for its investigations. If the information reveals assets held by a convicted person, COSC may issue a written and reasoned requisition prohibiting the transfer of such assets for five working days. This power can be invoked only by COSC in the event that the information derived from the receiver is inadequate to determine the solvency of the convicted person or if indicative evidence exists to suggest that the convicted person is endeavouring to evade the enforcement of the confiscation court order.

COSC may undertake a penal execution investigation⁹¹ against the convicted person and against third parties who are deliberately cooperating with the convicted person to avoid the execution of the judgment. In cases in which criminal assets are concealed in the names of third parties (companies, family and friends), a penal execution investigation can be instituted, which includes tracing, identification, freezing or seizing of assets against which the payment of fines, confiscation and the costs of penal proceedings can be executed. Any assets received by COSC within the context of a penal execution

⁸⁹ Prevention of Organised Crime Act, 1998.

⁹⁰ *ibid.*

⁹¹ It is part of the Belgian Code of Criminal Procedure and was established by Law of 11/02/2014.

investigation are transferred as soon as possible to the appropriate government receiver in the finance department for the execution of the outstanding fines, confiscation and procedure costs.

3. Enforcement of object-based confiscation orders

Where an identified asset is declared forfeited to the government, whether it has already been seized or is subsequently seized, the executing authority must be specified in the order. An order typically directs a law enforcement official or entity, another public sector enforcement or collections agency, a court-appointed asset manager (such as a *curator boni*, trustee, judicial manager, court broker or court administration clerk) or a country's designated asset management office to take possession of the asset. The designated executing authority is directed to either sell the asset and retain the proceeds or, instead of converting the asset to cash, retain it in the form in which it was seized, pending its allocation. In most cases, this allocation is either for use by law enforcement or to another social purpose. The authority designated to decide whether to convert to cash or retain the asset in the form it was seized or confiscated and how the decision is taken varies from country to country.

In **France**, confiscated moveable and immovable property is transferred to the State.⁹² Before selling confiscated real estate, AGRASC consults the State Property Administration to establish if the State is interested in obtaining the property free of charge. This option is rarely exercised because the government departments are usually only interested in acquiring office buildings, whereas confiscated buildings tend to be primarily residential property. Movable assets can be assigned to law enforcement agencies, such as the police, gendarmerie or customs units performing judicial police activities. The law enforcement agency obtains authorization from the Ministry of Interior to request the appropriate court to assign the movable assets to it. If no public sector entity requests the transfer of forfeited property, it is disposed of in favour of non-State players, either through sale by public tender or transfer to a selected beneficiary free of charge. If the assets are not gratuitously transferred or sold, then other options are applied: public tender rental agreements or gratuitous use. Contracts for rent or gratuitous use are always for a fixed period of up to eight years.

In **Australia**, the default position is that the official trustee, on behalf of the Government and as soon as feasible, must dispose of any property specified in the order that is not money.⁹³ The official trustee subsequently transfers any funds received from the disposal and any property specified in the order that is cash to the Confiscated Assets Account, after deducting its remuneration and other costs and charges.

However, the minister or a senior department officer in the Attorney-General's Department authorized by the minister may direct that the property be otherwise dealt with as specified in an order. This may occur, for example, when the minister determines that the property would best be dealt with by another organization or where funds have been seized in a foreign country and, as part of the recognition of that country's assistance, part of the funds are allocated to that country.

C. BENEFICIARIES OF CONFISCATION ORDERS

1. Payment to the State or the general revenue fund

In many countries, including **China**,⁹⁴ the default beneficiary of confiscation orders is the State. The income derived from confiscation orders is treated as government revenue⁹⁵ for use in government programmes to ensure, through the budget approval process, a fair, transparent and accountable way of allocating recovered proceeds.

⁹² General Code of the Property of Public Persons.

⁹³ Proceeds of Crime Act, 2002, Division 4—Enforcement of Confiscation Orders.

⁹⁴ Criminal Law of the People's Republic of China, 1997, part one, chap. IV.

⁹⁵ According to the International Monetary Fund's *Government Finance Statistics Manual* (2001),

Other countries take the view that if the recovered proceeds are turned over to the government revenue fund, the opportunity is lost to demonstrate a direct link between asset recovery and the compensation of victims directly or indirectly through programmes geared towards benefiting communities or individuals most affected by a crime. Equally, the symbolic value of using the proceeds of crime to fight crime is lost if the proceeds are distributed through the general budgetary process.

Allocating recovered proceeds to the national revenue fund to meet general government priorities, as opposed to permitting recovered proceeds to be allocated through a process that favours programmes for crime prevention and social reuse, are two equally compelling policy options. It is important that the policy choice is articulated in the asset recovery law.

2. Payment to a special or dedicated fund⁹⁶

Many asset forfeiture laws make provision for the proceeds of confiscation orders to be paid into a designated asset recovery fund. The fund is usually established in the law, which should specify the persons with responsibility for making decisions regarding the fund and the purposes for which the deposited funds can be used.

Where such a special fund is set up, it is usually accompanied by infrastructure to manage and account for deposits received and transfers out. Mechanisms for the fair allocation of funds (especially if the legislation is silent on the kind of projects that proceeds may be applied to) must be developed. Oversight, transparency and reporting are critical to maintaining the integrity of the fund and accountability for its contents. Allegations of misuse or mismanagement can have devastating consequence for the future of the asset recovery programme.

The **United States** operates one of the largest special asset forfeiture funds in the world.⁹⁷ The Comprehensive Crime Control Act of 1984 established the Department of Justice Assets Forfeiture Fund to receive the proceeds of forfeitures pursuant to any law it enforces or administers, as well as the federal share of forfeitures under state, local and foreign laws and the proceeds of investments of fund balances. All monies deposited into the Department of Justice's Assets Forfeiture Fund are considered as belonging to the federal government.

Staff of the United States Federal Asset Forfeiture Program manage the Assets Forfeiture Fund.⁹⁸ Forfeited funds can be used for forfeiture operations expenses (asset management and disposal, third-party interests, case-related expenses, training and printing, contracts to identify forfeitable assets, awards based on forfeiture) and for general investigative expenses (awards for information, purchase of evidence, joint law enforcement operations). After the costs associated with the management and sale of an asset are recouped and victim claims satisfied, an amount of at least 20 per cent may be retained for operational expenses, under strict auditing controls.

The Department of Justice Assets Forfeiture Fund and the Treasury Forfeiture Fund may be used to compensate victims—as defined under United States law. Forfeited funds may be used for forfeiture expenses, as permitted under United States law, and for domestic and foreign law enforcement efforts, also as appropriate and consistent with federal regulations. Both funds are largely self-sustaining and rely minimally on appropriated funds from the national budget. Every year, the Assets Forfeiture Fund is audited by an independent auditor, and the Department of Justice annually reports to Congress on the status of the fund, including every confiscation valued at more than \$1 million.

forfeitures and fines should be treated as government revenue.

⁹⁶ For a useful guide to the establishment of a special forfeiture fund, see Theodore S. Greenberg, Linda M. Samuel, Wingate Grant, and Larissa Gray: *Recovery of Stolen Assets, Best Practices Guide for Non-Conviction-Based Forfeiture* (Washington, D.C.: StAR Initiative, 2009), pp. 90–94.

⁹⁷ As of 30 Sept. 2014, there were 21,117 assets in the Assets Forfeiture Fund, valued at \$2.2 billion.

⁹⁸ For more information on the Justice Assets Forfeiture Fund and how it is managed and audited see: www.justice.gov/afp/fund#po.

In **South Africa**, the Criminal Assets Recovery Account was established to receive all money derived from the fulfilment of confiscation orders.⁹⁹ The Prevention of Organised Crime Act provides for the establishment of a high-level Criminal Assets Recovery Committee consisting of the ministers of justice, safety and security, and finance and the national director of public prosecutions to advise the Cabinet in connection with all aspects of forfeiture of property to the State.

The Committee makes recommendations to the Cabinet regarding: a policy to be adopted concerning the realization of forfeited property, other than money, and the transfer of such property to the Criminal Assets Recovery Account; the allocation of property and money from the account to specific law enforcement agencies or to any institution, organization or fund supporting victims of crime; and the allocation of funds for its own administration.

All amounts of money withdrawn or property allocated from the Criminal Assets Recovery Account is considered a direct charge against the National Revenue Fund. When allocating property or money to a specific law enforcement agency or to an institution, organization or fund supporting victims of crime, the Cabinet must indicate the purpose for which that property or money is to be used. The minister of justice must cause all particulars of such allocation to be tabled in Parliament.

The Committee may not allocate property or money to an institution, organization or fund supporting victims unless an accounting officer is appointed to account for the acquisition, receipt, custody and disposal of all property and that all payments made are for the purpose for which the allocation was intended. The Committee may issue guidelines to accounting officers in connection with the system of bookkeeping and accounting to be followed and must require separate accounting for money and property received from the fund. The auditor-general must audit the books of accounts, accounting statements, financial statements and financial management of each law enforcement agency or institution, organization or fund to which property or money had been allocated.

An administrative capacity operating out of the Department of Justice, called the Criminal Asset Recovery Unit, was instituted to implement the provisions relating to the Criminal Assets Recovery Account. Setting up these extensive legislative mechanisms for the management and accountability of the National Revenue Fund took several years—the first allocations were made five years into the establishment of the fund (table 2). It also took that long to build up sufficient capital in the fund to justify convening the Committee to make the first allocations. Because of the auditing requirements, there have been fewer allocations to victim organizations than to law enforcement initiatives and the administration costs of the asset recovery programme.¹⁰⁰

Table 2

Allocations from the Criminal Assets Recovery Account in South Africa, 2006

Beneficiary	Allocation
South African Police Service	SAR 33.7 million
National Prosecuting Authority	SAR 31.8 million
Department of Social Development	SAR 3.3 million
South African Revenue Services	SAR 5 million
In the same year, SAR 200 million was paid out directly to victims	

In **Mexico**, the proceeds from confiscated assets are used to reinforce the rule of law and the federal strategy to fight crime. The Asset Administration and Disposal Service (SAE) is responsible for the management and disposal of seized and confiscated assets.¹⁰¹ Given

⁹⁹ Prevention of Organised Crime Act, 1998.

¹⁰⁰ The 2010/2011 annual report of the Criminal Assets Recovery Account is available at www.justice.gov.za/reportfiles/other/cara-anr-2010-11.pdf.

¹⁰¹ Federal Law for the Administration and Disposition of Public Assets (*Ley Federal para la*

that Mexico recently introduced a system that allows for the early monetization of seized assets, SAE is entitled to sell them through auctions after confiscation. The Mexican law mandates that the proceeds from assets be used mainly to compensate victims of abduction. The remainder is divided in equal shares among: (i) crime prevention activities, (ii) the judiciary system and (iii) treatment of health problems related to drug dependence.

The scope of the SAE work goes beyond asset recovery and deals with the management of State enterprises. The asset recovery regime benefits from the enhanced integrity requirements of the SAE. For example, the SAE has a Board of Governors that approves policies, rules and general programmes; analyses and approves the director general's quarterly reports; determines general guidelines for the proper administration and disposal of assets; and approves programmes and budgets submitted by the director general. SAE complies with all requests for information and makes public as much information as possible regarding assets, expenditures, salaries, forms, audits, evaluations, etc. The agency is legally required to present an annual report to all its transferors regarding the state of the transferred assets, the revenue from their sale and the administration costs. It must also comply with the Mexican federal standard of accountability by answering to all the observations by the Government Audit Office (legislative branch) as well as to observations of the Internal Control Office.

In **Australia**, the official trustee is designated in the law to dispose of any property specified in the forfeiture order that is not money as soon as practical after the order is made.¹⁰² The official trustee must apply any money received from that disposal and any property specified in the order that is money to its remuneration and other costs, charges and expenses incurred in connection with the disposal, as well as costs associated with the management of restrained property. The remainder of the funds must be credited to the Confiscated Assets Account.

Monies in the Confiscated Assets Account can be used to fund: crime prevention and law enforcement measures; measures relating to the treatment of drug addiction and diversionary measures relating to the illegal use of drugs. These payments are made through community- and government-run programmes. The minister for justice determines, on a discretionary basis, which programmes are to be allocated funds, in line with the Government's priorities. Details of programmes to which funds are allocated are publicly available, and the funding is subject to standard government accounting and reporting requirements (where payment is to a government entity) or the usual rules applying to government grants (where payment is to a non-government entity).

In **Brazil**, the proceeds of all confiscated assets in criminal proceedings are deposited into a Penitentiary Fund that was established in 1994. The sole purpose of the fund is to improve the penitentiary system. The proceeds of confiscated assets in drug cases are deposited into an Anti-Drug Fund managed by the National Anti-Drug Secretariat. The proceeds in the Anti-Drug Fund are invested in drug prevention or law enforcement projects, on the basis of project applications submitted. Confiscated assets in money-laundering cases can be allocated to the national or a state government, depending on the jurisdiction over the predicate offence, to be used by the anti-money laundering authorities. The Government is working on a draft regulatory decree on the allocation of confiscated assets in the federal sphere; it will include the creation of a committee of ministers who analyse and decide in which projects the proceeds of confiscated assets should be invested and which institutions should benefit from such assets.

3. Payment to law enforcement agencies

Funds for law enforcement ordinarily come from the general budget. Many jurisdictions, however, permit recovered proceeds to be allocated to investigative and prosecutorial projects outside of the ordinary budgetary process, such as to purchase special

Administración y Enajenación de Bienes del Sector Público).

¹⁰² Proceeds of Crime Act, 2002 (Cth).

equipment, provide training or to fund joint law enforcement projects. The purpose is to convey a symbolic message that criminals will have the fruits of their crimes used against them. The allocations are generally not intended to fund recurring law enforcement expenditure, such as salaries.

There has been some criticism of the practice of allocating assets derived from asset recovery investigations directly to the law enforcement personnel involved in such investigations. Concerns regarding law enforcement officers improperly targeting individuals or property for personal or institutional gain have also surfaced. Opposition to the practice derives from fear that law enforcement will inappropriately target assets to benefit itself rather than to achieve legitimate objectives; governments have thus imposed tighter controls on the allocation of confiscated funds to law enforcement. Policies have been created to avoid any direct link between assets seized and rewards provided to law enforcement.

The **United States** “equitable sharing” programme, which is subject to extensive regulations and strict auditing controls that determine how funds are shared and limit how funds allocated to law enforcement can be spent—only for limited law enforcement purposes and only in cases in which there are no known victims.

The SPMD in **Canada** administers the Forfeited Property Sharing Regulations, promulgated under the Seized Property Management Act. The regulations specify a formula to determine the share of net proceeds with provincial and foreign governments involved in asset recovery investigations. All expenses of the SPMD (operational and overhead) are deducted, and the net proceeds are made available for sharing. Depending on an agency’s involvement in an investigation and trial, recipients could receive 10 per cent, 50 per cent or 90 per cent of the net proceeds. The Government always receives a minimum of 10 per cent.

In **Honduras**, the decision to allocate forfeited funds to law enforcement is made by the National Council of Defense and Security, a high-level government body. This national council determines whether to donate the forfeited funds to a law enforcement agency or other public body (listed in the law), after considering their needs and a submitted plan describing the manner in which the assets would be used. Otherwise, the assets are sold in a public auction. Money and other financial assets are distributed by the OABI to (i) units, institutions, programmes and projects of the security and justice sector (45 per cent), (ii) units, institutions, programmes and projects of the preventive sector (45 per cent), (iii) the OABI.¹⁰³

In Colombia, Law 1849 from 19 July 2017 foresees a mixed regime. After deducting the expenses of the asset management office, 25 per cent of the assets go to the judiciary, 25 per cent to the Attorney General’s Office, 10 per cent to the Judicial Police (part of the National Police) and 40 per cent to the national budget. There is an exception for rural properties (see section 6 further on).¹⁰⁴

4. Covering costs of the asset recovery programme

The cost of establishing capacity to properly manage seized and confiscated property and more generally meeting the aims of a country’s asset recovery programme can be significant. Without sufficient funds for personnel and infrastructure, it can be difficult to seize and confiscate assets at a scale sufficient to make an impact on crime. In countries in which there is intense competition for resources from other equally compelling development priorities, ensuring that asset recovery capacity is or becomes self-funding can considerably boost the work of an asset recovery programme.

¹⁰³ Asset Forfeiture Act, published through Decree No. 27-2010, modified by Decree No. 51-2014.

¹⁰⁴ Article 22 of Law No. 1849 from 19 July 2017, which modifies Law No. 1708 from 2014 (Code on non-conviction-based forfeiture).

In **France**, AGRASC (the agency responsible for managing and disposing of seized and confiscated property) has three main sources of self-financing:¹⁰⁵

- A provision of the Finance Act, which allows AGRASC to retain an annual capped amount of more than €1.8 million from the proceeds of confiscated assets.
- Interest earned on the funds deposited into the account opened with the Caisse des Dépôts et Consignations. All funds seized by law enforcement officers country-wide are deposited into this account, together with money earned from pre-confiscation sales.
- The domain tax, which is collected from the sale of confiscated assets.

AGRASC is fully self-funded, and its funding increases as its activity increases, by virtue of the second of its income streams—interest earned on seized cash and on the proceeds of pre-confiscation sales of seized property and, to a lesser extent, the domain tax.

In **Canada**, SPMD recovers all its operational costs from the proceeds of the sale of forfeited property. According to the Forfeited Property Sharing Regulations, all expenses of SPMD (both operational and overhead) are recovered and only the net proceeds of a sale¹⁰⁶ are shared domestically and internationally with jurisdictions that were involved in the investigation.

At the beginning of each fiscal year, SPMD draws upon an interest-free CAD\$50 million loan to fund SPMD operations. All its expenses are paid out of this account. This loan is then reimbursed throughout the year through the disposal of confiscated assets. At the end of the fiscal year, the agency's operational and overhead expenses are subtracted from the net proceeds of the disposals. The rest becomes available as prescribed by the Forfeited Property Sharing Regulations.¹⁰⁷ This greatly assists in providing the SPMD with a consistent base from which to fund its operations.

5. Victim compensation

Several international instruments encourage States to prioritize the use of proceeds of a crime to compensate its victims. Article 35 of the Convention against Corruption¹⁰⁸ and article 25 of the Convention against Transnational Organized Crime¹⁰⁹ both provide for the return of recovered proceeds to prior legitimate owners and for compensating

¹⁰⁵ Arts. 706-713 of the Code of Criminal Procedure.

¹⁰⁶ The “net” proceeds of a sale are calculated by subtracting the management and disposal costs from the proceeds of sale.

¹⁰⁷ In accordance with the Forfeited Property Sharing Regulations, following disposal of the confiscated asset, the amount available for sharing (proceeds of disposal minus the SPMD costs) is divided among the jurisdictions as follows: (i) in cases where there is predominant provincial and municipal involvement: 90 per cent to the province and 10 per cent to the federal government; (ii) in cases where there is significant provincial and municipal involvement: 50 per cent to the province and 50 per cent to the federal government; and (iii) in cases where there is minimal provincial and municipal involvement: 10 per cent to the province and 90 per cent to the federal government. See the Forfeited Property Sharing Regulations—SOR/ 95/ 76, <http://laws-lois.justice.gc.ca/eng/regulations/sor-95-76/FullText.html>.

¹⁰⁸ Art. 35 on compensation for damage: Each State party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation. See also article 57 para. 3(c).

¹⁰⁹ Art. 25 on assistance to and protection of victims: 1. Each State party shall take appropriate measures within its means to provide assistance and protection to victims of offences covered by this Convention, in particular in cases of threat of retaliation or intimidation. 2. Each State party shall establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this Convention. 3. Each State Party shall, subject to its domestic law, enable views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence. See also art. 14, para. 2 of the Convention against Transnational Organized Crime.

victims, as a priority over payment to the State.¹¹⁰ Article 57 of the Convention against Corruption foresees “in all other cases” (except for embezzlement, establishment of prior ownership and recognition of damages) to “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” (paragraph 3c).

The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005) requires that confiscated property be disposed of in accordance with the domestic law of the executing party and encourages payment of compensation to the victims of a crime.

Directive 2012/42/EU requires that if, “[a]s a result of a criminal offence, victims have claims against the person who is subject to a confiscation measure”, member States must ensure that confiscation measures do not prevent such victims from seeking compensation for their claims.

A 2014 study analysing the laws and practices for the management and disposal of confiscated assets in the European Union found that all member States have mechanisms to ensure that victims of a crime can be compensated.¹¹¹ Although the mechanisms differ greatly, it is common for jurisdictions to use confiscation mechanisms as a means to provide restitution to the victims. Priority is given to victims over the general treasury or any special confiscation fund. If sufficient assets exist to satisfy a confiscation judgment and a restitution order, the confiscated assets are generally used to benefit the government only after the victims receive restitution.

In **Belgium**, compensation to victims is also facilitated by the civil party procedure in the context of a criminal trial.¹¹² The Ministry of Finance executes a court decision on behalf of a victim. The civil party procedure is also available to foreign States and nationals who require compensation. The victim’s claim must be made prior to conclusion of the confiscation hearing.

France has an example of a typical victim-compensation regime in the European Union.¹¹³ In the context of a value-based confiscation order, a victim can participate as civil party and claim compensation at any stage of a criminal proceeding. The court may order the perpetrator of the offence to pay the civil party the sum it determines in compensation, as well as the costs incurred in pursuing the matter, to the extent that those costs were not paid by the State.¹¹⁴ Victims are entitled to receive compensation for the damage caused by the offence in preference to payment to the State,¹¹⁵ even in the absence of a court decision on civil liability. It is often easier and more cost-effective for victims to recover their losses through this process than it is through civil proceedings.

AGRASC has an important role to ensure that victims of a crime are compensated. Table 3 reflects amounts the agency paid in 2013 (exclusive of the general State budget and the Drug Fund).

¹¹⁰ Art. 53 allows a State party to participate as a private litigant in the courts of another State to recover corruption proceeds as a plaintiff in its own action, as a claimant in a forfeiture proceeding or as a victim for purposes of court-ordered restitution. For further information on the topic, see UNODC: *Good Practices in Identifying the Victims of Corruption and Parameters for their Compensation* (2016), www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2016-August-25-26/V1604993e.pdf.

¹¹¹ Center for the Study of Democracy: *Disposal of Confiscated Assets in the European Union Member States, Laws and Practices* (Brussels: European Commission DG Home Affairs, 2014), p. 20.

¹¹² Arts. 63-70 of the Code of Criminal Procedure.

¹¹³ In terms of art. 1382 of the Civil Code: “Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it”. See also art. 475-1 (criminal court) and art. 375 of the Code of Criminal Procedure.

¹¹⁴ Art. 132-45 of the Penal Code: A trial court or a penalty enforcement judge may impose on the convicted person the duty to make good, in all or part, according to his ability to pay, the damage caused by the offence, even in the absence of a court decision on civil liability.

¹¹⁵ Art. 142 of the Code of Criminal Procedure.

Table 3
Payments to victims of a crime in France, 2013

Purpose	Number	Amounts (in €)
Net restitutions	778	22 750 281
Transfer of funds seized on a life insurance contract	1	77 211 887
Public creditors	62	1 229 219
Civil claimants in criminal proceedings	51	1 117 457
Total	892	102 308 843

As part of the National Recovery Chain Programme in **the Netherlands**, the police, the special investigation services, the Movable Property Agency (within the Ministry of Finance), the Public Prosecution Service and the Central Fine Collection Agency cooperate to recover criminal assets. If successful, the recovery is first and foremost done in the interest of the victims of the crime. If there are no victims involved, the proceeds will flow into the treasury.¹¹⁶

In **Australia**, provision is made for a person to apply to a court for an exclusion order in a confiscation proceeding if it relates to property in which the person claims an interest.¹¹⁷ The application must be made before the confiscation order is made. Once a confiscation order has been issued, the court may grant leave to apply for an exclusion order in certain circumstances.

An applicant for a compensation order must give written notice to the authority responsible for the confiscation order of both the application and the grounds on which the order is sought. The authority must give the applicant notice of any grounds on which it proposes to contest the application. An application for a compensation order may not be heard until the responsible authority has had a reasonable opportunity to conduct examinations in relation to the application.

In the **United Kingdom**, a court making a confiscation order has discretion to decide whether or not to make an order if a victim has started, or intends to start, civil proceedings because of loss, injury or damage sustained due to criminal conduct.¹¹⁸ All payments made in terms of a confiscation order, regardless of how it is enforced, go to the Treasury after liquidators and receivers have been paid their fees and compensation has been paid to victims.

In the **United States**, the authority to distribute forfeited property among victims from the Department of Justice Assets Forfeiture Fund rests with the attorney general, who has delegated this authority to the chief of the Asset Forfeiture Money Laundering Section.¹¹⁹ The Secretary of Treasury determines claims against assets deposited into the Treasury Forfeiture Fund. That chief also has the power to take any other action to protect the rights of innocent persons in the interest of justice. In distributing the proceeds of forfeited assets, priority is given to valid owners, lienholders, federal financial regulatory agencies and victims (in that order). After losses to these parties have been satisfied, any remaining proceeds can be shared with state and local law enforcement agencies.¹²⁰

Victims may be granted remission of the forfeiture of property if they demonstrate that: a pecuniary loss of a specific amount has been directly caused by the offence that was the underlying basis for the confiscation order and the loss is supported by documentary evidence, including invoices and receipts; the pecuniary loss is the direct result of the illegal acts and is not the result of otherwise lawful acts that were committed in the

¹¹⁶ For more information about the National Recovery Chain Programme, see www.om.nl/publish/pages/43661/afpakken_corpbroch_eng_lr_def.pdf.

¹¹⁷ Proceeds of Crime Act, 2002.

¹¹⁸ Proceeds of Crime Act, 2002.

¹¹⁹ See Title 28, Code of Federal Regulations, part 9 (28 C.F.R. part 9), at 28 C.F.R. § 9.1(b)(2).

¹²⁰ Pursuant to the Crime Victims' Rights Act (18 United States Constitution § 3771).

course of the criminal offence; the victim did not knowingly contribute to, participate in, benefit from or act in a wilfully blind manner towards the commission of the offence; the victim has not been compensated for the wrongful loss of the property by the perpetrator or others; and the victim does not have recourse reasonably available to other assets from which to obtain compensation for the wrongful loss of property.

In **Honduras**, OABI may return property derived from illicit activities, such as kidnapping, extortion and corruption, to victims or a public institution.¹²¹ In such cases, the competent judicial authority specifies the amount or assets subject to restitution in the ruling.

6. Social reuse

Social reuse is particularly relevant to countries where criminal groups have become so entrenched in communities that law enforcement action against them is met with hostility, if not active resistance. This is often the case in communities in which criminal elements, like the mafia in Italy, have significantly undermined the rule of law and confidence in law enforcement. Social reuse initiatives make the confiscated property available to the affected communities in an effort to restore compliance with and confidence in the rule of law.

In some cases, criminal groups have managed to infiltrate the legitimate economy to such an extent that entire communities find themselves dependent for their economic well-being on the continuation of enterprises controlled by organized crime. The aim of social reuse measures in this context is to demonstrate that restoring State control does not necessarily entail destruction of the economic benefits produced by the businesses controlled by organized crime. The economic revitalization of affected communities is prioritized to mitigate the damage done to society and to restore confidence in the capacity of government to support communities.

Within the European Union, **Italy** has done much to promote the concept of social reuse of criminal property, particularly property recovered from the mafia.¹²² It developed as a response to the unique nature of the threat posed by mafia-type organizations to the communities subject to its control.¹²³ The law that originally introduced the concept had two interrelated purposes: on one hand, the subtraction of resources from the economic power of criminals, which permits control of the territory to the detriment of the rule of law; and on the other hand, the return of these resources to the community for institutional and social reuse—a form of restitution of stolen assets to the citizens who suffer the presence of crime in their territory.¹²⁴

¹²¹ Asset Forfeiture Act, published through Decree No. 27-2010, modified by Decree No. 51-2014.

¹²² The Italian system of asset confiscation is based on a two-pronged approach: “extended” confiscation, not only of property associated with a specific crime but also of additional property that a court determines constitutes the proceeds of other crimes, which can be ordered within a criminal proceeding, or as a consequence of a conviction for serious economic crimes, especially when organized crime is involved. And “preventive” confiscation, which is ordered through separate (preventive) proceedings, where the “danger to society” of a person (the likelihood to commit crimes in the future) is established in light of the person’s previous lifestyle and convictions. The danger to society consists of three categories established by law (Legislative Decree No. 159/11, art. 1): (i) those suspected of belonging to Mafia-related groups—this represents the most significant and substantial category; (ii) those living of illegal dealings or proceeds from criminal activity; and (iii) those suspected of having committed a set of serious organized crime-related offences.

¹²³ The element of danger to society is not necessary in case the indicted person is not found guilty “beyond any reasonable doubt”, if the proceedings have been terminated because the indicted person died or due to the statute of limitations and in cases in which the criminal proceedings are ongoing. According to art. 416 bis of the Italian Penal Code, the organization is of the mafia type when its components use intimidation, subjection and, consequentially, silence (*omertà*) to commit crimes and/or directly or indirectly acquire the management or the control of businesses, concessions, authorizations, public contracts and public services to obtain either unjust profits or advantages for themselves or other.

Law No. 109/96. Law 109 was used to supplement the legislation on confiscation of mafia associations introduced by *Rognoni-La Torre Law*, which supports the removal of assets illegally accumulated by

In recent years, there have been widespread non-conviction-based recoveries associated with anti-mafia preventive measures. In 2014, the Italian programme netted assets worth an estimated €1 billion. A single mafia-related seizure included 102 companies and 239 real estate and numerous movable properties.¹²⁵ The scale of the conviction and non-conviction-based recoveries placed enormous burden on the authorities for their management and disposal. The Government responded by forging creative agreements across a range of constituencies, such as investigating judges, local municipalities, private sector organizations, financial institutions and judicial managers, to ensure that the confiscated property benefits the victimized communities.

Some examples of social reuse initiatives in Italy that demonstrate the utility of the concept:

- houses allocated for use to families who lost their homes following a flood; manors assigned to a municipality to host women in distress
- assigning a building to house refugees and homeless people
- assigning a sailing boat to the University of Tuscia and the port authorities to be used for most of the year for vocational training courses for the crew and the ship's cook, while in the summer it will be rented for cruises.

Colombia similarly has been uniquely affected by drug trafficking and related organized crime. Colombia has made the compensation to society for economic, material, psychological and environmental damage derived from illicit activities a core policy priority. Law 1849 (2017) foresees a mixed regime for the use of forfeited funds, which generally dedicates them to the judiciary, the Attorney General's Office, the Judicial Police and the national budget (see the previous section 3). However, a different rule is applied for seized rural properties. They are sold in a pre-confiscation sale, and the proceeds are directed to a government programme that helps rural households access land.¹²⁶

Romania uses 20 per cent of the value of confiscated assets for legal education.¹²⁷

In the **United Kingdom**, the Asset Recovery Incentivisation Scheme specifies that a percentage of recovered assets is returned to agencies implementing the Proceeds of Crime Act. This money can then be used for either reinvestment in asset recovery projects or for community projects. The Asset Recovery Incentivisation Scheme was set up in 2006; it is not based in legislation but is an administrative scheme that has been agreed between the Home Office, the Attorney General's Office and the Ministry of Justice. The social use of funds received from the sale of confiscated criminal assets is

the mafia and reassigning them for social purposes.

¹²⁴ The "danger to society" is described in the three categories established by law. Common grounds of the two types of confiscation: (i) disproportion between the property owned by the suspect or convicted person and their legal income and (ii) the absence of feasible and legitimate justifications on the origins or sources of the goods.

¹²⁵ The main features of the preventive confiscation process: Even though the person might have already received a criminal conviction for a related offence, the competent tribunal must ascertain the degree of danger posed by a person and, in particular, the high probability of being found guilty through a separate fact-based (and not suspicion-based) inquiry. Hence a previous conviction is not a fundamental requirement. Asset seizure is decided upon at the request of the public prosecution by a panel of three judges who belong to the tribunal. After the asset seizure, all involved parties (the suspected person and third parties) may file a complaint before the Judges' Panel should they consider their rights breached. In any case, a hearing is scheduled shortly after the seizure, and on that occasion (which, upon request, is public) cross-examination between the public prosecutor and third parties is ensured before the Judges' Panel; in this hearing, a range of requests and evidence can be presented by the parties. The Judges' Panel provides reasons for its decision similar to those provided in criminal proceedings. The decision can be appealed with the Court of Appeal, based on issues of law as well as of facts. The Court of Appeal decision can be appealed before the Court of Cassation, which decides through one of its criminal sections.

¹²⁶ Article 22 of Law No. 1849 from 19 July 2017, which modifies Law No. 1708 from 2014 (Code on non-conviction-based forfeiture).

¹²⁷ Law No. 318/2015 on the establishment of the national agency for the management of seized assets.

also employed in **Scotland**. Recovered criminal assets are invested in facilities and activities for young people at risk of turning to crime or anti-social behaviour, as part of a programme called Cashback for Communities.¹²⁸

In **Honduras**, a partnership between OABI, the National Department of Social Intervention and the Government allowed for the loan of buildings to be used by communities through the Casa Hotel scheme, which is a system of hotel facilities for the temporary accommodation of displaced families, families affected by natural disaster and families who need to hide because they have been targeted by organized crime groups.

Some of the challenges to social reuse, based on the experiences of countries that have applied the concept:

- Developing an overarching strategy for allocating property—instead of deciding interventions on a case-by-case basis.
- Developing policies for determining when to allocate confiscated property, particularly real estate and whether to make it free of charge or to charge a reasonable rent or fee.
- Simplifying the assets allocation procedure.
- Developing capacity to evaluate the social or institutional credentials of potential beneficiaries of the seized and confiscated property.
- Developing capacity to verify the use of the allocated seized assets as initially contemplated and to verify the proper use of funding allocated to citizens in charge of the assets, including securing support of local government officials, to ensure that assets allocated for social reuse are used for such purposes and ensuring redress when not.
- Developing strategies for the economic management of seized businesses, including strategies to access high-quality but affordable judicial managers to turn around seized companies to ensure their re-entry into the legitimate economy (overcoming the “cost of legality”, such as legal contracts for workers, ensuring the health and safety of the workplace and the payment of fiscal obligations).
- Creating capacity to provide technical assistance to citizens in charge of the seized assets, including training courses to develop skills.
- Maintaining the cooperation of the financial sector to redirect assets for social reuse and facilitating financial resources to support reuse projects.
- Maintaining the cooperation and support of civil society organizations in identifying possible beneficiaries of assets during the seizure and after final confiscation, organizing initiatives to raise awareness and train potential beneficiaries of seized and confiscated assets.
- Maintaining a database with information on the allocated assets relevant for their management, such as the neighbourhood where they are located, pictures to illustrate their condition, specific characteristics, the names of judicial administrators and delegated judges or law enforcement officials.
- Developing strategies to ensure that property allocated to social reuse can remain productive and economically viable.

D. NO CONFISCATION ORDER

In the event that the accused is acquitted or a final confiscation order is not made, the property ordinarily must be returned as quickly as possible. However, before returning seized property to its owner when a court has declined to make a confiscation order,

¹²⁸ For more information, see <http://cashbackforcommunities.org/>.

some countries, either formally or informally, permit government departments that have outstanding debts owed them by the owner to recover payment from the seized funds. This particularly applies to debts owed to tax authorities for unpaid taxes.

In **Belgium**, before returning restrained property, COSC is required to first establish whether the beneficiary of the seized funds has any debt to the State, including social security contributions. The procedure is only available in cases in which funds are transferred to the COSC bank account during the interim stage.¹²⁹ COSC may, without further formality, place any sum due to be returned at the disposal of civil servants responsible for the collection of State debts owed by the beneficiary of the restrained cash. No appeal is possible, and the procedure is also applicable if the debt is disputed.

E. CONCLUSION

The enforcement of confiscation orders presents its own challenges, particularly when the authority that obtained the order is not the same entity responsible for its enforcement. The following trends emerged in this study's survey of practices employed to enforce confiscation orders and to distribute funds realized to specified beneficiaries.

- Especially in value-based confiscation, where insufficient property has been restrained to satisfy a confiscation order, countries provide for collection measures that either follow the general civil system or special realization orders to improve enforcement.
- In the case of object-based confiscation orders, countries have adopted additional guidelines for determining whether to retain the asset for reallocation, either to a government entity or non-government organization, or to realize the asset and to allocate the proceeds to the entity designated in the court order.
- There are primarily two competing policy options for the disposal of confiscated assets: (i) allocating recovered proceeds to the national revenue fund to meet general government priorities and (ii) permitting recovered proceeds to be allocated through a process that favours programmes that cater to crime prevention and social reuse. Countries articulate their policy choice generally in the legislation governing confiscation.
- Where countries have opted for the proceeds of confiscation orders to be paid into a designated asset recovery fund, the law usually specifies the purposes for which the funds are to be used. Special funds typically require infrastructure to manage and account for deposits received and transfers out.
- Where legislation is silent on how recovered funds may be used, it is even more important to put in place mechanisms that ensure the fair and transparent allocation of the funds. Oversight, transparency and auditing requirements are critical to maintain the integrity of a fund and accountability for its contents.
- Jurisdictions that permit recovered proceeds to be allocated to law enforcement projects, such as purchasing special equipment, providing training or supporting the rule of law more generally, convey the symbolic message that criminals will have the fruits of their crimes used against them. Countries have imposed tighter controls on the allocation of confiscated funds to law enforcement to counter concerns that assets could be inappropriately targeted to benefit law enforcement rather than to achieve legitimate law enforcement objectives. Policies have been established in many countries to avoid unintentionally incentivizing law enforcement, for instance, to strictly proscribe the use of any transferred funds and conduct frequent audits to ensure that funds are only used in the authorized manner.

¹²⁹ This procedure was introduced by art. 2 into law in July 2005 (coming into effect 18 Sept. 2005 and published on 8 Sept. 2005). Amended by Law of 27-04-2007. It is art. 16b of the COSC law.

- Many international instruments and domestic asset recovery laws prioritize the compensation of direct victims of a crime with the proceeds recovered from the criminal. Again, countries provide mechanisms in their asset recovery law to determine victims and permit their participation in the asset recovery procedures.
- Under the overall premise of social reuse, some countries have given the confiscated property or proceeds to communities uniquely affected by a particular crime. They have had to ensure that the infrastructure is in place to support, monitor and account for such projects.

IV. INSTITUTIONAL ARRANGEMENTS TO SUPPORT THE MANAGEMENT AND DISPOSAL OF SEIZED AND CONFISCATED ASSETS

A. INTRODUCTION

To cost-effectively preserve the value of seized assets, secure the maximum return from the sale of confiscated property and ensure confiscation orders are enforced, countries have developed a variety of institutional arrangements, which this chapter discusses.

In the early stages of setting up an asset recovery programme, the focus tends to be on adopting the appropriate legislative framework, developing investigative and prosecutorial skills and capacities to apply the law and ensuring there is judicial acceptance of the law as a legitimate law enforcement tool. Existing law enforcement infrastructure to deal with property seized as evidence is used to accommodate those assets awaiting a confiscation determination. Private law mechanisms to deal with the management of disputed property in the context of insolvency or bankruptcy and deceased estates, such as a court-appointed trustee, receiver, *curator boni* or judicial manager, are engaged to manage and dispose of seized and confiscated property. At the disposal stage, mechanisms in place for collecting criminal fines and public service entities with responsibility for disposing of surplus government property are relied on to enforce final confiscation orders. The realized proceeds are typically deposited into the government's general consolidated revenue fund.

The challenges of managing seized and confiscated property usually only begin to present themselves as more and more asset recovery cases are brought to court and the volume of assets seized and confiscated increase. Many of the jurisdictions that have relied on existing law enforcement and public service capacity to manage seize and confiscated property in the initial stages of implementing asset recovery laws have had to confront the following institutional challenges.

- The management and disposal of property are not conventional law enforcement functions. The increase in workload related to the administration and management of seized and confiscated assets strains traditional law enforcement responsibilities and functions for investigating and prosecuting crimes.
- The experience, skill and competencies needed to manage assets and dispose of them in ways that ensure maximum return are not typically available within law enforcement.
- Police pounds and storage facilities are usually not geared to manage the volume and types of assets typically made subject to seizure orders.
- Keeping track of seized assets and keeping them secure and in a reasonable state of repair becomes more onerous as the volume of assets seized increases, straining personnel and budgetary resources.
- The fees charged by private judicial managers, such as receivers, trustees and *curators boni*, or by private contractors, such as auctioneers, valuers and private security companies, often place considerable strain on the budget available for asset recovery.
- Contracting private sector professionals on a case-by-case basis makes it difficult to exploit economies of scale for bulk services, such as warehousing, and standard contracts to procure repeat functions, such as valuations and security.
- Opportunities to increase the revenue derived from confiscated property are often not exploited due to a lack of focus, specialist skill and resources.
- The trend towards making confiscated property available to compensate victims, support victim organizations and for social reuse by communities that have suffered harm as a result of criminal activity, requires the capacity to allocate assets in a

transparent, fair, responsible and accountable manner. These functions imply the availability of ongoing capacity to monitor that the assets allocated are being used for the purpose intended.

- Difficulties with maintaining a reliable record of seized assets, their location, ownership and status in the assert-recovery process arise. This can result in failure to take crucial steps in their management and disposal, exposing the authority to liability.
- The need to keep reliable data on the value of confiscated assets, as compared with the costs expended on management and disposal of seized and confiscated assets, becomes critical for the government to evaluate the return on investment expended on asset recovery.
- Failing to account for seized and confiscated property in a transparent manner can undermine the legitimacy of the asset recovery programme.

In responding to these challenges, countries have built up a rich reservoir of experience, which is discussed further on in three broad categories:

- asset management offices with additional asset-recovery enforcement functions located within law enforcement
- asset management offices located within public service entities, with additional property management-related functions
- self-standing asset management offices.

The range of functions the asset management office will be required to perform will determine the appropriate institutional home for it.

Only in a few countries is the designated asset management office able to perform asset management and disposal services for each and every asset that requires storage, maintenance or disposal. Judicially appointed managers, receivers, trustee or *curators boni* are inevitably relied on to perform specialized services not available in the asset management office. It often makes more commercial sense to outsource certain functions, and public or private sector providers may be procured to perform such functions more cost-effectively.

1. Specialized asset management offices

- a. Asset management offices with additional asset recovery-enforcement functions within law enforcement

In some countries, the asset management office is responsible for promoting asset recovery as a law enforcement tool within the law enforcement community, in addition to performing its regular asset management functions. For this reason, countries like **Belgium**, the **Netherlands**, the **United States** and **Thailand** have opted to locate the capacity within law enforcement.

In **Belgium**, the Central Office for Seizure and Confiscation was created in 2003 as an institution within the Public Prosecutor's Office to assist judicial authorities with seizure and confiscation.¹³⁰ It is the country's designated asset recovery office, set up in compliance with European Union Decision 2007/845/JHA. In addition to its role in the management of seized assets, COSC trains and advises practitioners on existing and new developments in asset recovery law, assists policymakers in developing law and provides assistance with international cooperation in asset recovery. COSC also has a role in asset tracing investigations after conviction to achieve the full realization of value-based confiscation orders.

¹³⁰ Law of 26 March 2003 (*Wet houdende oprichting van een Centraal Orgaan voor de Inbeslagneming en de Verbeurdverklaring en houdende bepalingen inzake het waardevast beheer van in beslag genomen goederen en de uitvoering van bepaalde vermogenssancties*); part of this law is incorporated within the Code of Criminal Procedure.

The only management of seized assets COSC does in-house is for cash (such as intercepted cash transfers at an airport in cases of suspected money laundering) and the cash realized from pre-confiscation sales and disposals. COSC may appoint experts to manage valuable assets or assets that require specialized skills. COSC also helps coordinate the actions of law enforcement officials, judicial authorities and public sector players who remain responsible for the management and disposal of the assets under their control:

- All investigating magistrates and police officers who remain responsible for asset management in the interim phase must notify COSC of all asset seizures and the methods of storage or preservation of seized assets, as well as any further decisions relating to the assets.
- Prosecutors who are responsible for decisions on pre-confiscation sales and disposals and the destruction of seized assets and for obtaining confiscation orders are equally obliged to notify COSC of such decisions and court orders.
- The Ministry of Finance and Ministry of Justice, both responsible for enforcement of confiscation orders, must notify COSC of all executions related to confiscated assets.
- The Patrimonial Services division within the Treasury is responsible for carrying out disposal activities, such as the sale, destruction, recycling and lending of confiscated property.

In this structure, COSC is able to maintain an accurate and up-to-date database of the status of assets subject to seizure, confiscation and execution. This information assists COSC in monitoring that assets do not remain under restraint for too long and are sold when possible.

To perform these functions, COSC employs public prosecutors, liaison officers from the police, staff from the Ministry of Finance, legal advisors, IT personnel and secretarial staff.

In **the Netherlands**, the National Public Prosecutor's Office for serious fraud, environmental crime and asset confiscation is located within the Public Prosecution Service¹³¹ and is the country's designated judicial asset recovery office (the Netherlands also has a police asset recovery office). It, too, performs the typical function of an asset recovery office in the European Union, such as asset tracing, providing expert knowledge and advice and as contact point for international cooperation. In addition, the prosecutors who deal with asset confiscation prosecute the more important conviction-based asset recovery cases; when the occasion arises, they deal with incoming foreign requests concerning a non-conviction-based asset recovery case.

Although located within the Public Prosecution Service, National Public Prosecutor's Office for serious fraud, environmental crime and asset confiscation encompasses public prosecutors, forensic accountants, experts in civil and international law and asset tracers. Within the institution, a small dedicated team of asset managers, called the Asset Management Office, is responsible for overseeing seized assets. Other players have responsibility for enforcement of confiscation orders:

- The Public Prosecution Service executes property confiscation orders by transferring realized funds to the public treasury. Confiscated property, such as weapons and drugs, are destroyed by the Dutch National Police Services Agency and movables, such as cars and computers, may be destroyed or sold by the Service for State Property in the Ministry of Finance. The Service for State Property is also responsible for dealing with other excess government property.
- The Central Fine Collection Agency collects value-based confiscation orders and other criminal fines.

¹³¹ Law of 14 August 2012 (*Organisatieregeling Dienstonderdelen OM 2012*).

- Bailiffs (the officials usually involved in civil recovery of property) may intervene in the execution of confiscation orders on behalf of creditors of convicted persons.
- Notaries are involved in the forced sale of properties.

The Asset Forfeiture Program in the **United States** was created within the Department of Justice in 1984, when the legislature first passed the Comprehensive Crime Control Act, which gives federal prosecutors forfeiture provisions to combat crime.¹³² The Money-Laundering and Asset Recovery Section of the Department of Justice leads the Asset Forfeiture Program in prosecuting and coordinating complex, multi-district and international asset forfeiture investigations and cases. It provides legal and policy assistance and training to federal, state, and local prosecutors and law enforcement personnel, as well as to foreign governments. It assists policymakers in developing and reviewing legislative, regulatory and policy initiatives. It also distributes forfeited funds and properties and decides on victim claims for compensation from forfeited properties.

The Marshal Service is the primary custodian of property seized by federal law enforcement agencies across the United States.¹³³ It assists with pre-seizure planning and analysis, seizure operations, execution of court orders, litigation support and distribution of proceeds. As a federal police service, the Marshal Service is also responsible for providing federal judicial security; apprehending fugitives and non-compliant sex offenders; securing and transporting federal prisoners; executing federal court orders; and assuring the safety of endangered government witnesses and their families.

The Marshal Service manages various types of assets, including real estate, vehicles, commercial businesses, cash, financial instruments, jewellery, art, antiques, collectibles, vessels and aircraft. It operates federal warehousing facilities to store seized goods and maintains a list of contract private sector service providers it uses to sell assets in a cost-effective manner. The Marshal Service manages the distribution and equitable sharing of proceeds with state and local law enforcement agencies that participated in investigations leading to forfeiture as well as payments to victims of crime and innocent third parties and, in some cases, has a role in making forfeited property available for social reuse.

The **Czech Republic** established the Centre for Seized Assets within the Ministry of the Interior in January 2017 to manage the assets seized by the police, pre-confiscation sales and the long-term storage of seized assets. Sales of motor vehicles are realized through electronic auctions, and small assets are sold in a shop operated by the Center.¹³⁴

In **Thailand**, the Anti-Money Laundering Office was established as an independent law enforcement and regulatory agency under the supervision of the Ministry of Justice.¹³⁵ It operates under the direction of the Anti-Money Laundering Board, which is chaired by the prime minister or a delegate.

The Anti-Money Laundering Office handles all anti-money laundering matters. It has investigative powers and can refer cases to the public prosecutor to consider filing a petition with the court for a forfeiture order. Within its structure, the Asset Management Division is tasked with maintaining a system for asset accounting, asset appraisal, storing and maintaining assets, turning them over to the Treasury or returning them to the owners. Its system for asset management involves permitting parties to take assets into custody for their use, permitting the use of assets for the State's benefit, renting them out, appointing asset managers, selling assets in an auction under the anti-money laundering law and managing the Anti-Money Laundering Fund.

¹³² See www.justice.gov/criminal-afmls.

¹³³ See www.usmarshals.gov/assets/index.html.

¹³⁴ The Center was established by Order of the Minister, with no amendments to Act No. 279/2203 Coll. required.

¹³⁵ Anti-Money Laundering Act, 1999.

- b. Asset management offices located within public service entities with additional property management-related functions

In view of the specialized and multidimensional skills required to efficiently manage and dispose of seized and confiscated assets, some countries, such as **Australia, Mexico and New Zealand**, have opted to combine the management and disposal of seized and confiscated criminal property with other property management functions.

In **Mexico**, the Asset Administration and Disposal Service is a decentralized body of the Federal Public Administration under the guidance of the Ministry of Finance but with legal standing and its own budget.¹³⁶ In addition to the administration of seized and confiscated property, SAE is also responsible for divestiture of State-owned entities, the investment units, administration of illegal assets from foreign trade and the management of portfolios and non-monetary assets from the federal Treasury.

In **New Zealand**, the Proceeds of Crime Act, 1991 was the original conviction-based asset confiscation legislation that conferred on the Official Assignee Compliance Unit the role of criminal asset recovery, management and disposal. That Act was repealed and replaced by the Criminal Proceeds (Recovery) Act, 2009¹³⁷ and new provisions in the Sentencing Act, 2002.¹³⁸ The Criminal Proceeds (Recovery) Act established a regime for the forfeiture of property that has been derived directly or indirectly from a significant criminal offence without the need for a conviction and the forfeiture of instruments of crime when a conviction has been entered. Most criminal proceeds cases have historically been drug related.

The Criminal Proceeds (Recovery) Act directs the official assignee to take into custody and control assets that are ordered to be restrained or forfeited by a court. It also directs the official assignee to: dispose of confiscated assets (being both instruments of crime forfeited under the sentencing provisions of the Sentencing Act and property confiscated under Asset Forfeiture Orders in civil cases); dispose of assets that have been restrained to meet a Profit Forfeiture Order in civil cases; and enforce Profit Forfeiture Orders when assets do not meet the amount specified to be repaid by the respondent. To carry out this function, a small, dedicated Criminal Proceeds Management Unit (CPMU) was established. The CPMU has inspection, administration, storage, protection, maintenance, transportation of moveable assets, valuation and appraisal functions. The CPMU also acts as receiver of rents and businesses; makes payment of certain costs relating to the preservation of assets; and acts as an independent agent to sell assets, as ordered to do so by a court. During the forfeiture phase, the CPMU disposes of confiscated assets, usually by public auction; pays the proceeds into a trust account, from where it will be paid to the Crown Consolidated Revenue Account; makes third party payments and covers other costs associated with the criminal and confiscation proceedings; returns assets when no order is made and pursues the recovery of unsatisfied forfeiture orders.

The CPMU consists of case coordinators who are appointed as deputy assignees and are all given delegated authority to act for the official assignee.¹³⁹ The full-time staff are supported by a network of contracted providers for a range of services, including physically securing assets in the field, logistics support and property maintenance.

To fulfil its functions, the CPMU is equipped with the necessary powers to search and seize property and anything else reasonably necessary to ensure that assets are not at risk of damage, alteration, removal or loss of value. Obstructing any person exercising a

¹³⁶ SAE was created in 2002 by the Federal Law on the Administration and Disposal of Public Sector Assets (*Ley Federal para la Administración y Enajenación de Bienes del Sector Público*). Other documents that regulate SAE's scope of action are: The Regulation to the Federal Law on the Administration and Disposal of Public Sector Assets (*Reglamento de la Ley Federal para la Administración y Enajenación de Bienes del Sector Público*) and the Organic Statute of SAE (*Estatuto Orgánico del Servicio de Administración y Enajenación de Bienes*).

¹³⁷ Criminal Proceeds (Recovery) Act, 2009.

¹³⁸ See www.insolvency.govt.nz/support/about/criminal-proceeds-management/.

¹³⁹ Criminal Proceeds (Recovery) Act, 2009 and State Sector Act, 1988.

power or carrying out a duty under the Criminal Proceeds (Recovery) Act constitutes an offence.

c. Self-standing asset management offices

An increasing number of countries, such as **Canada** and **France**, have set up entirely new, self-standing asset management offices exclusively for the management of seized and confiscated criminal property. This option is considered desirable, particularly when the scale (number and value) of assets being recovered through the judicial process has increased to a level that justifies the expenditure that setting up such an office inevitably requires.

A similar trend, particular in several South American countries, is to separate the function of managing and disposing of seized and confiscated assets from the more general asset recovery investigative and prosecutorial functions. The aim is to move away from what was perceived to be an excessive concentration of functions within the same institution and to establish instead a dedicated capacity to manage seized and confiscated assets outside of law enforcement.

In **Canada**, the Seized Property Management Directorate, established in 1993, is located in the Ministry of Public Works and Government Services.¹⁴⁰ The SPMD was housed outside of law enforcement in order to alleviate the burden associated with asset management on law enforcement agencies, thus allowing them to focus on their criminal investigation mandate. It was envisaged that creating a capacity dedicated to asset management would ensure a higher level of professionalism (box 3).

The police, through the Public Prosecution Services, may request a judge to appoint the minister of public works and government services to take control of and manage, or otherwise deal with, property in accordance with the directions of the judge. A judge may also order that property forfeited to the State be disposed of by SPMD, as directed by the attorney general. Additionally, SPMD advises on the financial viability of seizure, analyses the best method to protect and maintain the value of assets and evaluates the costs associated with asset management. SPMD may appoint specialists to take care of assets that require special skill and expertise to manage.

In **Colombia**, the Office of the Attorney General originally was responsible for all asset recovery investigatory and accusatory procedures and the National Directorate of Narcotic Drugs (Dirección Nacional de Estupefacientes) was responsible for asset management. In 2011, evidence of serious corruption emerged in the Directorate, and a decision was made to liquidate the directorate and migrate the asset management functions to the Society for Special Assets, which is under the Ministry of Finance and Public Credit. The Society for Special Assets is now responsible exclusively for the management of seized and confiscated assets.¹⁴¹

In **Honduras**, concerns about a lack of independence led to the removal of the asset management functions from the prosecution authority.¹⁴² The Office for the Administration of Seized Property as established in 2004 by decree as a specialized technical body under the General Prosecutor's Office and made responsible for the safeguarding, custody and administration of seized, confiscated or abandoned property entrusted to it.

OABI has its own legal personality and technical, administrative and financial autonomy. Since 2012, it reports to the National Council on Defense and Security, a permanent constitutional structure at the highest level of decision-making that is attached to the Office of the President. In addition to the administration of seized and confiscated property, the National Council is also responsible for directing, designing and

¹⁴⁰ See www.tpsgc-pwgsc.gc.ca/app-acq/gbs-spm/index-eng.html.

¹⁴¹ Asset Forfeiture Code, created by Law 1708, 2014 (*Código de Extinción de Dominio*).

¹⁴² The purpose of the law is to harmonize legislation relating to the administration of seized and confiscated property. Decree No. 51-2014 has since been updated by the new Act Against Money-Laundering.

monitoring general policies relating to security, national defence and intelligence and for designing strategies to prevent, combat, investigate and punish criminal conduct.

Box 3

The role of the Seized Property Management Directorate in Canada

- Provide advice to law enforcement agencies prior to seizure.
- Review all legal documents required for the management of assets (restraint orders and management orders).
- Daily interaction with police, the Department of Justice and the Public Prosecution Service on the status of cases, restrained assets, claims, etc.
- Day-to-day management of in-house and contracted private sector warehouse staff located across Canada.
- Liaise with Real Property Services (to set up SPMD-managed warehousing facilities).
- Establish contractual and interdepartmental or governmental arrangements, including the negotiation of memoranda of understanding, with governmental organizations.
- Develop and maintain policies, operating instructions and guidelines.
- Register incoming correspondence (legal documents, invoices, monies, negotiable instruments).
- Act as custodian of moveable assets and maintain a daily inventory.
- Act as custodian of moveable assets and maintain a daily inventory.
- Manage internal audits and monitor the implementation of the management action plan developed for each asset.
- Establish contracts for the delivery of asset management and other professional services, such as valuations and specialized storage and maintenance arrangements.
- Support financial analysis of service delivery and operations.
- Process all financial transactions related to the management of assets.
- Monitor and reconcile all accounts required for the management of the programme, in accordance with the legislation.
- Prepare and monitor operating budgets.
- Manage the costing system.
- Manage and maintain the operating system (SPMIS), provide system support and coordinate and identify new system requirements.
- Complete financial review of operationally closed files, closing them and sharing proceeds with involved jurisdictions.

France created the Agency for the Recovery and Management of Seized and Confiscated Assets in 2011 in response to newly enacted and expanded asset recovery laws. AGRASC functions under the supervision of both the Ministry of Justice and Freedoms and the Ministry of the Budget, Public Accounts and State Reform. Both the head of AGRASC and the head of the Board of Administration are appointed by the judiciary, and a secretary general is appointed from the Ministry of the Budget. Staff members are drawn from the civil service (including court registrars) and members of the gendarmerie. In its capacity as a public administrative body, AGRASC has a public accountant.

Its primary function is to provide technical and practical assistance and advice to members of the judiciary, the Public Prosecution Service, investigating magistrates, trial judges and investigators on the enforcement of asset recovery laws and, in particular, advising on the seizure of assets (including real estate, bank accounts, receivables and businesses).

AGRASC is not the only agency in France responsible for the management of seized and confiscated property—it only assumes this responsibility when entrusted with a management warrant issued by a judge regarding property subject to a seizure order,

confiscation order or protective measure. It assumes responsibility for the pre-confiscation sale¹⁴³ and disposal of property when a court orders it to do so, and it manages complex assets seized on the same basis. If AGRASC is appointed by the court to manage a business, it may appoint an interim receiver to do so under its control.

AGRASC has the monopoly over all cash seizures (including cash in bank accounts)¹⁴⁴ and real estate¹⁴⁵ seized in criminal matters. AGRASC operates a bank account opened with the Caisse des Dépôts et Consignations, which receives transfers of all seized cash, bank accounts and proceeds from the pre-confiscation sale or disposal of assets it has been assigned to manage.

AGRASC is alerted by the Penalty Enforcement Department of the Public Prosecutor's Office to enforce confiscation orders dealing with real estate.¹⁴⁶ AGRASC sets the sale process in motion by giving a power of attorney to a notary to proceed with the sale and takes charge of the management of the real estate asset until the sale is concluded. It is also responsible for returning assets if no confiscation order is made and makes payments to the State and to victims if a court makes a confiscation order.

In **Peru**, CONABI is a multi-sector body in charge of receiving, recording, classifying, keeping, safeguarding, preserving, managing, leasing, assigning on a temporary or definite basis, disposing of and selling in public auctions, any object, asset, effect and proceeds derived from the commission of offences against the State.¹⁴⁷ Its Management Council approves the CONABI guidelines, regulations and procedures, as well as its budget and internal organization.

d. Asset management offices as court-appointed functionaries

Australia, Canada, France and New Zealand provide for the asset management office to be appointed as receiver by a court. In **Australia**, the Proceeds of Crime Act authorizes the official trustees to take custody and control of property when a court deems it necessary.¹⁴⁸ The costs, charges and expenses incurred by the official trustees are governed by regulations.

In **Canada**, the Seized Property Management Act provides for a court to appoint the minister of public works and government services (who delegates the authority to SPMD) as the custodian of seized and forfeited property.¹⁴⁹

¹⁴³ Sale of chattels prior to judgment takes place in terms of arts. 41-5 and 99-2 of the Code of Criminal Procedure.

¹⁴⁴ In terms of a continued retention order issued by the investigating magistrate or the freedom and detention judge under art. 706-154, para. 1 of the Code of Criminal Procedure, bank accounts may be transferred to the AGRASC account.

¹⁴⁵ Art. 796- 151 of the Code of Criminal Procedure gives AGRASC the monopoly on registering, on behalf of the Public Prosecutor's Office, investigating magistrates and courts, all seizures of real estate carried out in criminal matters.

¹⁴⁶ Real estate seized remains the responsibility of the owner subject to a warrant of a court to prevent depreciation.

¹⁴⁷ CONABI was established by Legislative Decree No. 1104 of 19 April 2012.

¹⁴⁸ 2002 (Cth).

¹⁴⁹ In order for SPMD to expend resources on a file, the police, through the Public Prosecution Services, apply to a federal court judge for either a management order regarding a moveable asset that has been physically seized or a restraint or management order for assets that cannot be physically seized, such as real estate, bank accounts and businesses. At the confiscation stage, the court orders the property be forfeited to the State, to be disposed of by SPMD as the attorney general directs or to otherwise deal with it in accordance with the law. The restraint and management order restricts any changes in ownership and describes certain conditions that the accused must fulfil (paying property taxes, maintaining property in a good state of repair, paying utilities, etc.). The restraint and management order gives SPMD the authority to enter the property on 24 hours' notice to inspect or appraise and ensure the asset is being maintained.

In **New Zealand**, the Criminal Proceeds (Recovery) Act¹⁵⁰ provides for the appointment of the Official Assignee Compliance Unit as the only agency in New Zealand authorized to manage and dispose of seized and confiscated assets.¹⁵¹

In all three cases—Australia, Canada and New Zealand—the law provides that the court-appointed asset manager is entitled to recover fees and disbursements regarding the management of seized assets. All three entities may subcontract some of the functions to manage an asset, especially when unusual expertise is required.

2. Private sector players and their roles

a. Court-appointed asset managers

Some jurisdictions allow for a court to appoint a trustee, receiver, judicial manager or *curator boni* to take care of either an individual asset or the entire estate of a particular person. In common law countries like **Namibia, South Africa** and the **United Kingdom**,

the appointment of receivers, trustees or *curators boni* is the primary mechanism provided for in the asset recovery law for managing seized assets. In other countries (mostly civil law countries) like **Belgium, France** and **Italy**, judicial managers are appointed by a court or an investigating magistrate or judge to deal with complex assets. The private sector practitioners who avail themselves to be appointed as trustees, *curators boni*, receivers or judicial managers are usually insolvency, bankruptcy or probate practitioners who take judicial appointments to manage insolvent or deceased estates. They are usually part of a legal framework that regulates their appointment criteria, fees and professional liability and are typically registered with the courts, the asset management office or a relevant ministry.

In countries like **Namibia**,¹⁵² **South Africa**¹⁵³ and the **United Kingdom**,¹⁵⁴ the law provides for the prosecutor to apply to a court to appoint a receiver to either take care of the asset (a management receiver) or to dispose of the asset (an enforcement receiver). Although the appointment is initiated by the prosecutor (who usually recommends someone), the receiver becomes an officer of the court once appointed and obtains their powers in the court order or in terms of the law and reports to the court on steps taken in relation to the property. The trustee may even be separately represented at hearings, although usually only when there is a potential conflict between the receiver and the prosecutor.¹⁵⁵

The advantage of appointing receivers is that professionals with appropriate skill and expertise can address the requirements of a particular asset or confiscation order. The receiver must be appropriately qualified, be of good standing, have professional insurance to indemnify themselves against civil claims and must be accredited to perform the functions of a receiver by the body that oversees or regulates trustees or receivers in the country.

Using receivers can help to ensure that illegal businesses are properly investigated by financially trained insolvency practitioners. They can assist in the identification of assets, in the repatriation of assets hidden overseas and in the prompt settlement of

The institutional forms countries have adopted have each been adapted to the specific needs and institutional realities of their domestic situations.

¹⁵⁰ Sects. 24, 25 and 26 of the Criminal Proceeds (Recovery) Act, 2009.

¹⁵¹ Sects. 50, 55 and 70 of the Criminal Proceeds (Recovery) Act, 2009 and Instrument Forfeiture Order under sect. 142 of the Sentencing Act, 2002 provides for a court to make a restraining order to appoint the Official Assignee Compliance Unit to take custody and control of all property to which the order relates. The Act also provides for a court making a forfeiture order or direct that the property to which the order applies is placed in the custody and control of the Official Assignee Compliance Unit. A profit forfeiture order is recoverable from the respondent by an official assignee on behalf of the Crown as a debt due to the Crown.

¹⁵² Prevention of Organised Crime Act.

¹⁵³ Prevention of Organised Crime Act, No. 121 of 1998.

¹⁵⁴ Proceeds of Crime Act, 2002.

¹⁵⁵ Re G, Manning v G (No. 4) [2003] EWHC Admin 1732.

unfulfilled confiscation orders. A further advantage is that the trustee, as an independent officer of the court, can receive compelled disclosures from an accused person without any risk of violating the right against self-incrimination. When a court orders payment of living and legal expenses of the accused person while their assets are under restraint, the curator is best placed to oversee this process objectively.

The biggest controversy relating to the appointment of receivers has been the issue of cost. If the remuneration and expenses of the receiver are likely to be in excess of the amount that probably will be realized, a receiver should probably not be appointed in the first place. However, it is often difficult to predict the duration of a seizure order, in particular when a criminal conviction is requisite to the issuing of a final confiscation order. In such cases, the costs of maintaining an asset, not to mention the professional fees of the manager, can escalate out of all proportion to what may ultimately be realized.

In **Namibia**, the account of the curator in the first-ever appointment of a receiver under the Prevention of Organised Crime Act threatened to bankrupt the established asset recovery capacity in its first year of operation.

Such developments have forced authorities to search for cost-effective solutions. In the **United Kingdom**, a panel of receivers is appointed to act on behalf of the Crown Prosecution Service in a range of confiscation-related matters. The receivers' letters of appointment agree the fees they charge and the terms and conditions under which they will work, which are specified in a framework agreement. In **South Africa**, each court order appointing a curator is issued with a standard letter of engagement that consists of measures to control expenditure by the *curators boni*.

In **Italy**, extensive use is made of court-appointed asset managers or judicial administrators (*amministratori giudiziari*), particularly to deal with assets made available for social reuse under the anti-mafia legislation. Out of approximately 900 court-appointed asset managers, an estimated 400 specifically deal with the management of seized and confiscated businesses. Judicial managers must possess specialized skill to manage businesses; they need to ensure that a business can be operated sustainably without relying on unlawful conduct in its operations, and they must avoid re-infiltration or re-appropriation of the business by criminal organizations.

b. Subcontractors

The management and disposal of seized and confiscated assets often entails the use of external private service providers, such as specialized storage, transportation and maintenance services. Unlike asset managers appointed by order of a court, these services are procured directly by the court-designated asset manager or asset management entity.

In **Canada**, seized moveable assets are stored in SPMD warehouses located across the country. In smaller more remote locations, SPMD engages storage and maintenance services through the private sector. SPMD also uses the services of the private sector to sell assets particularly where conditions require it (a high-end car is sent to a private auction that draws people looking for expensive vehicles). For real property, SPMD has many government requirements to satisfy prior to actually selling the property. First, the property must pass environmental assessment (many properties used in illicit drug production are contaminated by chemicals and/or mould). Second, SPMD must consult with local aboriginal communities to determine if there is a historic treaty obligation surrounding the property. Only once all legal requirements are met can SPMD proceed to engage the services of a private sector real estate broker to sell the property on its behalf.

In **France**, AGRASC makes extensive use of subcontractors for specific purposes (box 4). It has entered into several partnership agreements with networks of professionals. Once AGRASC is entrusted by a court with a mandate to manage a particular asset, depending on the asset (nature, localization, value, etc.), it may contract one of the partners to undertake the management function.

Box 4

Types of partnership agreements the Agency for the Recovery and Management of Seized and Confiscated Assets (AGRASC) has signed with subcontractors for the sale of assets

- Domaine auctioneers (within the National Property Disposal Office) for the sale of assets
- High Council of Notaries
- National Chamber of Court-accredited Auctioneers (Commissaires-priseurs Judiciaires) to sell movable assets
- National Chamber of Accredited Commodity Brokers (Courtiers de Marchandises Assermentés) to sell movable assets
- National Council of Receivers, specifically for the management of businesses
- National Council of Judicial Officers (Huissiers de Justice) for the management of immovable assets, real estate and some movable assets.

In **New Zealand**, the team of full-time staff of the Criminal Proceeds Management Unit is supported by a network of contracted providers for a range of tasks, including seizure of assets, logistics support and property welfare. These contracts can be procured through a competitive tender process.

B. FINANCIAL AND BUDGETARY CONSIDERATIONS

Managing seized and confiscated assets can be a costly business. Even if an asset does not require active maintenance to preserve its value, it usually still has to be stored in a safe place. Data about its location, ownership and status in the process need to be captured and routinely monitored to ensure compliance with the court's order. Even assets that are left in the custody of the owner or possessor require ongoing monitoring to ensure compliance with the conditions imposed by the court. At the other end of the spectrum, there are assets that may cost considerably more to maintain or to keep profitable, such as yachts, aircrafts and businesses.

These costs, including costs of accommodating the asset management entity and remunerating its staff, warehouse facilities for storage, a database to track assets and funds to secure specialist contractors, must all be budgeted when an asset management office is established.

Often funds are needed to cover the maintenance of assets requiring specialized care or to effect basic improvements in order to dispose of an asset at a much more favourable rate. In addition to the legislation that needs to be in place to grant authority to effect such improvements, which are beyond what it would cost to merely preserve the value of the asset in the condition it was in when it was first seized, a budget needs to be available. Provision can be made in the statute for the costs to be recouped from the proceeds of sales, but such outlay usually must be funded before the proceeds are realized.

A budget is also needed to deal with litigation costs associated with the management of seized assets. This would include claims against practitioners associated with the management of seized assets and for damages claimed by owners in the event the assets are allegedly returned in a devalued state.

Funding options for asset management capacity:

- Revenue allocations from the national budget.
- Proceeds from the sale of confiscated property.

- Interest and income earned from investments made with seized cash and the proceeds of pre-confiscation sale.¹⁵⁶
- Fees earned from the management of productive assets.
- Fees earned by staff of the asset management office for services rendered in the management and disposal of seized and confiscated assets.

Although most countries aim to achieve a stage at which the cost of operating a specialized asset management office is absorbed by the revenue produced through the management and disposal of seized and confiscated funds, it is a long-term objective. Only some countries have achieved it.

In **France**, provision is made in the law for AGRASC to be funded from the proceeds of confiscated assets, interest earned on a centralized account for all cash seized by law enforcement and part of the domain tax. AGRASC is fully self-funded.

The initial budget for AGRASC was drawn up on the basis of forecasts that were fairly speculative. On the revenue side, the returns earned on the sale of confiscated property were initially low. The shortfall was due mainly to the time lag between the agency taking possession of seized property and a final confiscation order being made. Initial projections had to be drastically reduced and subsidies obtained to make up the shortfall. By 2013 (two years into its operation), AGRASC was fully self-funded. Today, AGRASC is not only self-funded, it continues to pay millions of euros into the Government Revenue Fund and to the Drug Fund.

Table 4
Source of revenue for the self-funded Agency for the Recovery and Management of Seized and Confiscated Assets (AGRASC) in France, 2013 and 2014

Source of revenue	Amount (€) 2013	Amount (€) 2014
Interest on CDC account	3 600 000	5 000 000
Share of sales	1 806 000 (capped)	1 806 000
Domain tax	130 000	300 000
Total revenue for 2013	5 500 000	7 100 000

AGRASC made provision in its first budget for staff expenditure. The main operating expenditures relate to the management of seized and confiscated assets. The main provision in the budget is for litigation risks, which amount to almost 40 per cent of its operating expenditure.

In **Canada**, SPMD recovers all its operational costs from the proceeds of the sale of forfeited property. All costs (both operational and overhead) are deducted from the returns, and subsequently the net proceeds of sale are shared domestically and internationally with jurisdictions that were involved in the investigation.

The Seized Property Proceeds Account receives the net proceeds from the sale of properties forfeited to the State and fines imposed and funds received from the governments of foreign States pursuant to asset-sharing agreements. Operating expenses incurred in the context of the sale of assets, amounts paid to settle claims, repayments of the loan from the Ministry of Finance, negative interest accrued in the operation of

¹⁵⁶ Some countries have achieved good results after including in their legislation the possibility to make investments with the seized money in properly supervised financial institutions. The financial income is used for the maintenance and preservation of the assets and in some cases to cover the operational costs of the asset management office. See in Mexico, art. 89 of the Federal Law on the Administration and Disposal of Public Sector Assets (*Ley Federal para Administración y Enajenación de Bienes del Sector Público*), art. 230 III, 245, 247 y 250 National Criminal Procedure Code (*Código Nacional de Procedimientos Penales*), art. 182 Q, 182 N y 182 R Federal Criminal Procedure Law (*Ley Federal de Procedimientos Penales*), art. 13 Federal Revenue Law (*Ley Federal de Ingresos de la Federación*).

the Seized Property Working Capital Account and costs related to the final distribution of returns to relevant authorities and jurisdictions are all paid out of the Seized Property Proceeds Account.

Both funds are audited and reported on as part of the Annual Financial Statements of the Ministry of Public Works and Government Services. At the end of the fiscal year, the net proceeds become available, as prescribed by the Forfeited Property Sharing Regulations.

In **Honduras**, OABI aims to be entirely self-funded. Although it has not yet achieved this status, it is close. It receives \$450,000 (equivalent) of treasury funding per year, plus 10 per cent of all confiscated proceeds and 40 per cent of the fines imposed on financial institutions for failure to comply with anti-money laundering measures. OABI can also lease or enter into other contracts to maintain the productivity and value of assets under its control. Income from those activities may be distributed in the event of a final confiscation decision.

The Federal Asset Forfeiture Program in the **United States** manages the Department of Justice Assets Forfeiture Fund.

Seized cash and proceeds of pre-confiscation sale and disposal from seized property are deposited in the Seized Asset Deposit Fund. Because entitlement to the funds are still under dispute, they are considered “non-public” monies and are not available for governmental purposes.

Forfeited funds could be used for “forfeiture operations expenses” (asset management and disposal, third-party interests, case-related expenses, training, printing, contracts to identify forfeitable assets and awards based on forfeiture) and for “general investigative expenses” (awards for information, purchase of evidence, joint law enforcement operations). The Department of Justice retains 20 per cent of the forfeited proceeds as overhead expenses, while the rest is shared with state and local law enforcement agencies that assisted in the forfeiture process (based on the number of work hours). This is done under strict auditing controls that limit how such funds can be spent to certain law enforcement purposes.

The size of the fund has grown considerably over the past 10 years. Annual net deposits increased from nearly \$580 million in 2005 to \$4.5 billion in 2014.

In **Mexico**, SAE receives funds from three sources: The first is the federal budget, which is approved annually by the Chamber of Deputies (legislative branch), and includes fiscal resources to cover operating expenses, such as personnel, materials and supplies, as well as unexpected costs.

The second source of funding derives from disposing of assets under its administration. According to article 13 of the Federal Revenue Law,¹⁵⁷ SAE may charge up to 7 per cent of the proceeds of a sale for administrative and sale expenses. In cases in which seized assets are sold, SAE manages these revenues through accounts that earn interest. Once those accounts have a final legal status, SAE can deduct its allotted percentage and deposit the remainder into a fund that consists of disposals of property owned by the Government, which is transferred to the treasury.¹⁵⁸

Finally, as a third source of funding, SAE can lease assets and charge fees for this action.

In **New Zealand**, the asset management office receives a funding allocation directly from the Government. In addition, the Official Assignee Compliance Unit is entitled to recover all costs, charges and expenses properly incurred and may charge a fee for work undertaken.¹⁵⁹ All frozen, seized or forfeited funds are accounted for through a trust accounting system.

¹⁵⁷ Even though this law is enacted every year, art. 13 alludes to funding for SAE.

¹⁵⁸ Art. 11 of the Federation Revenue Law.

¹⁵⁹ The fee provided for in the Regulations to the Act is remuneration of \$230 per hour or part of an hour.

C. ASSET REGISTRATION, DATABASES AND DATA MANAGEMENT

At the interim management stage, keeping track of the costs incurred in the management and maintenance of seized assets to ensure that such costs do not exceed the value that may ultimately be recovered from realization of the asset is a concern for many countries. At the confiscation stage, the effective execution of confiscation orders is often bedevilled by a lack of proper information management.

Accurate information about who is liable to pay in terms of the order, the amount that has to be recovered, the assets for which the order relates and accounting for any payments made in satisfaction of the order is necessary to effectively manage the execution process but also to enhance accountability of the system. Because the State is often the default beneficiary of confiscation orders, the property to which the order relates must be subjected to government accounting and auditing requirements. Failure to ensure that victims are compensated and that assets made available for reuse are properly monitored can damage the credibility of the asset recovery programme. Allegations of misuse and mismanagement will inevitably surface if serious attention is not given upfront to this accounting function and may undermine the credibility of and confidence in the programme.

Information management is particularly challenging when multiple law enforcement bodies and other government departments are involved in seizure and disposal processes and where asset management capacity is spread over a vast geographical area. Confiscation orders are usually obtained by prosecutors or investigating magistrates. These functionaries, however, are not typically the ones charged with enforcement of such orders after the court has made a final determination. Government entities charged with the collection of criminal fines are often given this responsibility. Coordination between the different players becomes critical. In many countries, a central database has been introduced to support the collection process.

In the early stages of developing asset management capacity, countries have developed fairly rudimentary data-capturing and data-storage mechanisms. As the system matures, it becomes harder to maintain accurate record of all property subject to seizure and confiscation orders. The need to improve or develop ever-more sophisticated capacity to maintain, access and keep the data reliable and secure increases.

In September 2014, the Seized and Forfeited Asset Management Project of the Organization of American States undertook an analysis of systems for the collection of data on seized and forfeited assets of illicit origin among its members. The recommendations of the project are outlined in box 5, with some modifications.¹⁶⁰

In **France**, AGRASC created a unit (the registration department) composed of two staff members to manage its database. This tool was designed in-house and was formally validated by the National Committee for Data Processing and Civil Liberties (the French Data Protection Supervisor) in 2011 to comply with European Union directives on the protection of personal information. The registration department registers more than 1,000 cases each month. The data are obtained from the courts and verified by AGRASC staff to ensure accuracy. In 2015, more than 45,000 files and more than 86,000 assets (of all kinds) were entered into the database, including information relating to their characteristics, case number, identification details and the judicial file they link to. As the number of seized assets increased, the database presented some limitations; a new database was created, with the aim of improving statistics, facilitating the work of users and increasing the security process.

¹⁶⁰ The full text of the report, *Analysis of Systems for the Collection of Data on Seized and Forfeited Assets of Illicit Origin in the Member States of the OAS* is available at www.cicad.oas.org/.

Box 5

Recommendations of the Seized and Forfeited Asset Management Project of the Organization of American States

1. Information should be collected by a centralized agency.
2. Information should be collected in a centralized structured database.
3. All agencies involved in the process related to seized and forfeited assets (investigation, seizure, custody, administration and disposal agencies) should provide information on their activities, to be collected in the centralized database.
4. The information should be updated by specialized personnel. The ability to change information in the database should be granted only to authorized personnel.
5. Information should be collected in a customized database.
6. The information should cover all of the phases of the process related to seized and forfeited assets (investigation, seizure, custody, administration and disposal) and therefore be provided by the relevant agencies involved in each phase.
7. For each asset, a description should be available.
8. The updated total number of assets, total number of assets by description and by category should be publicly available.
9. The physical location of each asset should be recorded, specifying the country, state or region, city and address at the time of seizure.
10. The owner of the asset should be recorded, specifying the name, national identification document number (or the date of birth if a national identification document is not available) and nationality, if the owner is a natural person and the name, national identification number and address if the owner is a legal person.
11. A serial number should be attributed to each asset when taken into custody.
12. If the asset has a specific serial number (vehicle registration plate, etc.), it should be recorded when the asset is taken into custody.
13. The condition of the asset at the time of seizure should be recorded.
14. The value of the asset at the time of seizure should be recorded in both local currency and US dollars. The valuation should be carried out by a specialized agent, based on the market value of the asset.

In **South Africa**, a central database with basic information on seized assets and their ownership was developed and updated by staff in the Asset Forfeiture Unit (the Enforcement Section) within the prosecuting authority. The misspelling of names of people involved in cases or categories of assets became a major challenge for those capturing the data. To facilitate data entry, drop-down lists from which to choose the respective categories of assets were developed. To easily verify assets during audits and to prevent irregularities in their use and disposal, an electronic system with bar codes attached to all seized assets is now used.

In **Colombia**, the country's database Matrix is managed and updated by personnel in the asset management office (Society for Special Assets). They catalogue the assets under such categories as rural and urban, immovable and movable, vehicles, companies and chemical substances. The inventory control was designed with support of the Prosecutor's Office and contains basic identifying information on each asset, including photographic records and the status of the assets in the judicial process. Due to the high volume of assets, there are 35 people responsible for the management and update of the database. For transparency purposes, all documents associated with the assets are scanned and kept within the Society for Special Assets office.

In the **United States**, the Consolidated Asset Tracking System that was launched in 1993 is maintained by the Asset Forfeiture Management staff. The system was designed to track seized assets throughout the forfeiture life cycle, which includes seizure, custody,

notification, forfeiture, claims, petitions, equitable sharing, official use and disposal of assets seized by federal law enforcement agencies.

In **Brazil**, in the absence of a centralized asset management office, the National Seized Assets database is maintained by the National Council of Justice, which is the body in charge of the administrative, financial and functional control of the judiciary. The National Council of Justice adopted a regulation requiring each judge in charge of a criminal proceeding in which a seizure occurs to record information about the assets under their control as soon as the seizure takes place and to update the information as necessary. Only assets with economic value must be registered. The database contains information on assets with economic value as well as assets that have no economic value, although this tends to “pollute” the database. There are also challenges relating to: the absence of standardized taxonomy, not all the data are recorded and the staff recording the assets are not adequately trained. Although by no means perfect, the database is an important tool for managing assets and providing information on the needs of the asset recovery system for purposes of planning improvements to the system.

In **Costa Rica**, the national database is considered secure and is operated in line with the principles of transparency and efficiency. It is updated in accordance with guidelines that are consolidated in a dedicated handbook. The national database was developed using freely available software.

In **Peru**, CONABI used a portion of its institutional budget to commission phase one (of three phases) of a property management computer platform to consolidate the National Registry of Seized Property (RENABI) as a reliable reference source to share data among state institutions collaborating in the fight against organized crime. In 2015, at an award ceremony organized by Updated Citizens (Ciudadanos al Día, a private non-profit association), in collaboration with the Ombudsman Office, Universidad del Pacífico and Grupo El Comercio awarded a Good Public Management Practices Certification for the Seized Property Management System. The main purpose of standardizing the information on property managed by CONABI as recorded in the RENABI is to make available a real-time information and reference system to provide for the more efficient management of seized property.

D. SKILL AND CAPACITY REQUIREMENTS

The same type of capacities, functions and expertise are regularly required, regardless of the type of asset management system in place.

Asset inspection, appraisal and valuation expertise or services: Valuations often require specialist expertise, which comes at a price. It is often the case that the more specialized the asset, the higher the cost of the appraisal. If, at face value, the asset is damaged or in a derelict state, it is important to carefully consider incurring such costs. Staff employed by a specialist or dedicated asset management office can become skilled at making the appropriate assessments regarding expenditure on valuations and may even develop in-house expertise to conduct valuations using readily accessible tools, such as vehicle valuation guides. Policies and regulations guiding such decisions can be developed once the asset management office has gained experience in performing this function.

Inventory and recordkeeping: Keeping detailed records of the nature, condition, location, value, ownership, stage in the confiscation process and other significant features of restrained and realized property greatly facilitates the efficient management of seized assets. An asset management office can intervene to release an asset to the owner, to sell it or take other action if the cost of managing it begins to exceed the value of the asset. Centralized recordkeeping and monitoring of seized assets across agencies has enabled the asset management office in **Belgium** and in **the Netherlands** to significantly reduce their costs for interim management. Many countries tend to look for a pre-packaged database that will solve all of its data management problems. However, countries that operate with a well-functioning, accurate and up-to-date database are clear that no such solution exists. The skills of an experienced developer in discussion and cooperation

with all the parties who will be required to provide data into the system are needed so that the design takes into account realities of that particular country. The persons who will manage the database on behalf of their principals will need to inform the developer of their expectations and the kinds of reports they will require the system to generate. While the original developer will not need to be retained, sufficiently skilled IT personnel will be needed to manage the system on a day-to-day basis.

Storage and transportation facilities: Particular types of movable assets will need specialized storage, such as safety deposit boxes for high-end valuables, a garage or pound for vehicles, a hangar for aircraft and dry dock facilities for vessels. These facilities can be procured on an asset-by-asset basis, and storage capacity can be increased as the asset recovery programme expands. Only once the programme has expanded significantly does it make sense to begin acquiring dedicated storage facilities to benefit from economies of scale. It may never make financial sense to procure certain types of storage facilities, such as hangar space, on a permanent basis if the prospect of regularly seizing aircraft is minimal. In the early days of an asset management programme, facilities used by law enforcement agencies, investigative judges or court support staff to store evidence pending its use at trial can be secured for interim management purposes. Care should be taken to ensure that such facilities are suitable to ensure preservation of the value of assets.

Procuring specialist skills: To manage complex assets (management receivers, trustees and judicial managers), auctioneers, estate agents, valuers and other service providers will be needed to assist or advise on disposal practices, marketing and advertising services. The processes for procuring these services are usually set out in government public procurement laws and policies. They must be complied with, unless and until special procedures are designed for asset management cases. More mature asset management programmes have procurement procedures tailored to the needs of criminal asset management. Procuring and managing outside contractors and disposal services are features of interim management programmes and must be part of the asset management process, regardless of the type of asset management system a country adopts. Emerging asset management programmes can often procure these services from within government, relying on others to deal with the complex procurement requirements until enough assets are seized, frozen or confiscated to justify a tailored process.

Budget: The interim management of assets will require a budget that can be accessed from the outset. If the law provides for the establishment of an asset recovery fund into which the proceeds of confiscated property will be deposited and from which the asset management programme is to be funded, it will take time before such funds are able to sustain a developing asset recovery programme. The management of assets is seldom budgeted for in the early stages—the expectation being that the agency responsible for asset recovery, the police, prosecuting authority or judiciary will be in a position to fund the programme. Until sufficient funds are set aside or resources are committed to setting up effective organizational infrastructure to support asset management, the asset recovery programme will be constrained.

Allocating recovered proceeds to the national revenue fund to meet general government priorities is usually more cost-effective than permitting recovered proceeds to be allocated through a process that favours programmes that cater for crime prevention and social reuse. Special funds typically require infrastructure to be set up to manage and account for deposits received into the fund and transfers made from the fund. Where the asset recovery law is silent on the purposes the recovered funds may be used for, mechanisms must be put in place to ensure the fair and transparent allocation of the funds. Oversight, transparency and auditing requirements are critical to maintaining the integrity of the fund and accountability for its contents.

It is important that the asset management office keeps track of the costs expended on asset management and that these costs are publicly available to increase the transparency and accountability of the system.

Pre-seizure advice: Before approaching a judicial authority with a request for permission to seize a particular asset, particularly in the case of complex assets, pre-seizure planning is important. The asset management office should have the capacity to provide advice and support to law enforcement officials on questions relating to the costs of storage, maintenance, security and disposal of the asset.

In the case of productive assets, such as rental earned from real estate or operating a business, the asset management office needs to have the capacity to take law enforcement officials through a planning process that identifies the risks and advise on mitigation measures. The Organization of American States produced a *Guide for the Management of Seized Businesses* that provides guidance on questions that need to be considered before seizing a business. The asset management offices in **Canada, France** and the **United States** emphasize advertising this service among law enforcement officials.

E. CONCLUSION

The institutional responses to the management and disposal of seized and confiscated property vary greatly from country to country. The following broad categories emerged from the review of the approaches adopted by countries participating in this study.

- Some countries locate their asset management capacity within law enforcement, combining the functions of managing seized and confiscated property with other law enforcement functions.
- Some countries locate the capacity to deal with criminal property within an existing public sector entity with experience in dealing with the management and disposal of assets, particularly entities tasked with regulating insolvencies or bankruptcies.
- And other countries created a new stand-alone entity to deal exclusively with the management of seized and confiscated property derived from crime; they also separated the asset management function from more conventional law enforcement functions.

Most jurisdictions have found it necessary to rely on private sector players to provide some of the specialized skill sets required to store and manage certain types of assets, either by means of:

- the use of court-appointed asset managers or
- the use of subcontractors procured by the asset management office to provide a range of services.

Regardless of the location of the asset management capacity, the costs of managing and disposing of seized and confiscated assets can be a major challenge for governments, particularly for countries with other pressing budgetary priorities. Governments have selected from a range of funding options to reduce the burden on the State. Several governments have provided in the asset recovery legislation for the asset recovery capacity to be funded from recovered proceeds. Many countries share the objective that these bodies should become self-funding over time. Some have achieved self-funded status within a short period of operation.

Key among the functions an asset management capacity will be required to perform is recordkeeping on assets under restraint or confiscated. An electronic database to improve information management is often the first priority of an asset management capacity because it allows for a proper understanding of the requirements of the system, making it easier to plan to meet the needs. It is often the starting point for designing any asset management system.

V. INTERNATIONAL COOPERATION AND THE RETURN OF STOLEN ASSETS

The focus of this study is on arrangements (both legislative and institutional) at the domestic level to deal with the management and disposal of seized and confiscated property derived from crime. The transfer or return of property of illicit origin in terms of a country's mutual legal assistance obligations are not specifically addressed, however. A well-functioning domestic asset management and disposal capacity should be able to meet the country's international obligations to provide asset management and disposal assistance to other jurisdictions when requested to do so—either by preserving and managing assets before returning them to other jurisdictions or by disposing of assets returned to it by other jurisdictions.

The management and disposal of assets returned from other jurisdictions will be part of a separate, although related, study by UNODC. Several of the aspects covered in this study on domestic asset management will guide the efforts to develop good practices on the management of returned assets, as well as asset return itself.

While some of the measures listed in the study may be well suited for domestic application, they may raise concerns in the context of international cooperation in asset recovery cases.

One of the issues that requires additional consideration in the context of the management and disposal of returned assets relates to the costs incurred in the management of seized assets. Article 57, paragraph 4 of the Convention against Corruption provides for the requested State involved in an asset recovery case to deduct “reasonable expenses incurred in investigations, prosecutions or judicial proceedings leading to the return or disposition of confiscated property”. Reasonable expenses cover those costs and expenses that national authorities might realistically have incurred and not unspecified charges, such as a finder's fee. Countries are encouraged to consult on likely expenses and to agree on how they will be covered.¹⁶¹ This may be done between two countries on a case-by-case basis or in terms of a bilateral or multilateral agreement. It will be critical to the successful return of confiscated property to consult early on regarding such questions as pre-confiscation sale or use or how costs of interim measures can be kept to a minimum without compromising the availability of the asset for confiscation.

The deduction of expenses is distinct from compensating a country for its contribution to the investigation and prosecution of an asset recovery case from the proceeds recovered. The deduction of expenses is about reimbursing a country for actual expenses incurred in the management and disposal process, such as the cost of storage, maintenance or transfer of property. Separating the asset management function from the investigation and prosecution functions can facilitate calculating the expenses incurred in management and disposal as opposed to the contribution of law enforcement to the asset recovery process for purposes of asset sharing. While this is provided for in the Convention against Transnational Organized Crime and several other United Nations Conventions,¹⁶² the Convention against Corruption does not specifically refer to asset

¹⁶¹ See *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, p. 266, para. 788.

¹⁶² The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 25 May 1988, art. 5(5)(b)(ii); International Convention for the Suppression of the Financing of Terrorism, 9 December 1999, art. 8 (3); United Nations Convention against Transnational Organized Crime, 15 November 2000, art. 14 (3). Different from the United Nations Convention against Corruption, the United Nations Convention against Transnational Organized Crime establishes the principle of asset sharing and the restitution to victims. Based on that Convention, UNODC developed a model agreement on international asset sharing which was endorsed by the United Nations Crime Commission in May 2005 and by the United Nations General Assembly in December 2005. This model on sharing confiscated proceeds of crime can be used by countries to strengthen international cooperation in the confiscation and disposal of illicit proceeds.

sharing. Agreements concluded under article 57, paragraph 5 may include such compensation.

The return of stolen assets also raises a series of policy issues regarding how to use the returned funds to support development goals and how to keep the public informed about their use.¹⁶³ The Convention against Corruption, which recognizes the return of assets as a fundamental principle, provides the following framework.

Article 57 paragraph 3 requires that the requested State party shall: (a) In the case of embezzlement of public funds or of laundering of embezzled public funds ... return the confiscated property to the requesting State party; (b) In the case of proceeds of any other offence covered by this Convention ... return the confiscated property to the requesting State party, when the requesting State party reasonably establishes its prior ownership of such confiscated property ...; and (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.” Paragraph 5 (article 57) further states that “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.”

In addition to the special agreements or arrangements referred to in article 57, paragraph 5, the individuals and entities designated as beneficiaries of confiscated property at the domestic level are typically specified in domestic legislation. Consequently, strengthening domestic policy, legal frameworks and institutional capacity to manage and dispose of seized and confiscated property may in the long term obviate the need for ad hoc special agreements and arrangements between States.

The experience gained on article 57 of the Convention against Corruption establishes that proceeds of embezzlement of public funds should be returned upon confiscation to the requesting State party in a manner that is consistent with the Convention against Corruption, whereas for the proceeds of other offences, a differentiating regime has been adopted that takes into account damages, prior ownership and victims. A practise is emerging in which the returned funds are made available to benefit communities adversely affected by the initial corruption.¹⁶⁴ This process, similar to the social reuse experience described in reference to Italy previously, can have considerable impact on restoring faith in the criminal justice system and the government.

These and other aspects related to the management and disposal of recovered and returned assets, including in support of sustainable development, will form part of the work UNODC is planning to conduct towards developing good practices on asset return. This work is based on target 16.4 of the Sustainable Development Goals to strengthen the recovery and return of stolen assets and the mandate by the Addis Ababa Action Agenda encouraging the international community “to develop good practices on asset return”.

The forthcoming work will focus on international asset recovery cases, although the management of assets confiscated in domestic cases will be addressed insofar as it provides the legal and institutional framework for international returns. The aim is to develop a directory of cases as well as a set of good practices that capture effective approaches and provide options for informed decisions on what special considerations should be applied when (i) managing assets pending return, (ii) negotiating agreements for returning assets and (iii) considering the final disposal of returned assets.

¹⁶³ An analytical framework for addressing the distinct policy questions and practical considerations are addressed in a StAR publication, *Management of Returned Assets: Policy Considerations*.

¹⁶⁴ The Bota Project in Kazakhstan is one example of this kind of social reuse project. BOTA Foundation, a partnership of Kazakh civil society organizations and the governments of **Kazakhstan, Switzerland** and the **United States** managed the return of more than \$115 million of disputed assets to Kazakhstan, which was used to improve the lives of vulnerable children and youth suffering from poverty.

VI. CONCLUSIONS

This study presents the experience of 64 countries on the effective management and disposal of seized and confiscated assets. It captures experience from all geographical regions, different legal systems and countries of different levels of development. Despite the diversity among these countries, some trends and common experiences emerge. Although not exhaustive, the following areas would lend themselves to further discussion on good practices.

(a) With regard to the administration of assets prior to a final confiscation judgment:

- The possibility of non-judicial authorities issuing urgent freezing orders.
- Flexible legislation offering a choice between freezing and seizure orders and providing wide discretion to tailor appropriate orders to a specific case.
- Dedicating sufficient capacity to pre-seizure planning, particularly to evaluate the costs and risks of restraining assets.
- Freezing orders that leave the asset under control of the owner and pose restrictions on its use.
- Pre-confiscation (or anticipated) sale with the consent of the owner and that of the agency responsible for enforcing the seizure order.
- Pre-confiscation (or anticipated) sale without the consent of the owner in defined circumstances, in accordance with the principles of national legislation.
- Mechanisms for the protection of third parties during the interim order.

No common trend emerged on the pre-confiscation (or interim) use of an asset. What was reported involved guarantees, a compensation or a damage claim in the event of deterioration of assets due to the interim use.

Many approaches were reported for the possible distinction between legitimate third parties and those associated with the suspect. The identification of good practices and guidelines in this area would require further systematization and discussion.

(b) With regard to the enforcement of confiscation orders and the disposal of confiscated assets:

- Especially in value-based confiscation, legislation that provides for realization measures that go beyond civil collection.
- For object-based confiscation, legislation or guidelines that establish criteria to use to decide whether to retain or sell an asset.
- Articulation in the legislation expressing the fundamental policy choice for the disposal of confiscated assets: allocating them to the national revenue fund or to specific programmes or a special fund.
- If proceeds of confiscation orders are to be paid into a special fund: adoption of specific rules for its use, infrastructure, management, oversight, transparency and auditing requirements.
- If confiscated proceeds are used for law enforcement projects: adoption of tight controls and clear policies to avoid direct links between seized assets and rewards provided to law enforcement, to avoid negative incentives.
- If confiscated proceeds are applied for social reuse in affected communities: establishment of infrastructure to support, monitor and account for such projects.

Priorities for the use of confiscated assets include funding the asset recovery office, compensating victims and social reuse. Solutions depend on the specific needs of communities and societies in which these assets are confiscated. Rather than good practices, policy considerations could be extracted from the available country experience

in the next step to inform decisions on the required infrastructure and capacity for each solution.

With regard to the institutional structure, the following broad categories emerged and criteria should be further discussed to allow countries to make informed policy choices:

- asset management capacity within law enforcement
- asset management capacity within an existing public sector entity that has experience in dealing with the management and disposal of assets
- a stand-alone entity for the management of seized and confiscated property.

Further discussions on possible good practices could cover the following areas:

- the use of private sector players (court-appointed asset managers or subcontractors)
 - systems that allow asset recovery offices and asset management offices to achieve self-funded status
 - electronic databases to improve information management on restrained and confiscated property.
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