Civil Recovery of Suspect Wealth and International Cooperation

Jeffrey Simser[1]

[Asset recovery is] …a friend to democracy, rule of law and constitutionalism… indispensable in a world where the institutions of state are fragile...[2]

Suspect wealth is secreted within the immense flows of value that move across borders through legitimate commerce. This paper explores civil recovery tools to chase suspect wealth across borders (primarily non-conviction based forfeiture - NCB also known as civil asset forfeiture). NCB forfeiture allows a state to freeze and confiscate the proceeds and instrumentalities of unlawful activity on a civil balance of proof. While not universally enacted, NCB forfeiture is increasingly available for states to untangle and attack laundered assets. Assets are laundered for a number of reasons: to evade the attentions of law enforcement, to give an organized crime figure the patina of legitimacy and for the kleptocrat to place stolen loot in a country more stable than the one they have destabilized through their corruption. Assets can be recovered through well-developed criminal justice tools, for example the MLAT process.[3] The United Nations Convention Against Corruption (UNCAC) can be particularly effective for assets are tainted by corruption; with 184 signatories, UNCAC enables cases even in the absence of a bilateral treaty and asset repatriation is a priority for an assisting state. The global level of corruption is stunning: the International Monetary Fund estimates magnitudes between $1.5 and $2 trillion annually.[4] Recovery levels are not commensurate: the Stolen Asset Recovery Initiative (known as STaR) estimates that since 1980, there have been $6 billion in assets recovered (and they are in the process of documenting an additional $2.5 billion).[5]

---

[1] Jeffrey Simser, Toronto, Canada. The views expressed in this paper are personal and do not reflect the views of his employer, the Government of Ontario nor the Ministry of the Attorney General. The author is grateful for the assistance of my friend (and long-suffering editor) Stephen Sterling, the thoughtful comments of Rachael Simser, M.A., the helpful suggestions from American expert Stefan Cassella (www.assetforfeiturelaw.us) and the advice on South Africa from Dr. Chris Ndzengu. Any errors or mistakes are mine alone. This paper, given at the 36th International Symposium on Economic Crime on September 6, 2018, is part of a larger research project that the author hopes to publish in the United States in Fall 2018.

[2] *NDPP v. Elran*, [2013] ZACC 2 at para 70.

[3] Mutual Legal Assistance Treaties. See for example Swiss Federal Department of Foreign Affairs, International Centre for Asset Recovery, and StAR: https://guidelines.assetrecovery.org/ UNODC Effective Management and Disposal of Seized and Confiscated Assets (Vienna: UNODC, 2017) Stephenson,K; Gray, L; Power, R; Brun, J-P; Dunker, G; Panjer, M Barriers to Asset Recovery (Washington: STaR, 2011).

[4] IMF Staff Discussion Note *Corruption: Costs and Mitigating Strategies* (May 2016) http://www.imf.org/external/pubs/ft/sdn/2016/sdn1605.pdf

[5] StaR Quarterly, April 2018 https://star.worldbank.org/content/star-newsletter-april-2018 See also Mugarura, N *The War Against Corruption is a Lost Cause without Robust Measures to Repatriate Stolen Assets to Countries of Origin* (2017), 1 J Anti-Corruption Law 53.

Tools to Civilly Recover Suspect Wealth Across Borders

This paper focuses on civil law tools available to state level actors and law enforcement as they try and follow the money across a border:

1. **The civil law suit**: a country can, as a victim, sue perpetrators in a third country as part of an effort to recover suspect wealth.
2. **Domestic NCB** proceeding and subsequent enforcement abroad.
3. **Offshore NCB** proceeding by another state with assets shared back.

Civil recovery cases occur through four phases:

1. gathering information;
2. turning information into evidence that links unlawful activity to property;
3. freezing and confiscation (or in the case of a civil law suit, damages and executions on judgments); and
4. asset disposal and distribution of funds.

Gathering Information: The Importance of Relationships

Before seeking NCB assistance, a requesting country will want to lever relationships for a number of reasons:

- Requesting countries need to understand what their options might be for civil recovery and the steps needed to take to exercise those options;
- Information is critical. Well laundered assets are challenging to follow through mazes of transactions, shell companies and trustees. If you cannot find it, if you cannot connect an asset to unlawful activity, you cannot recover it;
- Converting intelligence into evidence that can properly be adduced to support a civil recovery can pose challenges; having connections in the jurisdiction where the assets reside will help a requesting country navigate precisely what will be needed and by whom; and,
- The labour of an NCB proceeding, the risk of an unsuccessful proceeding, the costs of asset management, and cost recovery/asset sharing aspects all need to be sorted out prior to a proceeding being launched.

Gathering Information: Networks

Cross border cooperation can start with informal networks and the enabling expertise of multilateral institutions.[6] For example, one jurisdiction in the early stages of its inquiries may require assistance on publicly available documents (real property searches, for example). Things become more complicated when the information sought is not publicly available. Some inquiries may require the formality of a Mutual Legal Assistance Treaty

[6] For a sense of the networks, see the UNODC Guide to Asset Recovery Networks – June 2018 at https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2018-June-6-7/V1803851e.pdf

(MLAT) or nest under an authority like the UNCAC.[7] Even in that kind of instance, it is useful to have someone with local knowledge to ensure that the request is properly formulated and received. Law enforcement personnel, sometimes by design, frequently rotate positions of employment; the officer who one spoke with last year may have moved on to another unit. Networks and tools include:

- Asset recovery networks (ARINs)[8] and networks for law enforcement (INTERPOL), financial intelligence units (Egmont), the European Judicial Network (EUROJUST), MLAT/extradition (the Hemispheric Information Exchange Network for Mutual Assistance in Criminal Matters of the OAS), and the Ibero-American Legal Assistance Network;
- Regional tools, like the Warsaw Convention;
- Multilateral bodies like FATF (Financial Action Task Force), UNODC (United Nations Office of Drugs and Crime), the World Bank (particularly STaR, the stolen asset recovery initiative[9]), and the Commonwealth Secretariat;[10] and,
- UNCAC (the Merida Convention), the Vienna Convention (drugs), the Terrorist Financing Convention, and the Palermo Convention (organized crime).[11]

Gathering Information: The Role of an FIU

The most powerful tool for law enforcement can be the FIU (Financial Investigation Unit). Canada's FIU (FINTRAC) annually receives 20 million reports from 31,000 sources, including financial intermediaries and regulated institutions.[12] Canadian law enforcement can make a voluntary information request which gives the FIU the discretion to make a disclosure back to that law enforcement agency connecting transaction reports to the target. FINTRAC also has reciprocal information sharing arrangements with other FIUs around the world. They can ask an offshore FIU about the assets of the target, assuming law enforcement gives them adequate grounds for the request. Asset tracing can be laborious and iterative. For example, the first FIU disclosure may reveal wire transfers to a third country. A subsequent offshore FIU disclosure may reveal a transfer to a fourth country and so on. From an economic perspective, it makes no sense for a legitimate business person to make a series of

[7] Article 31 of which obliges State parties to take measures to freeze, seize and confiscate the proceeds of corruption. See UNODC's toolkit: http://www.track.unodc.org/Pages/home.aspx

[8] See FATF President's Paper: Anti-money laundering and counter terrorist financing for judges and prosecutors (2018) http://www.fatf-gafi.org/publications/methodsandtrends/documents/aml-cft-judges-prosecutors.html

[9] See for example: https://star.worldbank.org/corruption-cases/arwcases

[10] *Conference of the State Parties of the United Nations Convention Against Corruption, open-ended intergovernmental working group on asset recovery*, Vienna, June 7 and 8, 2018 – CAC/COSP/WG.2/2018/5.

[11] The 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Convention covers drugs and associated money laundering offences), the 1999 International Convention for the Suppression of the Financing of Terrorism, the 2000 UN Convention Against Transnational Organized crime (the Palermo Convention covers organized crime offences involving 3 or more actors with a maximum sentence of 4 or more years), and the 2003 UN Convention Against Corruption (Merida). See de Kluiver, J *International Forfeiture Cooperation* (Sept 2013) US Attorney's Bulleting 36 at 38.

[12] http://www.fintrac.gc.ca/re-ed/partner-partenaire2-eng.asp

back-to-back wire transfers of money: there are fees at each step. From a money laundering perspective, the technique has appeal. Many things can be traced, but barriers can test the limited resources of law enforcement.[13]

Gathering Information: Asset Tracing

There are practical steps that can enable asset tracing:

- **Know your parties**: research your target well. Know their basic identifiers, like name, date of birth and social insurance numbers. Research the date and place of marriages, divorces, spouses, ex-spouses, girlfriends, boyfriends, children, aliases, maiden names, nicknames and so on. Details matter: has the target deliberately misspelled their name at some point? Do they have an online moniker?
- **Social media**: there are numerous platforms that can reveal clues about whereabouts and assets (Facebook, Twitter, and LinkedIn). There are tools like the "Wayback Machine" which is an archival index hosting older versions of web pages dating back to 1996. Photos posted online can contain metadata revealing where and when they were taken.
- **Corporate Searches**: corporate registries in many places are still opaque. Finding the beneficial owner of a private company can be difficult and in some instances impossible. There are things criminal investigators can do. If a company is linked to their target, the FIU can search their databases. If the FIU produces a result, law enforcement can often seek a judicially authorized search warrant to determine whether financial institutions have responsive records. Anti-money laundering laws require banks and other regulated intermediaries to "know their client" as part of their due diligence. Law enforcement will want to ensure that the financial institution does not tip off their client. If a criminal knows his or her assets are under investigation, they will quickly take steps to remove from the jurisdiction. Private data bases can sometimes provide helpful information (the Yellow Pages, Dun and Bradstreet, LexisNexis, TransUnion and so on).
- **Property registries**: certain types of property link to publicly available registration systems. Land is the most typical of this type of asset, but vehicles, airplanes and watercraft can be registered as well. Lenders may register their security interests against property (e.g. in the US, under the UCC or Uniform Commercial Code or in Canada each province's PPSA registration system). [14]

---

[13] Kroeker, R; Simser, J Canadian Anti-Money Laundering Law: Gaming Sector (Toronto: Thomson Reuters, 2017); Abudulai, S A Guide to Canadian Money Laundering Legislation (5th Ed) (Toronto: LexisNexis, 2018).

[14] Wadlinger, N; Pacini,C; Stowell, N; Hopwood, W; Sinclair, D *Domestic Asset Tracing and Recovery of Hidden Assets and the Spoils of Financial Crime* (2018), 49:3 St Mary's LJ 611 at 611-612. For Canada see, for example, *Personal Property Security Act*, RSO 1990, c P.10. One interesting source for information is www.taxjustice.net which rates countries on issues like secrecy. See also Simser, J *Money Laundering and Asset Cloaking Techniques*, (2008), 11 J Money Laundering Control 15.

Information Gateways: Formalities Matter

The traditional investigative tools used by law enforcement are part of the criminal justice system. Can the fruits of the investigation transfer into an NCB case in the civil realm? The investigating authority must have a legally sanctioned mechanism, an information gateway, to disclose and the civil authority must be similarly empowered to collect, use and disclose the information. In Canada, there are extensive provisions in NCB statutes that authorize a criminal investigator to disclose information to the civil authority.[15] To ensure that the right information flows, there can be a review process. For example, certain categories of information ought not to be transmitted (e.g. information that identifies a confidential informant). Judicial authorization may be needed to transfer the products of a wiretap. Some categories of information are prohibited by statute from moving: tax information might legitimately be in the hands of a criminal investigator but not a civil authority. MLATs obtained information is an adjunct of the criminal law process and can only transfer to the NCB process if the central authority consents and the treaty so stipulates.

Formalities can matter: consider a VAT (value-added tax) case involving Ireland and the UK (as a requesting country). The Irish *Criminal Justice (Mutual Assistance) Act 2008* sets out the steps required to forfeit property. Ms. Devine was convicted in England of VAT fraud and sentenced to 6 years imprisonment. In 2003, a confiscation order was issued by the UK courts for roughly £1.5 million. Under her scheme computer parts were imported into the UK and VAT was avoided when Devine and others asserted that those parts were to be exported to Ireland. A portion of the goods were briefly imported to Ireland, but all of them ended up in the UK, where VAT should have been charged but wasn't. The fraud earned £19 million. Ms. Devine refused to sign over her Irish assets and served an additional 5 year sentence. In 2005, the Irish courts pursuant to the UK request froze real property and bank accounts in two counties. Various appeals ensued and a second request was made by the UK in 2010. The Court of Appeal held that MLAT requests had to strictly comply with the requirements of the Irish Act which called specifically for a statement by the court of the requesting jurisdiction. While the UK had adduced evidence from their officials, there was no statement specifically from the UK courts that pertained to the MLAT request. The Irish court released the properties to Devine.[16]

Using Evidence: The Civil Law Suit

A garden variety lawsuit, say between two large Canadian corporations, will be hard fought, but the loser will accept the result at each stage (discoveries, trial and so on). Respect for the rule of law and concerns about reputational risk mean that corporations will act honourably and within certain bounds. A fraudster or a kleptocrat is far less likely to act in this way. In 2007, the Attorney General of Zambia brought an action in the

[15] *Civil Remedies Act, 2001*, see Parts IV.1 and V

[16] *Minister for Justice v. Devine*, [2015] IECA 182.

English courts to recover assets looted by a former President. The court noted that the president had officially earned $105,000 over the previous 10 years, but bill for his Swiss tailor alone was over $500,000.[17] Most Zambians struggled at the time to survive on $1 a day. The English court went to extraordinary lengths to be fair, with the trial taking fifty one days of hearing time over a two year period, during which 110 level arch files moved between Zambia and England. There were a flurry of unsuccessful motions and a "blizzard" of correspondence. The Zambian Attorney General initially prevailed following a messy (and no doubt expensive) trial but that finding was overturned on appeal.[18]

Cases brought by an outside jurisdiction can, at times, need to navigate a complex legal geography. Following the $1 billion collapse of a bank in Lithuania, a number of proceedings were initiated in the UK against a Russian banker who had held a majority of the shares in the failed bank. He and his family had moved to the UK after the bank's collapse. A civil freezing order had been obtained by the Lithuanian Central Bank; the order was then challenged on a number of grounds. The courts refused to lift the order and didn't accept various arguments lodged by the banker (conflict with extradition, conflict with the MLAT process, and so on). The court did note that in some cases, where a civil proceeding of this nature could give rise to prejudice in the related criminal proceeding, certain protective measures (ring-fencing information flows and so on) could be put in place by the court.[19]

Finally, private lawsuits in this context can be very difficult to bring. A Swiss charity devoted to rainforest preservation suspected that an official from Malaysia had taken bribes in exchange for forestry licenses. That official's daughter had emigrated to Canada, married a Canadian and owned part of a large real estate company. The Swiss charity sought a pre-litigation production order, known as a *Norwich Pharmacal* order.[20] The charity sought a considerable amount of financial information from two banks, an insurance company and an accounting firm. They told the court that they sought, in essence, a civil search warrant in aid of a possible private prosecution for, amongst other things, money laundering. The court noted that criminal law is "overwhelmingly a matter of public investigation and enforcement" and that the plaintiff's information would not be sufficient, if in the hands of a police officer, to obtain a criminal search warrant. The court was unwilling to put a private prosecution on a lower standard of proof for a warrant than one required by rule of law for police and prosecutors.[21]

---

[17] Zambia v Meer Care & Desai (a firm) & Ors [2008] EWCA Civ 754

[18] Attorney General Zambia v. Meer Care, Desai & Ors [2007] EWHC 952; appeal allowed [2008] EWCA Civ 1007; Thaker v Solicitors Regulation Authority [2011] EWHC 660 (Admin) (22 March 2011); Simser, J Asset Recovery and Kleptocracy (2010), 17 J Fin Crime 321

[19] *Akcine Bendrove Bankas Snoras v. Antanov & Anor*, [2012] EWHC 131.

[20] A narrow grounds of discovery whereby a potential plaintiff can sue record keepers, like banks, to access information: *Norwich Pharmacal v. Comrs of Customs and Excise*, [1974] AC 133 (HL)

[21] *Bruno-Manser-Fonds v. Royal Bank*, 2017 ONSC 5517; 2018 ONSC 918.

Using the Evidence: Offshore Enforcement of an NCB Order in the US

American law allowing for enforcement in the United States of a foreign order has evolved considerably over the past twenty years.[22] At one point, enforcement was exceptionally difficult for certain types of cases, but legislative changes made it possible to register foreign orders[23] under 28 USC § 2467. The process now involves the following:

1. If there is a request to register a forfeiture or confiscation order, that foreign order must be a final judgment or order of a foreign nation;[24]
2. There is provision to register a restraint order in the US to preserve the availability of property at any time before or after foreign forfeiture proceedings have been initiated; [25]
3. A request must first be submitted to the US Attorney General (the AG), which must include (i) a summary of the underlying facts, (ii) a description of the proceeding that gave rise to forfeiture, (iii) a certified copy of the forfeiture judgment, (iv) an affidavit showing that steps were taken to give notice and due process and (v) that the judgment is final (and not under appeal), as well as (vi) any other additional information that the AG may request;[26]
4. The AG must certify the request. Once they have done so, a litigant cannot "look behind" the request to see if the foreign court had authority to issue a restraining or forfeiture order;[27]
5. The court must find that the foreign order was rendered under the due process of law;[28] and,
6. If a criminal or civil forfeiture proceeding is underway in the foreign jurisdiction, there is no right to a pre-restraint hearing.[29]

In 2012, the US courts considered an Attorney General request to freeze just over $12 million in accounts belonging to a group of individuals and companies known in Brazil

---

[22] See Cassella, S *Enforcement of Foreign Restraining Orders*, a 2013 paper originally given at the Cambridge Symposium on Economic Crime and published at https://works.bepress.com/stefan_cassella/31/

[23] Pub. L. No. 107-56, §232, 115 Stat. 392 (Oct 26, 2001). A case followed: *Re: Any and All Funds in the name of Tiger Eye Investments*, (2009), 601 F. Supp 2d 252, aff'd 613 F. 3d 1122 (DC Cir 2010) and *Re: Contents of Citibank Account No. Held by Rouz USA, Inc.*(2010), 759 F. Supp 2d 281, leading to a further amendment: The *Preserving Foreign Criminal Assets for Forfeiture Act of 2010*.

[24] 28 USC § 2467 (a)(2)

[25] 28 USC § 2467 (d)(3)(A)(i)

[26] 28 USC § 2467 (b)(1)

[27] 28 USC § 2467 (b)(2) see *Re Restraint of all Assets Contained or Formerly Contained in Certain Investments Accounts at UBS Financial Services Inc.* (2012), 860 F. Supp 2d 32 (D.D.C.).

[28] 28 USC § 2467 (d)(1) but the courts will not lightly look behind the judicial process of the courts in another sovereign nation - see *Re Restraint of all Assets Contained or Formerly Contained in Certain Investments Accounts at UBS Financial Services Inc.* (2012), 860 F. Supp 2d 32 (D.D.C.)

[29] Re Seizure of Approximately $12,116,153.16 and Accrued Interest in US Currency [2012] W.L. 5463306 (D.D.C.)

as "*doleiros*" or dollar dealers who had allegedly been laundering drug cartel money.[30] Money was collected in Brazil and then wired to an American financial institution, where a Vice President would then structure the funds. The former Vice President was indicted and pled guilty to charges of being an unlicensed money remitter. As part of the plea, she admitted that the accounts contained laundered money, but as she had no interest in the accounts themselves, the courts in New Jersey granted summary judgment in favour of the *doleiros*. Litigation ensued and the matter was transferred to federal court following a formal MLAT request from Brazil, after Brazilian money laundering charges were laid. The US argued that the six requirements to restrain under 28 USC § 2467 were met:

1. there was an MLAT between the US and Brazil;
2. the underlying conduct, had it been committed in the US, would violate American law and could lead to forfeiture;
3. the AG certified the proceeding;
4. Brazil's prosecutions have sufficient due process;
5. the Brazilian courts had subject matter jurisdiction to issue prejudgment restraining orders; and,
6. there was no contention that the Brazilian orders had been obtained by fraud.

The *doleiros* then argued three things:

1. that they should be entitled to a pre-restraint hearing in the US;
2. the US failed to prove dual forfeitability; and
3. the US improperly relied on retrospective amendments to the law.

The amendments to 28 USC § 2467 made reference to the civil forfeiture provisions under 18 USC § 983(j)(1) and this, the *doleiros* asserted gave them the right to a pre-restraint hearing; not so, said the court as the pendency of a foreign criminal forfeiture proceeding satisfies the US Code and an additional hearing is not required. The dual forfeitability argument also failed; the US had shown that the illegal money transmitting activities satisfied this requirement. Finally the *doleiros* argued that as the US were relying on amendments passed after this case had commenced, the doctrine against restrospectivity was violated (retroactivity in the US).[31] Their gravamen is a frequently litigated issue: is NCB forfeiture of a criminal or civil nature? Is NCB forfeiture a punishment directed at an individual? Or is NCB a restorative device focused on property rights? In the final analysis, the court also rejected this contention of the *doleiros* and ruled that the provisions were remedial, not penal and not restrospectively applied. The accounts were frozen.

---

[30] *In re Seizure of Approximately $12,116,153.16 and accrused interest in US currency* (2012), 903 F.Supp 2d 19 (D.D.C.)

[31] A penal or criminal sanction cannot retroactively be applied; citizens must know what the "law" is at the time they take their actions.

Using the Evidence: Requesting An Offshore NCB Proceeding in Canada

In a major fraud case, Canadian authorities assisted the US Securities and Exchange Commission (SEC), freezing a fraudster's accounts in Toronto. The case evolved after a brief agreement was signed that allowed for information exchange as well as asset sharing (as the case involved fraud, the focus of the asset share was almost entirely on compensation to victims). Robert Allen Stanford was convicted in the United States on various counts of fraud, money laundering and he is currently serving a 110 year sentence in prison.[32] Stanford was convicted in respect of his so-called banking enterprise, which in fact was a Ponzi scheme. Stanford sold CDs, certificates of deposit, which he promoted as safe while producing high returns (the CDs were purportedly backed by investment-grade bonds, securities, Eurodollar and FX accounts with stated returns of between 11% and 13.75%). Stanford's enterprise was designed to constantly bring in new investment money (he paid above-market commission rates to salespeople) and then used that cash to keep the scheme running. Dividends on the CDs were paid from the money left after Stanford was done paying for his extravagant lifestyle. There were at least $7.2 billion in CD sales. Stanford's empire ran 200 different accounting systems, none of which centrally reported. The accounting itself was a complete act of fraud. Stanford and his confederates would reverse engineer numbers to show the desired return for victims. Fancy-looking financial reports showed a balance of equities, fixed income securities, and precious metals, making the products look both liquid and secure. Stanford over-inflated his holdings: a series of transactions were used to acquire 1,587 acres of undeveloped land in Antigua, purchased for $63.5 million and 6 months later booked at a value of $3.2 billion. In a real estate market that was falling, Stanford claimed a 50 fold increase in value. As noted, Ontario signed an agreement with the SEC as a prelude to the preservation in Toronto of roughly $28 million. Some of those frozen funds in Toronto were directly and immediately traceable to victims who were lucky enough to be late in the fraud scheme (they recovered traceable funds); the balance was money that had been gathered up from various sales in the US and then wired up to Canada. The forfeited funds, minus a modest cost recovery for Ontario, were transferred to the United States Department of Justice for distribution to victims (along with assurances that American tax authorities and the government of Antigua, which had been complicit in the fraud, would not recover from the Ontario funds). There were a series of related cases in the UK.[33]

---

[32] This portion of the paper was originally given by the author as a talk at the 34th International Symposium on Economic Crime in 2016, Jesus College, Cambridge. The current status of the Stanford case and some of the facts related in this section come from the various filings organized by the receiver: http://www.stanfordfinancialreceivership.com/ Note in particular the filings and complaints by the Securities and Exchange Commission v. Stanford et all with the courts in the Northern District of Texas.

[33] Which include but are not limited to: *Stanford International Bank v. Director of Serious Fraud Office*, [2012] UKSC 3; *Re Stanford Int'l Bank*, [2010] EWCA Civ 137, 2001 Ch 33; Janvey v. Wastell, [2010] EWCA Civ 692; *Re Stanford Int'l Bank* [2012] EW Misc 1; and an appeal from Antigua and Barbuda: *Stanford Int'l Bank v. Lapps* [2006] UKPC 50.

NCB: Requesting UK Assistance

If a request is made for assistance from the UK, an asset sharing agreement is required and the normal share is 50% (half to the UK and half to the requesting state) unless there are extenuating circumstances (such as victim compensation). Asset sharing agreements are negotiated between the Home Office and the requesting state. Generally the UK, like most jurisdictions will seek to cost recover. The requesting states should be comfortable with that request. The managers of the NCB process are state officials who need to make choices in an environment of constrained resources. If there is no cost recovery, there is every possibility that the requesting state's case will fall to the bottom of the priority list. With cost recovery, the NCB manager can credibly apply their resources to the case. One issue that needs to be considered: what if the NCB proceeding fails? NCB proceedings are civil and typically cost consequences follow the event. The requesting country may be asked to provide an indemnity of some sort in the event the case doesn't succeed.

Cross Border NCB Assistance: An International Cooperation Checklist

Generally speaking, a requesting jurisdiction will want to assemble or work towards the following elements:

- Is there an existing framework or treaty through which an NCB request can be made?
- If not, can a bilateral agreement be reached?
- Has the requesting country sought assistance from the right officials? Often the Central Authority of a given country is the best place to start.
- Has open source research been conducted?
- Have property registries, social media sites and general web searches been canvassed?
- Have proprietary closed source sites been considered?
- Does the requesting jurisdiction have all of the details of the target person?
- Necessary information can include:
    - names, aliases, addresses, nationality, place of birth, marriages, divorces, children, and date of birth;
    - details of the relevant criminal investigation (the offences, the circumstances and the nature of the investigation);
    - details of criminal or NCB proceedings undertaking in the requesting country (as well as offences charged);
    - the grounds for belief that the property is recoverable: the unlawful activity and the link to the property;
    - the unlawful activity connections that link the defendant and any third party interests;
    - authenticated NCB orders (freezing, confiscating and so on);
    - details of properties restrained in other jurisdictions (values, copies of relevant orders and so on); and

    - finally, the grounds for the requesting party's belief that there is a risk of the property being dissipated.
- What are the details of the relevant criminal investigation in the requesting country?
- Have charges been laid?
- Have assets been restrained, on a criminal or NCB basis, in the requesting country?
- Some places, like the United States, may ask: was due process followed? Who was served? What was the judicial process?
- What grounds does the requesting country have to show that the assets are tainted?
- Has the requesting country generated sufficient information to know what the assets are, who has them and where they are?
- Are there third party interests? Are those third parties implicated in the unlawful activity?
- Have assets been restrained in other countries pursuant to other requests?
- Has the requesting country launched any ancillary proceedings, like lawsuits?
- Are there any other related proceedings, like bankruptcy or trusteeship proceedings?
- What is the risk of asset dissipation?
- What would the terms of an asset sharing agreement be?
- What is the asset share? Some places, like the UK, presumptively assume that recovered assets will be split on a 50:50 basis unless there are extenuating circumstances (like victim compensation).
- How do the jurisdictions propose to deal with an asset freeze or forfeiture proceeding that fails? Will the requesting jurisdiction indemnify?

The Future: What's Needed?

A reliable multilateral framework for NCB cases is highly desirable. Under such a framework, even countries without an NCB process might be able to recognize orders from the courts of requesting states, perhaps a treaty mandated letters rogatory process.[34] Such a framework could include:

- **Information Gateways**: before asset recovery can be initiated in any formal way, a requesting country must gather the relevant information about the target, the unlawful activity, assets that might be potentially restrained and third party interests. There are several modalities for this: open source information,

[34] A letter rogatory is a request by one court seeking the assistance of another court: *Haaretz.com v. Goldhar*, 2018 SCC 28. For example an American court sought assistance in Canada to procure evidence: *Lantheus Medical Imaging Inc. v. Atomic Energy of Canada Ltd*., 2012 ONSC 3582 (CanLII) or to conduct a discovery in aid of execution: *Prima Tek II v. Sonneman Packaging Inc.,* 2003 CanLII 6676 (ON SC) or to freeze an estate: *Elie c. Ouimet*, 2018 QCCS 522 (CanLII)

information that exists on public registers and commercial services, information with FIUs, and a process to obtain court-authorized production and monitoring orders. Establishing information gateways for effective cross border cooperation would enable effective NCB usage.

- **Information Sharing**: the requesting country may need to consider their ability to disclose and the receiving country's ability to collect information. For example, information gathered by a criminal investigator under an MLAT may not be available for an NCB case; it will depend on the treaty and on the position of the central authority.
- **Evidence Gathering**: information, including financial information, needs to be adduced from an evidentiary perspective for the purposes of an NCB matter. Who will swear out an affidavit in support of the application? What will they need to have before them to effectively adduce the evidence? Are there forms of evidence that need to be excluded: the American grand jury process, confidential informants, wiretaps, evidence related to young offenders, and tax information?
- **Networks**: both formal and informal should be strengthened. NCB practitioners need to have networks, like CARIN, through which they can obtain and process information, learn how to navigate systems for the purpose of a request, learn who to contact and learn techniques through which assets can be traced and linked to predicate unlawful activity. The work of the World Bank, UNODC and others is indispensable in this respect.
- **Civil MLAT Processes:** should be developed, through which signatory states can make requests for assistance (either investigative, for asset freezing or for NCB forfeiture). Some NCB laws allow for a local authority to obtain various categories of information (for example, a bank account monitoring order can be judicially authorized in the UK or Ireland). Can those processes become available to requesting states through a civil mutual legal assistance treaty process?
- **Asset sharing** protocols should be expanded. This could be as simple as the UK's presumptive 50:50 rules or complex (e.g. 20:50:80 depending on the involvement and assistance of the requesting state). Protocols for victim cases should be developed. Protocols for managing and disposing of assets, as well provisions to deal with the cost consequences of unsuccessful cases, also need to be devised.
- **Expand NCB:** there are already FATF and Council of Europe provisions encouraging further NCB adaptation. Countries wanting to develop or evolve their systems should be able to avail themselves of international support. There are a myriad of techniques available: American law has echoed into the approaches in Canada and South Africa; Ireland, Australia and the UK have developed a reasonably unique approach to NCB work. That said, the basic constituent elements of an NCB system need to be present: the ability to freeze and forfeit the proceeds and instruments of unlawful activity on a civil standard of

proof.[35] Wrinkles and improvements, like administrative forfeiture or unexplained wealth orders, can be adopted as jurisdictions see fit.

NCB forfeiture, when applied properly, can be an effective tool for law enforcement to civilly recover tainted property that has crossed a border.

[35] The author worked on: Commonwealth Secretariat Common Law Legal Systems Model Legislative Provisions on Money Laundering, Terrorism Financing, Preventive Measures and Proceeds of Crime (2016) archived at http://thecommonwealth.org/sites/default/files/key_reform_pdfs/Common%20Law%20Legal%20Systems%20Model%20Legislative%20Provisions%20EB_0.pdf