

# *The International Sharing Program*

## *Fostering International Cooperation*

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**D**uring the past few years, the DEA has received numerous requests from foreign countries through their respective investigative and prosecutorial agencies to participate in the U.S. Department of Justice's sharing program. This article presents an introduction to the substantive and procedural aspects of the

international forfeiture and sharing program.

### **Legislative History**

In 1992, Congress enacted Title 28, U.S. Code, Section 1355(b)(2), which vests U.S. district courts with extraterritorial jurisdiction over assets located abroad.<sup>1</sup> The assertion of U.S. jurisdiction under this

statute, by the filing of a civil forfeiture action, depends completely upon the cooperation of the foreign country in which the property is located. If the assets are not repatriated to the United States prior to or during a judicial forfeiture, then the repatriation request should be suspended until a final order of forfeiture is entered. Once the forfeiture

judgment is entered and final, it should be transmitted via the U.S. Central Authority, the Office of International Affairs, U.S. Department of Justice, to the foreign sovereign for enforcement or repatriation of the asset.

Criminal forfeiture cases are somewhat different than civil forfeitures because they are actions brought against defendants, not their property. Upon conviction, all of the assets named in the indictment may be included in the forfeiture order. Unless the defendants agree to the repatriation of the assets (i.e., through a plea agreement), or, unless the foreign sovereign is willing to enforce the (criminal or civil) final order of forfeiture, the United States has little chance of successfully securing physical custody of the asset and may never realize the value of the asset through the forfeiture process.

In 1986, Congress enacted Title 18, U.S. Code, Section 981(a)(1)(B), which enabled the United States to provide forfeiture assistance to foreign governments as required by its obligations under the United Nations Convention Against Illicit Narcotics Trafficking of Narcotic Drugs and Psychotropic Substances (“Vienna Convention”). The Vienna Convention was drafted in response to the increasing frequency and complexity of international drug-related money laundering. Section 981(a)(1)(B) authorizes the United States to seize and forfeit assets within its borders that represent the proceeds of drug-related felonies committed abroad even where there has not been a violation of domestic law. U.S. law currently does not authorize the seizure and forfeiture of instrumentalities used or intended to be used in violation of a foreign drug law.

In addition, proceeds from drug trafficking can be forfeited under the recently enacted Civil Asset Forfeiture Reform Act of 2000 (“CAFRA”). Pursuant to an amendment to Title 18, U.S. Code, Section 981(a)(1)(C), the proceeds of all specified unlawful activities will be directly forfeitable, including Title 18, U.S. Code, Section 1956(c)(7)(B)(i) offenses in which individuals commit crimes against a foreign nation involving the manufacturing, importation, or sale of controlled substances.

### Asset Sharing

It is the policy and practice of the United States, pursuant to governing statutory authority, to share the proceeds of successful forfeiture actions with countries that make possible or substantially facilitate the forfeiture of assets under U.S. law. Pursuant to Title 18, U.S. Code, Section 981(i) (money laundering offenses) and Title 21, U.S. Code, Section 881(e)(1)(E) (drug trafficking offenses), asset sharing is a discretionary authority vested in the Attorney General, the Secretary of Treasury, or their designees to transfer a percentage of the net forfeited assets or the proceeds of the sale of any forfeited property to any foreign country that participated directly or indirectly in the seizure or forfeiture of property. Such a transfer must be—

- agreed to by the Secretary of State;
- authorized in an international agreement between the United States and the foreign country; and



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- made to a country which, if applicable, has been certified under Title 22, U.S. Code, Section 2291(j).<sup>2</sup>

A Mutual Legal Assistance Treaty (MLAT) is the typical agreement between the United States and other countries that will provide the basis for legal assistance in drug and other criminal matters, including international asset sharing. In addition, executive agreements, which are not treaties and, therefore, do not require Senate approval, are narrower in scope than MLATs and also can provide for international asset sharing. Finally, if neither an MLAT nor an executive agreement exists, the State Department can draft a case-specific agreement with a foreign country to satisfy the statutory requirements governing the international transfer of forfeited funds. Thus, an existing international agreement is not necessary in order to effectuate sharing with a foreign country.

### International Sharing Procedures

A portion of the net forfeited property, or the proceeds from such property, may be transferred to a foreign government (not a foreign police agency<sup>3</sup>), as reflected by its participation in the investigation and forfeiture of the asset. U.S. foreign counterparts must understand that the investigative agency and U.S. agents with whom they are dealing cannot bind the United States to transfer any particular amount of sharing because the ultimate decision rests with the Attorney General and the Secretary of State, or their designees.

While a foreign government may submit a sharing request under an applicable MLAT, sharing agreement, or through diplomatic channels, the foreign investigative agency is not required to submit any memoranda requesting a share of the forfeited assets. Instead, the responsibility to prepare the “justification memorandum” explaining the assistance rendered by the foreign law enforcement entity and recommending a sharing percentage rests with the case agent and must be signed by the special agent in charge or country attaché.

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Similarly, the foreign government need not submit a Request for Equitable Sharing (form DAG-71), although there should be a notation on the Decision Form for Transfer of Federally Forfeited Property (DAG-72) indicating that an international sharing request has been or will be submitted.

When a case involves multiple assets, the Asset Forfeiture and Money Laundering Section

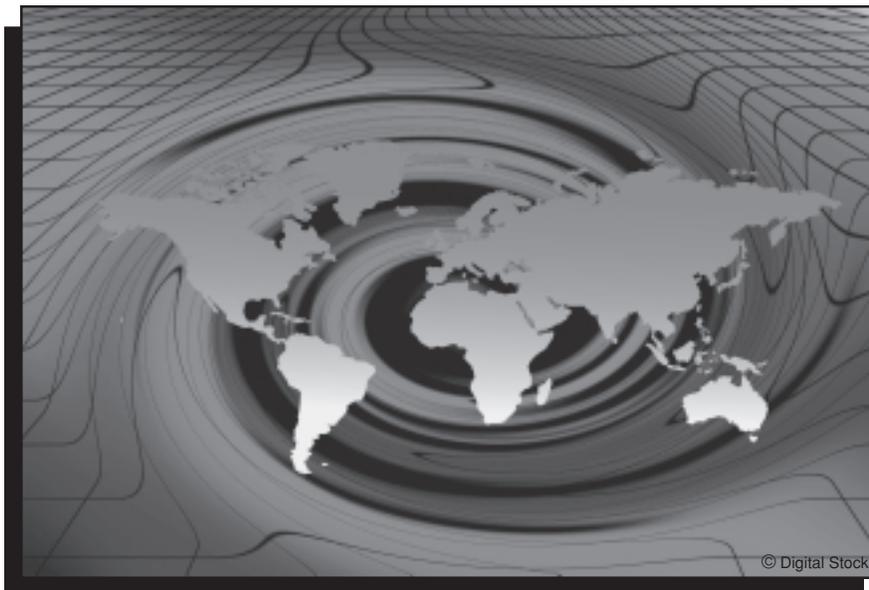
(AFMLS), Criminal Division, U.S. Department of Justice strongly urges submitting one sharing recommendation covering all assets that were forfeited in the case. But, if there are multiple assets and the foreign government contributes a different amount of assistance for each asset seizure, the request for sharing will still be processed.<sup>4</sup>

The justification memorandum must detail all of the pertinent case information such as—

- specific explanation of the assistance provided by the foreign country, type of conditions surrounding the case, and length of participation;
- whether any assistance was received from domestic law enforcement agencies; and
- whether confidential informants were used and awards are anticipated.<sup>5</sup>

If the DEA is the seizing agency, the justification memorandum is then forwarded to the chief of the Asset Forfeiture Section (AFS). If the assets were forfeited administratively, the AFS sends its recommendation directly to the AFMLS. If the assets were forfeited judicially, the AFS sends its recommendation to the responsible U.S. Attorney’s Office (USAO) so that the DEA’s recommendation can be incorporated with the USAO’s recommendation and be forwarded to the AFMLS.

The AFMLS reviews the request and forwards its recommendation to the Deputy Attorney General (DAG).<sup>6</sup> In an effort to maintain parity and consistency in



the Departments of Justice and Treasury international sharing programs, the AFMLS also notifies the Treasury Department about the pending request. Once the DAG approves the recommendation, the AFMLS forwards it to the State Department for its concurrence.

The Departments of Justice and Treasury entered into a Memorandum of Understanding (MOU) on May 4, 1995, to provide guidance on what percentage is appropriate to recommend for a foreign government. The MOU outlines three percentage-based ranges. The MOU recommends a sharing of 50 percent or more to foreign governments that—

- repatriate forfeitable assets to the United States without the cooperation of a signatory authority or property owner;
- relinquish or waive the option of proceeding against the defendants or their property to allow the United States to forfeit the assets;

- defend against, in litigation brought by owners, claimants, and third parties, attempts to impede the foreign government's efforts to assist the United States; or
- provide the United States with all, or substantially all, of the evidence needed to prevail in a domestic forfeiture action against property deposited in the United States.<sup>7</sup>

The MOU recommends a sharing of 40-50 percent for foreign governments that provide important assistance, although not necessarily essential to the successful forfeiture action. These foreign governments should—

- enforce a United States forfeiture order and repatriate the assets;
- freeze assets at the request of the United States and lift the freeze to enable the witness defendant to repatriate the assets to the United States;

- return the property for forfeiture pursuant to an extradition request;
- expend substantial law enforcement resources to assist the United States; or
- engage in law enforcement activity that places foreign law enforcement personnel in physical danger.

The MOU recommends a sharing of up to 40 percent to foreign governments that—

- disclose information that leads to a U.S. investigation resulting in a successful forfeiture action;
- provide bank or other financial records that allow the United States to determine the location and extent of forfeitable wealth;
- support efforts of the United States to persuade foreign banks to take steps that facilitate the forfeiture of account proceeds in the United States;
- assist in the service of process or conduct discovery;
- permit foreign law enforcement officials to testify at U.S. forfeiture proceedings; or
- allow foreign territory to be used in an undercover operation involving U.S. law enforcement officials that ultimately leads to the forfeiture of assets.

As more countries enact sharing legislation, the United States increasingly is submitting requests to other countries for a share of assets

forfeited with U.S. investigative or judicial assistance. Similar to the procedures set forth above, the country attaché or special agent in charge must prepare a memorandum to the AFS. The AFS will then draft a memorandum to the AFMLS which, if there is an applicable treaty or agreement, will forward its request to the Office of International Affairs for transmission to the foreign country.

### Uses of Shared Property

Unlike the policy underlying domestic equitable sharing, there is no statutory or regulatory authority by which the United States can insist that a foreign country use shared property or proceeds in any particular manner or allocate them to any particular government component. Accordingly, as a general rule, the United States does not place conditions or stipulations on how the recipient country must use the proceeds.<sup>8</sup>

### Conclusion

The international sharing program is a critical tool to develop and foster relationships with foreign governments and their respective law enforcement agencies. If a U.S. law enforcement agency requests and receives assistance from a foreign counterpart that results in the seizure and ultimate forfeiture of assets, case agents should not let that assistance go unrecognized. They should draft a memorandum justifying the transfer of a percentage of the net forfeited proceeds to the assisting government. The justification memorandum should be submitted before the forfeiture is complete and should accompany

the domestic sharing package (DAG 71 and 72) so that the reviewing officials will be aware of all domestic sharing requests and international sharing recommendations to the forfeited property.

The nature of large-scale drug investigations routinely requires foreign assistance because illicit narcotics are typically manufactured or produced in one country and distributed in another. Moreover, shipment routes may transgress the territorial boundaries of several other foreign countries.

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Therefore, successful criminal prosecutions and civil forfeiture actions will depend invariably on international cooperation. Where countries have worked together, it is fair that they share in the fruits of their efforts. U.S. law enforcement officials have an obligation to ensure that those cooperating nations receive their fair share. ♦

### Endnotes

<sup>1</sup> In such actions, the United States will require assistance from the foreign authorities to perfect the court's *in rem* jurisdiction over the property by: restraining the property, providing notice to all interested parties, arranging for foreign publication, and most

important, recognition of a U.S. forfeiture judgment.

<sup>2</sup> This section requires annual certification that a specific country has cooperated fully with the United States, has taken adequate steps to achieve full compliance with the goals and objectives established by the Vienna Convention, or that such certification is warranted as a vital interest of the United States.

<sup>3</sup> The statute provides for government-to-government sharing. Consequently, the United States does not share with foreign police agencies unless the sharing agreement or MLAT authorizes such a sharing.

<sup>4</sup> Neither the Department of Justice nor the Department of State wants to seek approval from high level officials for multiple assets for the same foreign government in the same case in a piecemeal fashion. Moreover, there is a greater likelihood that if recommendations are processed individually for assets in the same case, the sharing allocation may fall below the \$10,000 threshold that the State Department has imposed for processing international requests.

<sup>5</sup> Pursuant to *A Guide to Equitable Sharing of Federally Forfeited Property for State and Local Law Enforcement Agencies* (March 1994), the net proceeds available for international and domestic sharing are calculated after the expenses, such as awards to informants, are deducted from the “gross receipts,” Chapter IX, Section A. The available federal share from which domestic sharing is calculated is determined after the international sharing has been allocated.

<sup>6</sup> *Id.*, the ultimate determination of the actual percentage shared by the Department of Justice is at the sole discretion of the Attorney General or a designee.

<sup>7</sup> It is highly unusual for the United States to share more than 50 percent with any one country in a case. Restitution to foreign victims is an acceptable basis for recommending the maximum percentage.

<sup>8</sup> There is the possibility of requesting the transferred amount to be used specifically for anti-narcotics law enforcement efforts. Approval of the recommendation, however, is not routine and requires Congressional notification.

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*Law enforcement officers of other than federal jurisdiction who are interested in this article should consult their legal advisors. Some police procedures ruled permissible under federal constitutional law are of questionable legality under state law or are not permitted at all.*

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