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“The Recovery of Criminal Proceeds Generated In One Nation and Found in Another”

Stefan D. Cassella, Assistant Chief
Asset Forfeiture and Money Laundering Section
U.S. Department of Justice

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I. INTRODUCTION

It is now common for criminals to generate proceeds of crime in one country and to transfer those proceeds to another country. For example, drug traffickers who generate enormous profits from the sale of cocaine and other controlled substances in the United States will employ professional money launderers to move the money from the U.S. to financial institutions abroad.

How the money gets there varies from case to case: it may be deposited into a bank and sent overseas by wire; it may be converted into cashiers checks, money orders, travelers checks or other monetary instruments that are then sent across the border by mail or by courier; it may be converted into merchandise that is exported to a foreign country and then turned back into cash when the goods are sold; or it may simply be smuggled out of the country as bulk cash. The latter, it turns out, is an increasingly popular form of money laundering, in that it avoids the creation of the paper trail that is generated by the various currency transaction reporting requirements now in effect in the United States.

What happens to the money once it is outside of the United States also varies from case to case. It may simply go into a bank account that the criminal or his family controls; it may be stored in a safe deposit box, or used by the drug trafficker to invest in land, domestic securities, businesses, or personal items; or it may be sold, though the Black Market Currency Exchange, to a third party who then uses it to make his own investments, or to pay for foreign imports.

In the latter case, of course, the money derived from the original criminal offense no longer belongs to the drug trafficker, but to a third party who has wittingly or unwittingly allowed the criminal to wash his dirty money by trading his

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1 The views expressed in this paper are solely those of the author and do not necessarily reflect the views or policies of the United States or any of its agencies.
U.S. dollars for local currency. This, as will be seen, makes recovery of the criminal proceeds by law enforcement doubly difficult.

In any event, the point is this: whatever the mechanism, the proceeds of crimes committed in the United States frequently find their way into foreign bank accounts or foreign assets held by foreign criminals, or into accounts held by third parties who acquired the money through a money broker in exchange for local currency, or even into the accounts of fourth parties who received it in exchange for goods shipped to the third party who needed U.S. dollars to pay for foreign imports.

Of course, there is a mirror-image to this problem: There are criminals all over the world, not only drug traffickers but corrupt public officials, swindlers, and traffickers in human cargo, who hide the money looted from the public treasury, or taken from an innocent victim, by placing it in a bank account or investing in land or securities in the United States. In both cases, the question is how do we recover the money while taking into account the rights of possibly innocent persons into whose possession the money may have passed.

**Good will is not enough**

There is an international consensus that countries must cooperate with each other to address the globalization of money laundering. But good will and good intentions are not enough. There have to be in place, in each country, judicial procedures setting forth what must be done when one country asks another to help it in recovering the proceeds of crime. Right now, there are no such procedures, which is causing enormous problems for law enforcement.

It must be understood at the outset that even if law enforcement in one country is successful in locating criminal proceeds in another country -- in a foreign bank account, for example -- it must seek the cooperation of the foreign jurisdiction in seizing or restraining the property. While criminals can move assets across international borders with reckless abandon, no country can act unilaterally to recover that money once it has left its jurisdiction. Mutual legal assistance between countries is required. But because our laws are so different, it is frequently impossible to obtain such assistance in time for it to be useful. Enormous obstacles block the way. For example, many countries will not recognize a request for assistance from the United States where the request is based on a U.S. civil forfeiture action against the property, simply because many
In the United States, civil forfeiture is a judicial proceeding for the condemnation or confiscation of the proceeds and instrumentalities of crime that requires proof of a criminal offense, but is filed separately from, and is not dependent upon, the criminal prosecution of any individual. In international cases, civil forfeiture is particularly useful where the person who committed the offense giving rise to the forfeiture is a fugitive, and thus is beyond the reach of the prosecutorial powers of the domestic courts.

In a celebrated case a few years ago called Operation Casablanca, the United States traced millions of dollars of drug money into bank accounts in 27 countries, from Italy to the Bahamas to Hong Kong. The Government then filed a civil action to forfeit those funds in Washington, D.C., and requested the foreign countries to freeze the assets while the U.S. proceeded with the litigation that would, in the end, lead to the issuance of forfeiture orders that the other countries could enforce. What happened next is a case study in what can go wrong when there are no accepted procedures in place for dealing with criminal proceeds that have crossed an international border. These are a few of the questions that arose:

1. When does a court in Country One (the country where criminal proceeds may have been generated) have jurisdiction to enter an order restraining or forfeiting property located in Country Two (where the proceeds have been moved)?

2. Does a court in Country Two have the authority to restrain property at the request of Country One, and if so, what is the procedure for doing so?

3. Once the money is frozen, will the forfeiture action proceed in Country One or Country Two?

4. If the action is to proceed in Country One, how will the prosecutors in that country learn the names and addresses of the interested parties who might want to oppose the forfeiture action, and who are therefore entitled to notice?

5. Where do those interested parties complain? Do they challenge the restraining order in Country Two, or do they have to make their claims in Country One where the case is pending?

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6. Once the court in Country One issues an order forfeiting the property that has been restrained in Country Two, will Country Two enforce the order?

7. Finally, who gets to keep the money once the forfeiture is complete?

In our cases, there has been massive dysfunctional confusion on all of these points. Some countries refuse to cooperate at all. Most want to cooperate but have no mechanism for freezing assets at the request of another State, or for giving notice, or for enforcing a foreign order. Some will freeze the money only to release it as soon as a third party complains that he was an innocent recipient of the funds.

The purpose of this paper is to describe the types of cases that, in the experience of U.S. law enforcement, have most often resulted in the deposit of criminal proceeds in foreign bank accounts or other avenues of investment; and to suggest legislative proposals for dealing with the issues that those cases have raised, when the United States has sought the assistance of other States in the recovery of those assets.

II. LAUNDERING DRUG MONEY THROUGH THE BLACK MARKET

One example of how criminal proceeds generated in the United States find their way into foreign bank accounts is through what we call the Black Market Peso Exchange. In a typical case, the drug trafficker arranges for his cash drug proceeds to be picked up on the street by a professional money launderer. Sometimes, the money launderer simply transfers or smuggles the dollars to a foreign account controlled by the drug trafficker, and is paid a fee for doing so. But most often, the drug trafficker wants to convert his dollars into local currency. In that case, the money launderer buys the dollars from the drug trafficker and then sells them on the Black Market to foreign persons who want U.S. dollars and will pay for them, at a discounted rate, with foreign currency. The beauty of the scheme is that the drug trafficker gets his foreign currency up front and is quickly out of the picture, while the criminal proceeds are deposited in the account of the third-party Black Market customer, or his designee.

The diagram below illustrates the flow of criminal proceeds through the Black Market. The diagram is like a pinwheel; the top half is the trafficker’s money; the bottom half is the third party’s money. The left half is dollars; the right half is foreign money.
On the top and bottom, the nature of the money changes: on the top half, as money moves left to right, the trafficker’s money turns from dollars to foreign currency. On the bottom half, as the money moves right to left, the third party’s money turns from foreign currency to dollars.

On the left and right, the ownership of the money changes: on the left side, as the money moves from top to bottom, the dollars change from the drug trafficker’s cash on the street to deposits in an account held by a third party, or his designee. On the right side, as the money moves from bottom to top, the foreign money changes from legitimate third-party assets to assets of a drug trafficker.

Where do we attack this problem? While it is sometimes possible to prosecute the money launderer himself, or even the drug trafficker, the most common technique is to follow the dollars on the left side of the diagram and attempt to seize the money from the third party’s destination account. In such cases, we may attempt to forfeit the money civilly, by filing an action against the third-party account, or we may get a criminal judgment against the drug trafficker or money broker and attempt to recover the money on the theory that the money still belongs to the defendant. In either case, the forfeiture action is directed
against assets nominally in the control of a third party who would have an opportunity to mount an “innocent owner” defense.

Operation Casablanca

In Operation Casablanca, an undercover operation involving drug dealers, money brokers and corrupt foreign bankers, there were numerous instances in which U.S. law enforcement was able to trace drug dollars from Los Angeles through a money broker’s account and on to a third and fourth party accounts in Italy, the Bahamas and numerous other places. In each of those instances, the United States filed a civil forfeiture action in the United States against the funds in the foreign bank account, and the accounts were frozen at our request by the foreign authorities.

In one instance, the United States traced over $1 million in drug proceeds to four bank accounts in Italy, including the sum of $101,725 to an account at Credito Italiano held in the name of Faro S.p.A. Faro is a jewelry manufacturer and exporter in Milan. One of its larger clients is Kevin’s of Bogota (Colombia), a jewelry retailer. According to Faro, the payment of $101,725 was partial payment of an invoice for “jeweler’s wares” issued on October 31, 1996. The payment was received January 24, 1997.

Apparently, Kevin’s of Bogota purchased the $101,725 on the Black Market from a money broker and directed the money broker to send the money to Faro to satisfy the outstanding invoice. Faro, of course, asserted that it had no way of knowing that the money received in payment on its invoice was derived from any illegal source, even though the payments came from an unidentified third party in the United States, and not from its customer in Colombia. Similar claims were made by the holders of the other three Italian bank accounts.

In another instance, the United States traced several hundred thousand dollars in drug money to five bank accounts in the Bahamas held by Colombian nationals. Again, the account holders asserted that they had acquired the money from a money broker and had no idea that it was derived from illegal activity of any kind.

In each of these cases, and numerous others arising out of the same investigation, the United States commenced a forfeiture action against the money in a United States court under domestic law, and asked that the accounts be frozen by the authorities in the other countries. But the absence of any
procedures governing such mutual legal assistance made international cooperation virtually impossible.

III. CREATING AN “ADAPTER” BETWEEN LEGAL SYSTEMS

The problem is that over the centuries, countries have evolved disparate and inconsistent legal systems that simply do not mesh. The procedure for seizing criminal proceeds in the United States has no application in Italy or the Bahamas; and the procedures in those countries carry no water in the United States. Thus, while a criminal, using 21st Century technology, can move money across international boundaries in an instant, any two countries would need months or years to extend each other the cooperation needed to freeze the money in place, and extinguish the criminal’s ownership interest in it – assuming they could do it at all.

The problem facing law enforcement is not unlike the problem facing the international traveler who finds himself in another country unable to use his laptop computer to access the internet because the shape of the electric plug is unfamiliar. To make the technology work, he needs an adapter. What I discuss below are proposals for specific legislation all countries might enact to regularize the process of providing mutual legal assistance in money laundering and asset forfeiture cases, thus beginning the process of building the adapter that would allow our disparate legal systems to mesh with each other.

A. Jurisdiction and Venue

First, each country should have a law making clear when its courts have jurisdiction to enter orders concerning property abroad. Stated simply, if a court has no jurisdiction over the property in another country, no order it issues concerning that property can have any effect.

The United States Congress attempted to address this problem in legislation enacted in 1992. Under 28 U.S.C. § 1355(b), the United States may file a forfeiture action to recover property involved in a crime committed in the U.S., even if the property is located abroad, by filing a lawsuit in the jurisdiction where the underlying crime took place, or in Washington, D.C.3

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3 28 U.S.C. Section 1355 provides as follows:

“(b)(1) A forfeiture action or proceeding may be brought in--
Courts have held, however, that this statutory authority alone is not sufficient to confer jurisdiction over the foreign property on the U.S. court. In addition, the United States must request that the authorities in the country where the property is located seize or restrain the property, and the property must in fact be seized or restrained by the foreign authority in response to the request. Only if such actions are taken in concert with one another will the court in the United States have jurisdiction over the foreign property.

The case law in the United States has evolved to fill in the gap in the statutory scheme on this issue, and to set forth what is required for a court in the United States to obtain jurisdiction over property located abroad so that the U.S. court may, eventually, issue a confiscation order. But it has taken nearly a decade since the first statute dealing with this issue was enacted to reach this point. Presumably, other countries have encountered similar problems in trying to establish the authority of their courts to enter orders relating to the confiscation of foreign assets. It may therefore be very helpful if statutes were enacted in each country spelling out specifically what steps each country must take in concert with the other to ensure that the courts in the State where the criminal proceeds were generated has jurisdiction to issue an order leading to the recovery of those assets.

“(A) the district court for the district in which any of the acts or omissions giving rise to the forfeiture occurred, or . . .

“(2) Whenever property subject to forfeiture under the laws of the United States is located in a foreign country, or has been detained or seized pursuant to legal process or competent authority of a foreign government, an action or proceeding for forfeiture may be brought as provided in paragraph (1), or in the United States District court for the District of Columbia.”

4 United States v. All Funds in Account Nos. 747.034/278 (Banco Espanol de Credito), ___ F. Supp.2d ___, 2001 WL 476194 (D.D.C. May 4, 2001) (court need not have physical possession of property to have jurisdiction to enter a forfeiture order; constructive control is sufficient; cooperation between U.S. and Spanish authorities relating to seizure of defendant funds, and agreement by Spain to transfer funds to the U.S. upon entry of forfeiture judgment, was sufficient to give court in U.S. constructive control); United States v. All Funds on Deposit, 856 F. Supp. 759 (E.D.N.Y. 1994) (section 1355(b)(2) gives district court in New York venue and subject matter jurisdiction over property in United Kingdom; court also has in rem jurisdiction because seizure by U.K. authorities at request of U.S. gives court constructive possession or control); aff’d, United States v. All Funds in Any Accounts Maintained in the Names of Meza, 63 F.3d 148 (2d Cir. 1995); United States v. All Funds in “The Anaya Trust” Account, 1997 WL 578662 (N.D. Cal. 1997) (court has in rem jurisdiction over property abroad under section 1355(b)(2) if the property has been seized by a foreign official cooperating with the U.S.).
For example, such a statute might say the following:

A court will have jurisdiction to issue an order for the condemnation, confiscation or forfeiture of the proceeds or instrumentalities of a criminal offense committed within its jurisdiction, even if the property is located in a Foreign State, if the Foreign State, acting at the request of the court, takes steps under the laws of the Foreign State to freeze, restrain or seize the property.

B. Authority to freeze at the request of another State.

If the courts in Country One need the assistance of the courts in Country Two to obtain jurisdiction over the property to be forfeited, then the courts in Country Two must have the authority to render that assistance. If they do not, the courts in Country One will never obtain jurisdiction over the property, and the case will be over before it begins.

In the two examples from Operation Casablanca, both Italy and the Bahamas reacted quickly to the request of the United States to freeze the identified drug proceeds; there was no lack of good will or mutual belief in the importance of recovering the proceeds of crime. But because of the absence of any laws in either country regarding the propriety of entering a restraining order at the request of a foreign State, or the procedures for putting one in place, it took, in some instances, weeks, months and even years for the targeted funds to be restrained. In the end, the entry of such restraining orders was sufficient to give the courts in the United States jurisdiction to proceed with the forfeiture cases that had been filed there. But obviously, delays of weeks, months and years in the entry of a restraining order presents an intolerable situation in a world where electronic funds can be disbursed in a matter of minutes if the account holder has access to his account.

The problem is the absence of clear statutory authority allowing the courts in one country to seize or restrain property within its borders that is traceable to a crime committed abroad, when a request is made by the State seeking to recover the property. I am not suggesting for a moment that this problem exists only in the statutory regimes of foreign states. U.S. law is equally inadequate in allowing courts in the United States to restrain domestic assets at the request of foreign countries. For many years, there was no authority to seize or restrain property in such circumstances at all: the best we could do was to initiate our own forfeiture action based on evidence submitted by another State.
In 2000, however, the United States enacted, for the first time, a statute that permits a U.S. court to restrain property in the United States for a period of 30 days if a request is made by a foreign state, the owner of the property has been arrested or charged with a criminal offense in that State, and the offense is one that would permit the court to enter an order of forfeiture under *domestic* law.5

This provision is a good start, but it is clearly designed only to allow a U.S. court to preserve property for a short time while law enforcement authorities in the United States commence a forfeiture action against the property under domestic law. What is really needed is a statute giving a court the authority to restrain property at the request of a foreign state to preserve the property while forfeiture proceedings take place in the *foreign* country under *foreign* law. That could be accomplished either by authorizing the courts in Country Two to restrain property based on evidence submitted by Country One in the form of an affidavit, stating the grounds for belief that the property in Country Two is forfeitable under the laws of Country One, or by allowing the courts in Country Two simply to register and enforce a restraining order issued by a court in Country One. One proposal, which could serve as a model for both U.S. and foreign legislation on this issue, would be the following:

To preserve the availability of property subject to an action pending in a foreign country for the entry of a forfeiture or confiscation

5 Title 18, United States Code, Section 981(b), provides as follows:

(4)(A) If any person is arrested or charged in a foreign country in connection with an offense that would give rise to the forfeiture of property in the United States under this section or under the Controlled Substances Act, the Attorney General may apply to any Federal judge or magistrate judge in the district in which the property is located for an ex parte order restraining the property subject to forfeiture for not more than 30 days, except that the time may be extended for good cause shown at a hearing conducted in the manner provided in rule 43(e) of the Federal Rules of Civil Procedure.

(B) The application for the restraining order shall set forth the nature and circumstances of the foreign charges and the basis for belief that the person arrested or charged has property in the United States that would be subject to forfeiture, and shall contain a statement that the restraining order is needed to preserve the availability of property for such time as is necessary to receive evidence from the foreign country or elsewhere in support of probable cause for the seizure of the property under this subsection.
judgment, or subject to an investigation leading to the commencement of such action, the Government may apply for, and the court may issue, a restraining order regarding such property. In issuing the restraining order, the court –

(A) may rely on information set forth in an affidavit describing the nature of the proceeding or investigation underway in the foreign country, and setting forth a reasonable basis to believe that the property to be restrained will be named in a judgment of forfeiture at the conclusion of such proceeding, or

(B) may register and enforce restraining order that has been issued by a court of competent jurisdiction in the foreign country.

Such order may be entered at any time before or after an application is made to enforce such foreign judgment, and shall remain in effect until such time as the judgment is enforced.

C. Which country will pursue the forfeiture?

Once Country Two has agreed to freeze or restrain the property on behalf of Country One, and has found a way to do so, there inevitably arises confusion over which State will proceed with the forfeiture action. In our experience, as much time is spent on bilateral discussions over this issue as over any other; it is a great consumer of time. More often than not, when we ask another country “will you be pursuing the forfeiture action under your law, or should we proceed under ours?” the answer is “yes.” Unfortunately, this is one instance where “yes” is a less than helpful response.

We should all work toward model legislation that describes the procedure for determining whether Country Two will simply hold the property while litigation proceeds in Country One, or whether Country Two will proceed with its own forfeiture action. Without such legislation, we will continue to waste time and resources pursuing parallel forfeiture actions in two places at once, or even worse, pursuing the action in neither place and letting the money fall between the cracks.

Such model legislation could simply say the following:

Once property is seized or restrained at the request of a Foreign State, based on evidence that the property was derived from or used to commit a criminal offense committed in such State, the
Government shall promptly notify the Foreign State that the seizure or restraint has taken place, and that –

1) confiscation proceedings will be commenced against the property in accordance with domestic law; or

2) the seizure or restraint will remain in effect during the pendency of confiscation proceedings in the Foreign State, and until such time as the Foreign State submits a confiscation order for enforcement in this jurisdiction.

D. Giving notice to potential claimants

If the decision is made to have Country One pursue the forfeiture while County Two simply holds the property, the prosecutors in Country One will need to provide notice of the forfeiture action to interested parties, many of whom will reside in Country Two. In the United States, for example, no forfeiture action, civil or criminal, may result in the confiscation of any property unless steps have been taken to notify all persons with a potential interest in the property of the procedures available to challenge the forfeiture in a federal court. Those rules apply equally to property located in the United States and property located abroad.

In Operation Casablanca, as mentioned, the Bahamas restrained several bank accounts at the request of the United States. The intent was for the Bahamas simply to hold the funds while the forfeiture action was litigated in Washington, D.C. But first, the United States was required to give notice of the forfeiture action to persons in the Bahamas who might have an interest in the property.

Unfortunately, there was no mechanism in place for the United States to learn the names and addresses of the holders of any of the restrained bank accounts so that we could provide notice, and the Bahamian banks were reluctant to provide that information because of local bank secrecy laws. Thus, it was highly ironic that the bank secrecy laws that were intended to protect the interests of bank customers were being invoked to prevent the government from giving notice of the forfeiture to the persons whose interests were directly affected.

In fact, we learned that in some countries it is actually illegal to publish notice of a forfeiture action in a newspaper, even though the purpose of such
publication is simply to give all persons with a potential interest in the property the opportunity to come forward and file a claim to the property in the appropriate court in the United States.

There needs to be model legislation making it clear that when property is restrained for forfeiture at the request of another State, local laws regarding the privacy of bank account information must give way to the need to afford due process to bank customers by providing them with notice of the forfeiture action and the means for contesting it. This might be addressed by adding the following to the legislative proposal outlined above:

If the Government notifies a Foreign State that property has been seized or restrained at the request of the Foreign State, and will remain so pending the completion of confiscation proceedings in the Foreign State, the Government shall take whatever steps are necessary to allow the Foreign State to comply with any requirements of foreign law regarding the giving of notice to persons affected by the confiscation proceedings so that such persons may contest the confiscation proceedings in the Foreign State.

E. Litigating challenges to the forfeiture

The next issue that arose in both Italy and the Bahamas in the Casablanca cases was what to do with third-party challenges to the restraining order. This issue proved to be the greatest obstacle by far to the bilateral efforts to cooperate in the confiscation of the criminal proceeds.

This issue concerns the way in which we address the claims of so-called “innocent owners.” Do they challenge the forfeiture in Country Two where the money is frozen, or in Country One where the case is pending? Claimants love to have it both ways: try to get the money release where it is frozen, and failing that, oppose the forfeiture in the country where the forfeiture action is filed. But why should the law give third-party claimants two bites at the apple?

In the United States, third parties who desire to challenge a forfeiture action have a right to do so under U.S. law; the mechanism is to file an “innocent owner” claim in the U.S. court where the action is pending.6 So, in Operation

6 The “uniform innocent owner defense,” applicable to virtually all U.S. civil forfeiture proceedings, is set forth at Title 18, United States Code, Section 983(d). In general terms, it provides that an innocent owner's interest in property may not be forfeited, and defines an
Casablanca, once the property in Italy and the Bahamas was restrained by local authorities at the request of the United States (and the U.S. courts thus had jurisdiction over the property), and once notice was sent to all potentially interested persons, it was the intent that anyone desiring to make a challenge to the forfeiture would file an innocent owner claim in the U.S. court.

In a number of instances, however, persons with a claim to the property chose to file their claims in the foreign courts – in Italy and the Bahamas – seeking relief from the forfeiture action in those jurisdictions, instead of filing their claims in the U.S. courts where the forfeiture proceedings were pending. Thus, we had, in each case, two judicial proceedings taking place in parallel at the same time: the United States was sending notice to interested persons and preparing to litigate their “innocent owner” claims in the federal courts where the forfeiture actions were pending, while at the same time, the same claimants were also challenging the forfeiture proceedings in the foreign courts that had issued the restraining orders freezing the property at the request of the United States.

This led to a great deal of confusion, and of course, gave each of the persons challenging the forfeiture proceedings the proverbial two bites at the apple: parties opposing the forfeiture actions first challenged the restraining orders in Italy and the Bahamas, hoping that success in those venues would end the litigation before it really began, and knowing full well that if they were unsuccessful they would have a second chance to raise the same objections to the forfeiture before a court and jury in the United States. In the end, several cases ended when the foreign courts released the funds at the behest of the third-party claimants even though the litigation over those same claims was still underway, or had barely commenced in the United States.

So the question is: Should the court that restrained the funds, at the request of a foreign State entertain third-party claims? Or should those claims be referred to the Requesting State where the forfeiture action is pending?

I see no reason to give persons contesting confiscation proceedings two bites at the apple. As long as parties whose property is seized or restrained in one country will have a full and fair opportunity to litigate their claims in the country where the crime was committed and where the confiscation proceedings

innocent owner as a person who did not know that his property was being used for an unlawful person, took all reasonable steps to prevent such illegal use of his property, or acquired the property as a bona fide purchaser who was without reason to know that the property was subject to forfeiture on account of its connection to a criminal offense.
are pending, there is no reason why that party should be able to raise his objections to the merits of the action in the guise of a challenge to the seizure or restraint of the property in the country where the property happens to be located. The notion of international cooperation in such cases implies that the State where the property is located is merely preserving the property at the request of the State where the crime was committed and where the litigation over the merits of the forfeiture action is taking place. Thus, Country Two’s responsibility should merely be to ensure that any seizure or restraint of the property be in accord with local laws regarding due process, and should leave it to the forum State to entertain challenges to the forfeiture that go to the merits of the action. Such challenges would, of course, include the assertion of an “innocent owner” defense.

In short, countries should have legislation in place that says, in effect, “we’re just enforcing the restraining order issued by the court in Country One – that’s where the case is pending, that’s where you go to complain.” One proposal to address this issue is the following:

If a restraining order is entered in response to the request of a Foreign State where an action for the confiscation or condemnation of the property is pending, no person may object to the restraining order on any ground that is the subject of parallel litigation involving the same property that is pending in a foreign court.”

F. Enforcement of a foreign judgment

If all goes as planned, and Country One is able to obtain a judgment of forfeiture against the property frozen or restrained abroad, there remains the problem of whether Country Two will be able to enforce that judgment. For many years, the United States was not able to enforce any foreign confiscation orders or forfeiture judgments. That changed in 2000 when, for the first time, Congress enacted a statute giving the federal courts the authority to enforce certain categories of foreign orders. Unfortunately, those categories are currently limited to drug offenses, certain crimes of violence, and bank fraud. It is imperative that Congress expand these categories to include any violation of foreign law that would constitute a violation of an offense for which property could be forfeited under federal law if the offense were committed in the United States.

7 The authority to enforce foreign forfeiture judgments is set forth in Title 28, United States Code, Section 2467.
In any event, it is essential that each State that is acting in concert with others regarding the confiscation of the proceeds and instrumentalities of crime that have moved across the political borders have a mechanism in place for the enforcement of judgments issued by the courts of the country where the underlying crime was committed.

G. Equitable Sharing

Finally, whether the forfeiture ultimately takes place under the laws of Country One or the laws of Country Two, each country should have legislation in place to allow for the equitable sharing of the forfeited property between the two countries. The existing U.S. statute on this point, 18 U.S.C. § 981(i), reads as follows:

“(i)(1) Whenever property is civilly or criminally forfeited under this chapter, the Attorney General or the Secretary of the Treasury, as the case may be, may transfer the forfeited personal property or the proceeds of the sale of any forfeited personal or real property to any foreign country which participated directly or indirectly in the seizure or forfeiture of the property, if such a transfer—

“(A) has been agreed to by the Secretary of State;
“(B) is authorized in an international agreement between the United States and the foreign country; and
“(C) is made to a country which, if applicable, has been certified under section 481(h) of the Foreign Assistance Act of 1961.

“A decision by the Attorney General or the Secretary of the Treasury pursuant to this paragraph shall not be subject to review. The foreign country shall, in the event of a transfer of property or proceeds of sale of property under this subsection, bear all expenses incurred by the United States in the seizure, maintenance, inventory, storage, forfeiture, and disposition of the property, and all transfer costs. The payment of all such expenses, and the transfer of assets pursuant to this paragraph, shall be upon such terms and conditions as the Attorney General or the Secretary of the Treasury may, in his discretion, set.

“(2) The provisions of this section shall not be construed as limiting or superseding any other authority of the United States to provide assistance to a foreign country in obtaining property related to a crime committed in
the foreign country, including property which is sought as evidence of a crime committed in the foreign country.

Conclusion

The past decade has seen the emergence of an international consensus that all countries must lend legal assistance to each other regarding the seizure, restraint and confiscation of assets, if there is to be any hope of forestalling the dispersal of the proceeds of crime across international boundaries. There is an enormous reservoir of goodwill; law enforcement professionals around the world recognize that global problems require global solutions, and that they have to work together.

But mutual good will and good intentions are not sufficient. Too often, law enforcement officials in friendly countries, sharing a mutual desire to brake the spreading influence of international criminals, and anxious to act in concert to deprive the criminals of the fruits of their nefarious undertakings, have been frustrated by the absence of a clear set of laws setting forth the responsibilities of each State, or setting forth the procedures to be followed when one State seeks to restrain property found within its borders while another State acts to obtain a lawful judgment against that property.

Just as two countries with different telecommunications systems, or electrical systems, or systems for deploying orbiting spacecraft need an adapter to link those systems together, so countries with different legal systems need an adapter, in the form of a set of judicial procedures, to allow them to work together to address the globalization of crime. The challenge of the coming decade is to develop and to enact such procedures – to build that adapter and make it work -- so that the good will and good intentions of governments can be translated into effective law enforcement tools.