Recovering the Proceeds of Foreign Crimes that are Found In the United States

By Stefan D. Cassella[1]

I. Introduction

It is commonplace for the proceeds of crimes committed in foreign countries to be deposited or invested in property in the United States. Foreign countries naturally have an interest in recovering such property, and the United States is committed to assisting them in doing so.

There are two principal means to this goal. The first is for the foreign Government to obtain a forfeiture or confiscation order for property located in the United States from its own courts – as part of a criminal prosecution or pursuant to a non-conviction-based forfeiture action – and ask the assistance of the United States in having that order registered and enforced by a federal court. The second is for the foreign Government to provide the evidence linking property in the United States to a foreign crime to the U.S. Department of Justice, which may use it to commence a non-conviction-based forfeiture action against the property under federal law.

Either way, the end result would be the entry of an order by a federal court in the United States that would allow the property to be repatriated to the foreign country.

This article sets forth the procedures that apply to these two alternative ways of recovering and repatriating the property. The first part discusses the statutory framework for registering and enforcing a foreign forfeiture or confiscation order and the requirements that must be satisfied to bring the case to a successful conclusion. The second part explains what it means to bring a non-conviction-based forfeiture action in the United States, and how that process may be used to recover property under U.S. law. [2]

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[2] The provision in US law authorizing the enforcement of foreign judgments uses the term "forfeiture or confiscation judgment." 28 U.S.C. § 2467(a)(2). In the United States, the term "forfeiture" applies to both civil and criminal cases. In other countries, "forfeiture" applies only to civil or "non-conviction-based" proceedings, whereas "confiscation" is the term applied to criminal judgments. Thus, the term "forfeiture or confiscation judgment" makes clear that Section 2467 authorizes the enforcement of both civil and criminal judgments. *See also* Section 2467(d)(3)(A)(i) (expressly authorizing the restraint of property "subject to civil or criminal

II. Enforcing a Foreign Forfeiture Judgment in the United States

One of the keys to stopping the flow of criminal proceeds across international borders is for countries to find ways to recognize and enforce each other's judicial orders. In particular, it is important for countries where criminal proceeds are found to be able to enforce orders issued by foreign courts forfeiting or confiscating proceeds derived from crimes that occurred within their jurisdiction. Likewise, it is important for such countries to be able to enforce a foreign order freezing or restraining such property to ensure that it is preserved while the foreign forfeiture proceeding is pending.

The need for such procedures is obvious, but the means of putting them into practice are not. Indeed, policy makers, academics and commentators have been discussing solutions to this problem for decades.[3]

Until the year 2000, the United States had no means of enforcing a foreign forfeiture order. To the contrary, courts had held that under a provision of the common law known as the "penal rule," federal courts were *prohibited* from enforcing foreign penal laws, including criminal and civil forfeiture judgments.[4]

In 2000, however, the United States Congress enacted for the first time a statute prescribing a procedure whereby a foreign forfeiture order may be enforced against assets located in the United States.[5] Entitled "Enforcement of a Foreign Judgment," the statute is codified at Title 28, United States Code, Section 2467 (28 U.S.C. § 2467).[6]

The U.S. Department of Justice assigns a high priority to requests by foreign countries for assistance in restraining, forfeiting, and ultimately repatriating assets derived from foreign crimes, and is committed to using

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forfeiture"). For simplicity, unless quoting from the statute, I will use the term "forfeiture judgment," understanding that it applies equally to what a foreign country may call a "confiscation judgment."

[3] *See* Stefan D. Cassella, "The Recovery of Criminal Proceeds Generated in One Nation and Found in Another," 9 J. of Financial Crime 268 (2002) (paper presented at the 19th Cambridge International Symposium on Economic Crime, Cambridge University, September 2001).

[4] United States v. Federative Republic of Brazil, 748 F.3d 86, 95-97 (2nd Cir. 2014).

[5] The Civil Asset Forfeiture Reform Act of 2000, Pub.L. 106-185, § 15(a), 114 Stat. 219 (April 25, 2000).

[6] *See* House Report on Civil Asset Forfeiture Reform Act, H.R. Rep. 105-358(I), 105th Cong., 1st Sess., 1997 WL 677201 (Leg. Hist.) (1997) (stating that the purpose of the statute is to give foreign governments that have obtained criminal or civil forfeiture judgments in their courts a means of gaining access to courts in the United States that have the power to ensure that those judgments are enforced). The statute was drafted by the Department of Justice and was first included in the Department's draft of an asset forfeiture reform bill in 1996. *See* Legislative History, Civil Asset Reform Act (CAFRA) of 2000 (publication of the Department of Justice) (2000) at 55, 98.

Section 2467 to do so. As explained in its *Asset Forfeiture Policy Manual,* the Department believes that "it is important for the United States to act affirmatively on such incoming requests so that it is not wrongly perceived as becoming a safe haven for proceeds of foreign crime and other property forfeitable under foreign law."[7]

A. The procedure for enforcing a foreign judgment

The process of enforcing a foreign forfeiture judgment involves several steps: the foreign Government makes a formal request to the United States to enforce its judgment; the Attorney General certifies that it is in the interests of justice to do so; the Department of Justice files an application to enforce the judgment in federal court; and the court issues whatever orders may be necessary to enforce the judgment and repatriate the property to the foreign state.

Thus, an action to enforce a foreign forfeiture judgment under Section 2467 is an action brought by the United States on behalf of a foreign Government. In such an action, the United States is the "applicant" and any person who would be affected by the foreign judgment and who opposes its enforcement is the "respondent."[8] Neither foreign governments nor the victims of foreign crimes have the right to commence an enforcement action under Section 2467 on their own.

1. The request

The first step is for the foreign government to submit a request to enforce its judgment to the Attorney General that includes the following information:

(A) a summary of the facts of the case and a description of the proceedings that resulted in the forfeiture or confiscation judgment;

(B) a certified copy of the forfeiture or confiscation judgment;

(C) an affidavit or sworn declaration establishing that the foreign nation took steps, in accordance with the principles of due process, to give notice of the proceedings to all persons with an interest in the property in sufficient time to enable such persons to defend against the charges and that the judgment rendered is in force and is not subject to appeal; and

[7] *Asset Forfeiture Policy Manual* (2019), Chap. 8, Sec. II.

[8] 28 U.S.C. § 2467(c)(2)(A).

(D) such additional information and evidence as may be required by the Attorney General or the designee of the Attorney General.[9]

2. The certification

It is up to the Attorney General (or his designee) to determine whether it would be "in the interest of justice" to certify the foreign request. His decision to do so – thus clearing the way for the commencement of an enforcement action – or his refusal to certify the request for whatever reason, is final and is not subject to judicial review.[10]

In essence, the certification process is a means by which the Department of Justice ensures that all of the information needed to proceed with an enforcement action under Section 2467 is in place, and that the foreign judgment was obtained in a manner that comports with "the principles of due process." The United States is not required to enforce judgments obtained under regimes that do not honor the procedural rights of criminal defendants and property owners, and the certification process is seen as the first line of defense against that possibility.[11]

While the Attorney General's decision to certify or not to certify the foreign request is not subject to judicial review, however, the determination that the foreign judgment was obtained in accordance with the principles of due process is not the final word on that question. As we shall see, the courts also have a role in ensuring that the rights of the property owner were protected in the proceeding in the foreign court that led to the forfeiture judgment.

3. Filing an application

Once the request is certified by the Attorney General, the next step is for the Government to "file an application on behalf of a foreign nation in a district court of the United States seeking to enforce the foreign forfeiture or confiscation judgment as if the judgment had been entered by a court in the United States."[12]

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[9] 28 U.S.C. § 2467(b)(1), quoted in In Re: Enforcement of Philippine Forfeiture Judgment, ___ F. Supp.3d ___, 2020 WL 990032 (S.D.N.Y. Feb. 27, 2020).

[10] *Id.* § 2467(b)(2).

[11] *See* H.R. Rep. 105-358(I), *supra* note 6 ("The Requesting Party, however, would not be allowed to file for enforcement without approval from the Untied States Department of Justice, thereby permitting the United States to screen out requests that are factually deficient or based on unacceptable foreign proceedings").

[12] 28 U.S.C. § 2467(c)(1).

The application may be filed in Washington, DC or in any other district in the United States in which the property subject to forfeiture may be found.[13]

There is no requirement that the foreign government make its request to enforce its forfeiture judgment within any particular period of time. Indeed, the request may not be made until all appeals in the foreign courts are resolved and the forfeiture judgment is final. Once the request is made, however, the United States must make its application to enforce the judgment within five years of receiving the request.[14]

4. The court order

Once the application to enforce the foreign judgment has been filed, the court will issue an order enforcing the judgment if it finds that the criteria for doing so are satisfied.

B. Requirements that must be satisfied

Section 2467 defines "forfeiture or confiscation judgment" as "a *final order of a foreign nation* compelling a person or entity —

"(A) to pay a sum of money representing the proceeds of . . . any violation of foreign law that would constitute a violation or an offense for which property could be forfeited under Federal law if the offense were committed in the United States, or any foreign offense described in section 1956(c)(7)(B) of title 18, or property the value of which corresponds to such proceeds; or

"(B) to forfeit property involved in or traceable to the commission of such offense."[15]

In turn, the term "foreign nation" means any country with which the United States has a bilateral treaty or other formal international agreement for mutual

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[13] *Id.* § 2467(c)(2)(B). *See* In Re: Enforcement of Philippine Forfeiture Judgment, 2019 WL 3084706 (D.D.C. Jul. 15, 2019) (granting change of venue in § 2467 action from the District of Columbia to the Southern District of New York where, by virtue of prior litigation over the forfeited property, courts in that district have greater familiarity with the case).

[14] In Re: Enforcement of Philippine Forfeiture Judgment, ___ F. Supp.3d ___, 2020 WL 990032 (S.D.N.Y. Feb. 27, 2020) (because the action to enforce a foreign forfeiture judgment is distinct from the action to obtain the forfeiture order in the first place, the 5-year limitations period for bringing an action under § 2467 does not run from when the act giving rise to the forfeiture was committed, but from the date when the foreign Government requested the United States to enforce its judgment).

[15] *Id.* § 2467(a)(2) (emphasis added).

forfeiture assistance or is a party to the U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.[16]

Stated simply, for a foreign forfeiture judgment to be enforced in the United States –

- it must be a final order;[17]
- it must be an order from a court in a country with which the United States has a treaty or other agreement for assistance in forfeiture matters;
- it can be either a criminal forfeiture order or a non-conviction-based ("civil") forfeiture order;[18]
- it may be for a sum of money or for the recovery of a specific asset; and
- it must be based either on an offense that would give rise to forfeiture under federal law if the offense were committed in the United States, or on one of the foreign offenses listed in the federal money laundering statute, 18 U.S.C. § 1956(c)(7)(B).

The latter requirement is called the dual forfeitability requirement. In the United States, not every crime gives rise to the forfeiture of property. There are miscellaneous forfeiture statutes scattered throughout the federal criminal code, but the general forfeiture statute, 18 U.S.C. § 981(a)(1)(C), limits forfeiture to some 250 enumerated state, federal and foreign crimes.[19] The list is extensive, but it is not all-inclusive. Accordingly, in most cases the requesting foreign Government will have to show that the forfeiture judgment was based on a crime that is the functional equivalent of one of the 250 enumerated offenses.[20]

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[16] *Id.* § 2467(a)(1).

[17] *See* In re: Trade and Commerce Bank, 890 F.3d 301 (D.C. Cir. 2018) (because the foreign criminal forfeiture order was being appealed, it could not be enforced under §§ 2467(b) and (c)).

[18] 28 U.S.C. § 2467(d)(3)(A)(i) (expressly authorizing the restraint of property subject to criminal or civil forfeiture under foreign law). *See Luan v. United States,* 722 F.3d 388, 400 (D.C. Cir. 2013) (rejecting defendant's argument that § 2467(d)(3) is limited to the enforcement of restraining orders issued in foreign civil forfeiture cases).

[19] The list comprises a series of descriptions and cross-references to state and federal crimes set forth in 18 U.S.C. § 1956(c)(7) as well as six categories of foreign crimes listed in Section 1956(c)(7)(B).

[20] *Cf.* In re Seizure of Approximately $12,116,153.16 and Accrued Interest in U.S. Currency, 903 F. Supp.2d 19, 35 (D.D.C. 2012) (restraining order issued by Brazilian court based on money laundering and operation of an illegal

For example, if the crime giving rise to the forfeiture judgment was an investment fraud involving private investors, the request to enforce the judgment could recite that investment fraud is the equivalent of mail or wire fraud under federal law, 18 U.S.C. §§ 1341 and 1343, respectively, for which forfeiture is authorized under 18 U.S.C. § 981(a)(1)(C).

Alternatively, the requesting Government may satisfy the dual forfeiture requirement by showing that forfeiture judgment was based on one of the six categories of foreign crimes listed in Section 1956(c)(7)(B), which include the following:

i. drug trafficking;

ii. crimes of violence such as murder, kidnaping, robbery or extortion;

iii. bank fraud;

iv. bribery of a public official or the misappropriation of public funds by a public official;

v. arms smuggling; and

vi. human trafficking.

There is also a catch-all category that includes crimes that can result in extradition pursuant to a multi-lateral treaty to which the United States is a party.[21]

C. **The role of the court**

Once the United States commences an enforcement action by filing an application on behalf of the foreign Government, the matter is in the hands of the federal court. The statute provides that the court must grant the application

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money exchange business satisfied dual forfeitability requirement; provisions were analogous to forfeiture under § 982(a)(1) for violations of §§ 1956 and 1960); In re Restraint of All Assets ... at UBS Financial Services, Inc., 860 F. Supp. 2d 32, 41-42 (D.D.C. 2012) (questioning but not deciding whether the "dual forfeiture" requirement in § 2467(d)(3) applies to the enforcement of a pre-trial restraining order, but holding that in any event a money laundering investigation satisfies that requirement).

[21] 18 U.S.C. § 1956(c)(7)(B)(i)-(vii). *See* United States v. Real Property Located at 9144 Burnett Road, 104 F. Supp.3d 1187 (W.D. Wash. 2015) (forfeiture based on Romanian tax offense with respect to which the United States was obligated to extradite the offender under the United Nations Convention Against Transnational Organized Crime).

unless it finds that one of five exceptions applies. Specifically, Section 2467(d)(1) says the following:

"The district court shall enter such orders as may be necessary to enforce the judgment on behalf of the foreign nation unless the court finds that —

"(A) the judgment was rendered under a system that provides tribunals or procedures incompatible with the requirements of due process of law;

"(B) the foreign court lacked personal jurisdiction over the defendant;

"(C) the foreign court lacked jurisdiction over the subject matter;

"(D) the foreign nation did not take steps, in accordance with the principles of due process, to give notice of the proceedings to a person with an interest in the property in sufficient time to enable him or her to defend; or

"(E) the judgment was obtained by fraud."[22]

Importantly, the statute does not permit the federal court to look behind the foreign order to relitigate the merits of the case.[23] The Section 2467 enforcement action, in other words, is not intended to give persons affected by the foreign order a second bite at the proverbial apple.[24] This is stated explicitly in Section 2467(e):

> "(e) Finality of foreign findings.— In entering orders to enforce the judgment, the court shall be bound by the finding of fact to the extent that they are stated in the foreign forfeiture or confiscation judgment."

D. **The "requirements of due process"**

Not surprisingly, the issue that arouses the most controversy is whether the foreign judgment was issued in accordance with American notions of what constitutes due process of law. *See* Sections 2467(d)(1)(A) and (D), quoted above. There will always be differences in procedure from one country to the next: one may place the burden of proof on the defendant or property owner,

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[22] 28 U.S.C. § 2467(d)(1) (apparent typographical error corrected).

[23] *See* In Re: Enforcement of Philippine Forfeiture Judgment, ___ F. Supp.3d ___, 2020 WL 990032 (S.D.N.Y. Feb. 27, 2020) ("the section 2467 proceeding does not revisit the merits of the foreign judgment"); In re: Enforcement of Philippine Forfeiture Judgment, 2020 WL 391947, *6 (S.D.N.Y. Jan. 24, 2020) (holding that "the sole issue that is the subject of the proceedings [is] whether the foreign judgment suffers from one of the five defects listed in section 2467(d)(1)").

[24] *See* In re $6,871,042.36 and Accrued Interest, 217 F. Supp.3d 84, 97 (D.D.C. 2016) (citing the legislative history and holding that Congress intended to prevent litigants "from taking two bites at the apple by raising objections to the basis for the forfeiture in the federal court" that were raised, or could have been raised, in the foreign court).

while another may place the onus on the state; one may require proof beyond a reasonable doubt while another may approve a forfeiture judgment based on a balance of the probabilities; and one may prescribe a different manner of providing notice of the forfeiture action to potentially affected persons than another state would require. The question is when do these inevitable differences rise to the level of procedures that are "incompatible with the requirements of due process of law."

Thus far, federal courts in the United States have been reluctant to view differences in procedure as obstacles to the enforcement of foreign forfeiture judgments. In an early case, one court said that a court in the United States "should not lightly sit in judgment of the legal system of a foreign sovereign," and that minor differences in procedure, such as whether an order may be issued *ex parte* and whether it is subject to direct appeal, are not sufficient to reject a request to enforce a foreign restraining order.[25]

E. **Intervention by third parties**

The drafters of Section 2467 probably assumed that any litigation over the enforcement of a foreign forfeiture judgment would involve only the Government (attempting to enforce the judgment on behalf of the foreign country) and the person against whom the foreign order was made (the defendant in a criminal case or the owner of the forfeited property). As it happens, there have been a number of cases in which third parties have attempted to intervene in opposition to the enforcement of the order. In some cases, courts have permitted the intervention; but in all of those cases they have held that the third parties are limited to contesting the enforcement of the forfeiture order on the same grounds on which the defendant or the property owner could contest it.

For example, in one case the Government of the Philippines obtained a forfeiture judgment against the assets of former President Ferdinand Marcos that were located in New York, and asked the United States to register and enforce the order. When the Government commenced its action under Section 2467, two parties moved to intervene. One was the Philippine bank in whose account the money was being held in New York; the other was a group of 9,000 human rights victims who had obtained a personal judgment against the Marcos estate and had used it to obtain a judgment lien against the New York assets.

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[25] In re Restraint of All Assets ... at UBS Financial Services, Inc., 860 F. Supp. 2d 32, 42 (D.D.C. 2012). *See also* In re Seizure of Approximately $12,116,153.16 and Accrued Interest in U.S. Currency, 903 F. Supp.2d 19, 33-34 (D.D.C. 2012) (finding that Brazil's criminal forfeiture procedures comport with due process; that claimant has burden of proving lack of due process does not itself offend due process).

The court held that the bank was merely a stakeholder with no legal interest in the assets themselves and thus lacked standing to intervene in the case.[26] On the other hand, it held that the victims did have a legal interest in the assets by virtue of their judgment lien. Accordingly, the victims were allowed to intervene,[27] but the court made it clear that the grounds on which they could object to the enforcement of the judgment were limited to the grounds set forth in the statute.

"There is no reason for an entity or person to participate in a section 2467 enforcement action," the court said, "unless it is addressing the sole issue that is the subject of the proceedings – whether the foreign judgment suffers from one of the five defects listed in section 2467(d)(1) – and seeks to stop the enforcement on that basis."[28]

Similarly, in another case a party that had obtained a judgment against a Brazilian corporation attempted to intervene in the Section 2467 action in which the United States was attempting to enforce a Brazilian judgment against the corporation's assets. The federal court allowed the creditor to intervene, but it held that a Section 2467 proceeding is not the appropriate forum in which to resolve competing claims, and that the creditor's right to contest the forfeiture order was something that it should have raised in the Brazilian courts.[29]

F. **Restraining orders**

Finally, Section 2467(d)(3) contains a provision authorizing a federal court to register and enforce a foreign order designed to preserve the availability of property in the United States while a proceeding that may result in the forfeiture judgment is pending in a foreign court, or is pending on appeal. The history of that provision is somewhat tortured: for the first decade after the statute was enacted in 2000 it was unclear whether it allowed the restraint of property prior to the entry of a final forfeiture order by a foreign court or only after such final order was made.[30] But an amendment to the statute enacted in 2010 has made it clear

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[26] In re: Enforcement of Philippine Forfeiture Judgment, 2020 WL 391947, *5-6 (S.D.N.Y. Jan. 24, 2020).

[27] In Re: Enforcement of Philippine Forfeiture Judgment, 2019 WL 3084706 (D.D.C. Jul. 15, 2019) (granting motion to intervene by holders of judgment lien against assets in the United States).

[28] In re: Enforcement of Philippine Forfeiture Judgment, 2020 WL 391947, *6 (S.D.N.Y. Jan. 24, 2020).

[29] In re $6,871,042.36 and Accrued Interest, 217 F. Supp.3d 84, 97 (D.D.C. 2016).

[30] *See* Cassella, "Enforcement of foreign restraining orders", J. of Money Laundering Control, Vol. 16 No.: 4, pp. 290–97 (2013).

that a restraining order may be enforced "at any time before or after the initiation of forfeiture proceedings by a foreign nation."[31]

Just as it must when it is seeking the enforcement of a final forfeiture judgment, a foreign Government requesting the restraint of property in the United States under Section 2467(d)(3) must first apply to the Attorney General, who must certify that the restraining order was issued by a court of competent jurisdiction in the foreign country.[32] That certification is not subject to judicial review.[33] Nor may a party opposing the restraining order do so "on any ground that is the subject of parallel litigation involving the same property that is pending in a foreign court."[34] In other words, the no-two-bites-at-the-apple rule applies to the enforcement of restraining orders just as it applies to the enforcement of final judgments.[35]

There is no right to prior notice and a hearing before the foreign restraining order is enforced,[36] but there may be circumstances in which a respondent can request that the restraint be lifted or at least modified after it is imposed. For

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[31] 28 U.S.C. § 2467(d)(3)(A). *See* In re Seizure of Approximately $12,116,153.16 and Accrued Interest in U.S. Currency, 903 F. Supp.2d 19, 29 (D.D.C. 2012) (the 2010 amendment permits enforcement of pre-trial restraining orders and applies retroactively); In re Restraint of All Assets ... at UBS Financial Services, Inc., 860 F. Supp. 2d 32, 43 (D.D.C. 2012) (granting motion under § 2467(d)(3) to enforce pre-trial restraining order entered by court in Curacao); In re Enforcement of Restraining Order, 2011 WL 3920280 (D.D.C. May 5, 2011) (registering an enforcing Hong Kong order restraining $23.7 in U.S. bank accounts pending trial); In re: Trade and Commerce Bank, 890 F.3d 301 (D.C. Cir. 2018) (because foreign criminal forfeiture order was being appealed, it could not be enforced under §§ 2467(b) and (c), but it was proper for the Attorney General to request a restraining order under § 2467(d)(3) to preserve the property while the appeal was pending).

[32] 28 U.S.C. § 2467(d)(3)(B)). *See $12,116,153.16,* 903 F. Supp.2d at 30 (listing the six criteria that must be met before a court can enforce a foreign restraining order).

[33] $*12,116,153.16,* 903 F. Supp.2d at 34 (for purposes of registering and enforcing a foreign restraining order, foreign officials' representation that the restraining order was issued by a court of competent jurisdiction and that the property would be forfeitable under foreign law in the event of a conviction is sufficient); *UBS Financial Services,* 860 F. Supp. 2d at 40-41 (nothing in Section 2467(d)(3) authorizes or requires a district court "to pierce the veil of authority behind a request for legal assistance;" all that is required is that the Attorney General certify the foreign request; the court will not question that action).

[34] 28 U.S.C. § 2467(d)(3)(C).

[35] In re $6,871,042.36 and Accrued Interest, 217 F. Supp.3d 84, 97 (D.D.C. 2016). *See $12,116,153.16*, 903 F. Supp.2d at 34 (§ 2467(d)(3)(C) expressly bars challenges that could be raised in the foreign court from being raised in the U.S. court, thus denying the claimant two bites at the apple).

[36] *UBS Financial Services*, 860 F. Supp. 2d at 42-43 (rejecting argument that a § 2467(d)(3) restraining order is governed by § 983(j)(1)(B) and that therefore the claimant is entitled to a pre-restraint evidentiary hearing; rather, because there is already an action pending in the foreign court, it is § 983(j)(1)(A) that applies, and therefore claimant has no right to relitigate factual issues that were presented or could be presented to the foreign court); *$12,116,153.16,* 903 F. Supp.2d at 32 (same; § 983(j)(1)(A), as applied through § 2467, is satisfied if there is a pending criminal prosecution in the foreign court; therefore there is no statutory right to a pre-restraint hearing).

example, in *In re Seizure of Approximately $12,116,153.16*, the court denied the respondent's request for a post-restraint hearing on the ground that he needed the restrained property to hire an attorney in the foreign court, but granted the request for a hearing on the ground that the extraordinary four-year delay in completing the forfeiture process in Brazil raised the risk of the erroneous deprivation of the property.[37]

G. **Repatriation of the property**

If the case proceeds as it should, the end result will be an order from the federal court enforcing the foreign judgment and ordering the return of the forfeited property to the foreign state in accordance with the foreign order.

III. Using NCB Forfeiture to Recover the Proceeds of Foreign Crimes

If the country where the crime occurred is unable to obtain a forfeiture or confiscation order that can be enforced in the United States, the alternative is for the Department of Justice to commence a civil or "non-conviction-based" (NCB) forfeiture action to recover the property under federal law. Such an action may be based on the violation of foreign law (if the violation falls within one of the six categories of foreign crimes listed in Section II.B, *supra*), or on proof that in transferring the property to the United States, someone committed a violation of U.S. law, such as money laundering, smuggling, or the interstate transportation of stolen property.

In all events, a successful NCB forfeiture action will result in the transfer of title to the property to the United States, which will then be free to repatriate all or part of it to the country where the underlying crime occurred pursuant to whatever bilateral or multi-lateral agreement for the equitable sharing of forfeited property may exist between the two countries.[38]

To understand how this works, it is first necessary to explain what an NCB forfeiture action is and how it is prosecuted. Then we will look at examples of actions that have been brought to recover assets derived from a wide variety of crimes occurring throughout the world that resulted in the transfer of assets to or through the United States.

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[37] *$12,116,153.16,* 903 F. Supp.2d at 33. *See* In Re Restraint of Twenty Real Properties, 2019 WL 481167 (D.D.C. Feb. 6, 2019) (respondent allowed to intervene but motion to vacate restraining order denied; no showing that the procedural protections in 18 U.S.C. § 983(j) were not provided, and there was no showing of need for property under Sixth Amendment).

[38] *See Asset Forfeiture Policy Manual* (2019), Ch. 8, Sec. XIII ("International Sharing"); 18 U.S.C. § 981(i) (authorizing the transfer of forfeited property to foreign countries).

A. What is NCB forfeiture?

An NCB forfeiture is an action filed in a federal court to determine whether title to real or personal property should be transferred to the United States because the property was derived from or was used to commit a crime. While it involves proof of a criminal act and is used as a tool of law enforcement, an NCB forfeiture action is not a criminal prosecution; it is a civil action brought to obtain title to a particular asset or set of assets.

The Government commences the action by seizing or restraining the asset and naming it in a complaint that is filed in a court in the district where the property is located, or where the acts giving rise to the forfeiture took place.[39] The Government then invites all parties that may have a legal interest in the property to lay claim to it, indicating their intent to contest the Government's forfeiture action and their reasons for doing so. If no one files a claim, the property will be forfeited to the Government by default. Otherwise the parties will engage in civil litigation.

In the end, if the Government is successful, it will obtain clear title to the property against anyone who filed or could have filed a claim, and will be free to dispose of the property as it sees fit. If is unsuccessful, it must release the property to the party from whom it was seized, and will be liable to pay his attorney's fees.[40]

Such actions are called *in rem* actions because they are brought against property, not people. Thus, in NCB forfeiture cases, the Government is the plaintiff, the property is the defendant, and persons seeking to contest the forfeiture are "claimants," who must intervene in the case and show that they have standing to do so.[41]

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[39] 28 U.S.C. § 1355(b). In some cases, where the property is located outside of the United States or it has been seized or restrained by a foreign Government, the action may be filed in Washington, DC.

[40] *See* 28 U.S.C. § 2465(b) (providing for the award of attorney's fees to any party who substantially prevails against the Government in a civil forfeiture case).

[41] *See* United States v. Vazquez-Alvarez, 760 F.3d 193, 197 (2nd Cir. 2014) (requiring the claimant to establish standing before the court will consider the merits of any motion he may file makes sense because the defendant in the forfeiture action is the res, not the claimant; until the claimant establishes standing, "he is simply a stranger to the litigation"); United States v. $196,969.00 in U.S. Currency, 719 F.3d 644, 646 (7th Cir. 2013) (in a civil forfeiture case, the defendant is "the thing;" the claimant is like a plaintiff in a "suit nested within the forfeiture suit"); United States v. $8,440,190.00 in U.S. Currency, 719 F.3d 49, 57 (1st Cir. 2013) (in a civil forfeiture case, the defendant is the property, and persons raising defenses to the forfeiture must establish standing to intervene); United States v. All Funds in Account Nos. 747.034/278 (Banco Espanol de Credito), 295 F.3d 23, 25 (D.C. Cir. 2002) ("Civil forfeiture actions are brought against property, not people. The owner of the property may intervene to protect his interest.").

In the United States, there is no distinction in the federal system between criminal courts and civil courts. The same courts that hear criminal prosecutions will also hear civil actions brought by the Government and by private parties. Thus, an NCB forfeiture action is likely to be filed in the same court in which a criminal prosecution might have been lodged. Nevertheless, because it is designated as a civil action, it will be governed by the procedures that govern civil lawsuits – with certain special provisions tailored to the peculiarities of NCB forfeiture.[42] It is for this reason that courts and practitioners in the United States universally refer to NCB forfeitures as "civil" forfeitures.

The custom in the United States is to name the property that is subject to forfeiture in the caption of the case; that is why NCB cases in the United States have names such as *United States v. One Gulfstream G-V Jet Aircraft* or *United States v. All Assets Held in Account Number 80020796* that some may consider odd or unusual. Naming the property as the subject of the proceeding, however, does not mean that the Government believes the property has done something wrong. Rather, NCB forfeiture is simply a procedural device designed to identify the property that the Government is seeking to forfeit, and to get everyone with an interest in the property in the courtroom at the same time.[43]

For example, if the Government believes that a jet airplane is subject to forfeiture because it is the proceeds of a crime (or was used to commit one), it would name the property as the subject of the forfeiture action and invite anyone with an interest in the property – the titled owner, his spouse, a lien holder, a person with a leasehold interest – to file a claim and contest the forfeiture in a single proceeding. This is a far more efficient process than would ensue if the Government were required to file a separate NCB forfeiture action against each of those potential claimants individually – assuming they could even be found.

For the United States, this is not a new concept. To the contrary, it was developed in the Eighteenth Century as a way of recovering property from pirates and slave traffickers whose vessels and cargo could be seized, but who, as individuals, remained outside of the jurisdiction of the US and its courts. So, if

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[42] *See* Federal Rule of Civil Procedure, Supplemental Rules for Admiralty and Maritime Claims and Asset Forfeiture Actions. For an overview of NCB forfeiture actions in the United States, *see* Cassella, "Nature and Basic Problems of Non-Conviction-Based Confiscation in the United States," *International Review of Penal Law*, Vol. 90, Issue 2 (2019), pp. 195-214, presented at the International Colloquium on Prevention, Investigation, and Sanctioning of Economic Crime, Max-Plank Institute, Freiburg, June 2018. (Also available in Portuguese and Spanish at Veredas Do Direito (Brazil), Vol. 16, No. 34 (2019), pp. 41-65, https://works.bepress.com/stefan_cassella/53/.) For a detailed discussion of civil forfeiture procedure, *see* Cassella, *Asset Forfeiture Law in the United States* (2d ed. 2013) (Juris New York).

[43] United States v. Ursery, 518 U.S. 267, 295-96 (1996) (Kennedy, J. concurring).

the Government seized the pirate ship and all of its cargo but could not lay hands on the ship owner, it brought an NCB forfeiture action against the ship and invited the pirate to come into court to oppose the action. If he refused to do so, he could not be prosecuted criminally; there is no possibility of conviction in *abstentia* in the United States. But the Government could recover his property.

Federal prosecutors now use NCB forfeiture in all manner of cases, from drugs, to fraud, to corruption, to virtually every other type of crime for which forfeiture is authorized. In particular, it is the vehicle of choice for recovering criminally-tainted property when a criminal prosecution – and hence, a criminal confiscation order – is not possible because the wrongdoer is dead, is a fugitive, is unknown, or is otherwise beyond the reach of the criminal law. Thus, it is the vehicle of choice when no criminal prosecution is possible because the crime giving rise to the forfeiture was a violation of foreign law and/or the wrongdoer is a foreign national over whom the court is unable to obtain personal jurisdiction.

B. **Proof of the crime and its connection to the property**

An NCB forfeiture does not require a criminal conviction or even a criminal case; its claim to fame is that it provides a means of recovering criminally tainted property when no criminal case is possible. Nevertheless, in an NCB forfeiture case the Government must prove two things: that a crime was committed, and that the property was derived from or used to commit that crime.

So, if the Government is attempting to forfeit the money in a bank account on the ground that it is the proceeds of fraud, it must prove that the fraud occurred and the money in the account is traceable to the fraud. Because the case is governed by the procedures that apply in civil cases, however, it may satisfy its burden on both points on a balance of the probabilities; it is not required, as it would be in a criminal case, to prove beyond a reasonable doubt that a crime occurred and that a particular person committed that crime.[44]

Even if the Government meets its burden and proves that a crime was committed and that the particular property was derived from or used to commit that crime, the case may not be over. At that point, the claimant contesting the forfeiture has the right to assert what is called an "innocent owner" defense. In the case of property subject to forfeiture because it was used to commit a crime, he may say that while someone else may have used his property in that way, he did not know it, or that he took all reasonable steps to prevent it. Or it the case of property shown to be the proceeds of crime, the claimant may say that he

[44] Prior to the enactment of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), the burden was on the claimant to prove that the property was *not* subject to forfeiture. CAFRA, however, abolished the reverse burden of proof and placed the burden of establishing the forfeitability of the property on the Government. 18 U.S.C. § 983(c)(1).

acquired the property from the wrongdoer as a bona fide purchaser for value without reason to know that it was criminally derived. If the claimant establishes either of those defenses by a balance of the probabilities, he will prevail.[45]

So, for example, if someone uses his wife's car to commit a crime, and the wife knew all about it and let it happen, the Government could forfeit the car in an NCB forfeiture action without having to charge the wife with any crime. Proving the crime and the connection between the car and the crime would be enough. But if she did not know that her car was being used to commit a crime, she would have an innocent owner defense, and would have the right to recover her attorney's fees if she prevailed.[46]

C. The tracing requirement

It is critically important to understand, that because an NCB forfeiture action is an *in rem* action against property, and not an action against a person, the Government must show that the particular asset named in its complaint is traceable to the crime. In a criminal case – which is an *in personam* action – the court might find that the property derived from the crime is no longer available – because it has been spent, or lost, or placed beyond the jurisdiction of the court – in which case it may issue a value-based judgment against the defendant for a sum of money equal to the value of the missing assets, and may order that the judgment be satisfied out of something else that the defendant owns. But in an NCB case, this is not possible. The Government must identify the particular asset that was derived from or used to commit the crime, and must prove the connection between that asset and the underlying offense. If it cannot do so, it cannot prevail.

So, for example, if the Government proves on a balance of the probabilities that someone committed fraud, or sold illegal drugs, or embezzled money from his employer, and it finds a million dollars in that person's bank account, it can only recover the money (or any part of it) in an NCB forfeiture action if it can trace the money to the underlying crime. It cannot say, "we have proven the crime and the amount of money stolen; we will take this money to satisfy the judgment." If the money in the bank account is not traceable to the crime, the Government cannot prevail. This is the tradeoff that the Government accepts when it brings an NCB forfeiture action instead of a criminal prosecution.

D. Procedure in an NCB forfeiture case

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[45] 18 U.S.C. § 983(d). *See* Cassella, "The Uniform Innocent Owner Defense to Civil Asset Forfeiture," 89 *Ky. Law Journal* 653 (2001).

[46] 28 U.S.C. § 2465(b).

The procedure in an NCB forfeiture action may be summarized as follows: the Government generally commences the action by seizing the property (most often with a judicial warrant),[47] and by filing a complaint setting forth the basis for its belief that the property is subject to forfeiture.[48] It must send a copy of the complaint to any person who appears to have a legal interest in the property and must give such persons time to file a claim contesting the forfeiture.[49]

If a claim is filed, the parties – the Government and the claimant(s) – engage in civil discovery; that is, they may make reciprocal demands on each other to produce relevant evidence, to respond to written interrogatories, and to appear for depositions. At the end of the discovery process, the parties may file dispositive motions. For example, the Government may challenge the claimant's standing to contest the forfeiture or move for summary judgment based on the undisputed facts. Or the claimant may move to suppress evidence that was illegally seized, move to dismiss the complaint, or file his own cross-motion for summary judgment.[50]

If no dispositive motions are granted, the case goes to trial before a federal judge. If either party so requests, the forfeitability of the property, as well as any innocent owner defense, must be determined by a jury.[51] If the Government prevails – *i.e.,* if it establishes both that a crime was committed and that the property was derived from or used to commit that crime – and the claimant does not establish an innocent owner defense, the court will enter an order transferring title to the property to the Government.

E. Using NCB forfeiture to recover the proceeds of foreign crimes

At this point, the utility of using NCB forfeiture to recover the proceeds of foreign crimes should be obvious, but so should its limitations.

When money is stolen in a foreign country and transferred to the United States, there is little likelihood of a criminal prosecution being filed in federal court. Most likely, the crime will be a violation of foreign law over which a court in the United States will not have extraterritorial jurisdiction. Moreover, even if the

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[47] With rare exceptions, the Government does not generally seize real property, but instead will preserve the property for forfeiture by obtaining a pre-trial restraining order, *see* 18 U.S.C. § 983(j), and/or by filing a notice of *lis pendens* on the land records. The procedures unique to commencing an action involving real property are codified at 18 U.S.C. § 985.

[48] *See* Supplemental Rule G(2).

[49] *Id.* Rules G(4) and (5).

[50] *Id.* Rule G(8).

[51] *Id.* Rule G(9).

movement of the money into the United States constituted some violation of federal law such as international money laundering, it is likely that the wrongdoer will remain outside the jurisdiction of the United States and will not be subject to criminal prosecution in its courts.

In such cases, however, a court in the United States will have jurisdiction over an NCB forfeiture action either because the property in question is found in the United States, or because the forfeiture can be based on a federal crime – such as money laundering – in which the property was involved.[52] Accordingly, it is quite common for foreign countries that have been unable to obtain a forfeiture or confiscation order regarding property found in the United States to ask the Department of Justice to commence an NCB forfeiture action and to repatriate all or part of the property to the foreign country if the action is successful.

The United States understands the importance of using this tool not only to honor its treaty obligations, but also to prevent the United States from becoming the repository of the world's criminal proceeds, and to prevent its financial institutions and markets from being used and in some cases dominated by organized criminals, corrupt foreign officials, and kleptocrats who have drained the treasuries of countries in the developing world and invested the illicit proceeds in real estate, securities and businesses in the United States.

On the other hand, this procedure has its limitations. First, the action must be brought against a specific asset. Thus, before the action can be commenced, the foreign country must be able to identify the specific asset or set of assets that were derived from the foreign crime. It is not enough to say, "X is a corrupt public official in our country; we believe that he has transferred the proceeds of his crime to the United States." It must be able to say, "X is a corrupt public official in our country, and we have traced the proceeds of his crime to this bank account in New York, or to this condominium in Miami."

Importantly, tracing the property in the United States to the crime that occurred in the foreign country will be part of the Government's burden of proof. Thus, even if the foreign country has identified specific assets that belong to the wrongdoer and believes that those assets are traceable to his crime, it will have to provide the prosecutor with admissible evidence to establish that connection.

To be sure, the Government will have tools at its disposal to assist it in meeting its burden of proof. It can demand the production of books and records

[52] As discussed in the example in Section III.F, NCB forfeiture actions to recover the proceeds of foreign crimes are often brought under 18 U.S.C. § 981(a)(1)(A), which authorizes the forfeiture of any property involved in a federal money laundering offense, which could include the proceeds of foreign crimes sent into the United States violation of 18 U.S.C. §§ 1956 and 1957.

from the claimant, take his deposition under oath, and rely on circumstantial evidence – such as the claimant's lack of any source of legitimate income sufficient to explain his ownership of the property in question – to establish that the crime occurred and to satisfy the tracing requirement, but doing so is not always easy.

Indeed, a frequent obstacle in such cases is the need to rely on foreign evidence and foreign witnesses to establish the foreign crime. Such evidence is not always easy to obtain.

The Government also must contend with the possibility that claims will be made by third parties who may or may not have an actual interest in the property – and thus may or may not have standing to put the Government to its proof – and who may be able to show that they have a valid innocent owner defense.

Finally, as a practical matter, bringing an NCB forfeiture action on behalf of a foreign Government is a time-consuming, labor-intensive process that the prosecutor in the particular location where the property happens to be found will have to undertake at the expense of other matters that might be of more immediate, if parochial, concern to his or her office, and which will result in the Government's being liable for attorney's fees if the forfeiture action is not successful.

For all of these reasons, bringing NCB forfeiture actions on behalf of foreign Governments is not something that is undertaken lightly, but rather is reserved for cases involving significant numbers of victims, prominent politically exposed persons, and/or large sums of money. The cases discussed below illustrate what such cases generally entail.

F. Examples of NCB forfeiture cases involving foreign crimes

There are many examples of cases in which the United States has brought an NCB forfeiture action to recover the proceeds of a foreign crime or property used to commit it. The most common involve artwork or other cultural property that was stolen or illegally removed from a foreign country but turned up – sometimes decades later – in an American museum, auction house, or private collection.

For example, in *United States v. Eighteenth Century Peruvian Oil on Canvas*,[53] the Government filed an NCB forfeiture action to recover two religious paintings that had been stolen from churches in Peru and were discovered in Virginia when someone attempted to bring them into the United States rolled up

[53] United States v. Eighteenth Century Peruvian Oil on Canvas, 597 F. Supp.2d 618, 625 (E.D. Va. 2009).

in cardboard tubes. In that case, the forfeiture was based on the UNESCO Convention on Cultural Property[54] and the Cultural Property Implementation Act,[55] which has its own civil forfeiture provision.[56] In other cases, the Government has recovered stolen paintings, archaeological artifacts, and other items as property illegally brought into the United States in violation of the Customs laws or as the proceeds of violations of the National Stolen Property Act, each of which has its own asset forfeiture authority.[57]

The United States has also brought NCB forfeiture actions to recover the assets of terrorist organizations and of international drug traffickers. In *United States v. All Funds on Deposit with R.J. O'Brien & Assoc.,* for example, it filed an action seeking the forfeiture of $6.7 million held in futures trading accounts in Chicago that belonged to an affiliate of Al Qaeda.[58] And in *United States v. $11,071,188.64 in U.S. Currency*,[59] it filed an action against more than $11 million in a Florida bank account held by a British Virgin Islands corporation ostensibly doing business as an ostrich farm, but in fact was engaged in laundering money for the Sinaloa drug cartel in Mexico. The terrorism case was brought under the civil forfeiture statute that pertains specifically to terrorist assets, 18 U.S.C. § 981(a)(1)(G), and the drug case under the statute that authorizes the civil forfeiture of any property involved in domestic or international money laundering, 18 U.S.C. § 981(a)(1)(A).

The Government has also filed NCB forfeiture actions to recover the proceeds of theft, fraud and other economic crimes committed in other countries. In one particularly notorious case – popularly known as the "Magnitsky Case" because it the involved the murder of Russian attorney Sergei Magnitsky in his jail cell in Russia – the Government brought a forfeiture action under the money laundering statute to recover a portion of $230 million that was stolen in a

[54] Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Nov. 14, 1970), 823 U.N.T.S. 231.

[55] 19 U.S.C. § 2606.

[56] 19 U.S.C. § 2609.

[57] *See* Cassella, "Recovering Stolen Art and Antiquities Under the Forfeiture Laws: Who is Entitled to the Property When There are Conflicting Claims," *North Carolina Journal of International Law*, Vol. 45, pp. 393-440 (2020) https://works.bepress.com/stefan_cassella/51/.

[58] United States v. All Funds on Deposit with R.J. O'Brien & Assoc., 783 F.3d 607 (7th Cir. 2015). *See also* United States v. One Gold Ring with Carved Gemstone, 2019 WL 5853493 (D.D.C. Nov. 7, 2019) (entering default judgment under § 981(a)(1)(G) against foreign assets of terrorist organization ISIS).

[59] United States v. $11,071,188.64 in U.S. Currency, 825 F.3d 365 (8th Cir. 2016).

Russian fraud scheme, laundered through bank accounts throughout Eastern Europe, and invested in real estate in New York.[60]

In *United States v. Real Property Located at 8 Drift Street,*[61] the Government filed a forfeiture action against several bank accounts and real property in New Jersey and South Carolina that was derived from the theft of millions of dollars in VAT tax refunds owed by a Chinese company to other companies in China. The forfeiture action in that case was based on both the money laundering statute and the National Stolen Property Act.[62]

Similarly, in *United States v. Real Property Located at 9144 Burnett Road,*[63] the Government used the money laundering statute to file a forfeiture action against real property in Washington State, alleging that a Romanian citizen who was extradited from the United States to Romania to face criminal charges involving tens of millions of dollars in unpaid excise taxes, laundered the proceeds of the foreign offense through multiple foreign bank accounts and ultimately used the money to purchase the property in the U.S.

Perhaps the best-known example of an NCB forfeiture action to recover the proceeds of a foreign white-collar crime is the 1MDB case in which a Malaysian businessman – the target of an on-going criminal investigation -- allegedly transferred $37 million in stolen funds from an entity in Hong Kong to newly opened bank accounts of two corporations in the United States, and subsequently transferred the money from one of those accounts to another. In that case, the Government filed a civil forfeiture action against the bank accounts alleging that the $37 million was the proceeds of bank fraud (18 U.S.C. § 1344) and property involved in laundering those proceeds.[64]

G. Kleptocracy and public corruption

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[60] United States v. Prevezon Holdings, Ltd., 2015 WL 4719786, *15-17 (S.D.N.Y. Aug. 7, 2015). The Prevezon case is discussed in detail in Cassella, **"**Illicit Finance and Money Laundering Trends in Eurasia," *J. Money Laundering Control*, 22:2, pp. 388-399 (2019). https://doi.org/10.1108/JMLC-01-2018-0003 (paper presented at the Cambridge International Symposium on Economic Crime, Cambridge University, September 2017).

[61] United States v. Real Property Located at 8 Drift Street*,* 2015 WL 5007830 (D.N.J. Aug. 20, 2015).

[62] Under 18 U.S.C. § 981(a)(1)(C), the Government may forfeit property stolen in violation of foreign law by alleging that when the property was transferred to the United States, it became subject to forfeiture as the proceeds of a violation of 18 U.S.C. § 2314-15, which is known as the National Stolen Property Act.

[63] United States v. Real Property Located at 9144 Burnett Road, 104 F. Supp.3d 1187 (W.D. Wash. 2015).

[64] United States v. $37,564,565.25 in Account No. xxxxxxxx9515, 2019 WL 5269073 (D.D.C. Oct. 17, 2019).

While all of these cases involve important matters, the Department of Justice has assigned the highest priority to cases involving money stolen in foreign countries by kleptocrats and other corrupt public officials who use the money to purchase assets or make investments in the United States, or who invest the money elsewhere after passing it through financial institutions in the United States in violation of US law.[65]

In *United States v. One Gulfstream G-V Jet Aircraft*,[66] the Government filed a civil forfeiture action against a $38.5 million jet aircraft, alleging that it was purchased in the United States by the son of the president of Equatorial Guinea with funds derived from extortion, theft and embezzlement. The Government's theory was that the aircraft was forfeitable under Section 981(a)(1)(C) as the proceeds of a foreign crime listed in Section 1956(c)(7)(B), and under Section 981(a)(1)(A) as property involved in the money laundering offense that occurred when the criminal proceeds were used to make the purchase in the United States.

Similarly, in *United States v. The M/V Galactica Star,*[67] the Government filed a civil forfeiture action under Sections 981(a)(1)(A) and (C) against a 65-meter motor yacht, real property located in New York and California, and other investments in the United States, alleging that they were involved in laundering the proceeds of public corruption offenses committed by the Nigerian Minister of Petroleum Resources.

And in *United States v. $215,587.22 in U.S. Currency*,[68] the Government filed a civil forfeiture action against the funds in nine bank accounts, alleging that they were involved in the operation of an unlicensed international money transmitting business that served various prominent clients, including the President of Gabon and his family, in violation of 18 U.S.C. § 1960.

The two best-known kleptocracy cases involve former Ukrainian Prime Minister Pavel Lazarenko, and former Nigerian leader Gen. Sani Abacha.

In the Lazarenko case, the United States has been engaged in a decades' long action filed in Washington, DC, to recover more than $250 million representing the proceeds of fraud, extortion, bribery and the embezzlement of

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[65] Reflecting this priority, the Government has established a specialized Kleptocracy Team within the International Unit of the Money Laundering and Asset Recovery Section of the Department of Justice. https://www.justice.gov/criminal-mlars.

[66] United States v. One Gulfstream G-V Jet Aircraft, 941 F. Supp.2d 1 (D.D.C. 2013).

[67] United States v. The M/V Galactica Star, 784 Fed. Appx. 268 (5th Cir. 2019).

[68] United States v. $215,587.22 in U.S. Currency, 282 F. Supp.3d 109 (D.D.C. 2017).

public funds that was laundered through bank accounts in the United States and ultimately transferred to over 20 bank accounts in Guernsey, Antigua, Switzerland, Lithuania and Lichtenstein. At each stage in the forfeiture proceeding, the Government has had to deal with claims filed not only by Lazarenko, but by his family members and others, raising a host of issues under U.S. and foreign law.[69]

In the Abacha case, the Government filed a forfeiture action, also in Washington, DC, against sixteen assets traceable to the theft of $4 billion from the Nigerian treasury by Gen. Abacha during his tenure as the military ruler of that country. Included among the assets was $287 million on deposit in an account held by Abacha's relatives through an entity called Doraville Properties in Jersey, Channel Islands.[70] The Government's theory was that the money was the proceeds of an offense involving public corruption under Nigerian law, and that the movement of the money through financial institutions in the United States constituted violations of the federal money laundering laws, which gave the federal court the authority to order the forfeiture of the property even though it was located outside of the United States. After rejecting efforts by the relatives to intervene in the action, the court entered a default judgment which was ultimately enforced by a court in Jersey under Jersey law.[71]

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[69] *See, e.g.,* United States v. All Assets Held at Bank Julius Baer & Co., 2020 WL 1615870 (D.D.C. Apr. 2, 2020) (rejecting Lazarenko's attempt to assert an interest in $148 million in a trust account in Guernsey under Guernsey law); United States v. All Assets Held at Bank Julius Baer & Co., 2019 WL 1167743 (D.D.C. Mar. 13, 2019) (rejecting Lazarenko's challenge to the Government's ability to trace the funds to his offense); United States v. All Assets Held at Bank Julius Baer & Co., 251 F. Supp.3d 82 (D.D.C. 2017) (holding that the US may exercise extraterritorial jurisdiction to bring a forfeiture action against the proceeds of a foreign crime listed in § 1956(c)(7)(B), and that there is no requirement that it have personal jurisdiction over the perpetrator or that venue lie in the US for a criminal prosecution); United States v. All Assets Held at Bank Julius Baer & Co., 268 F.Supp.3d 135 (D.D.C. 2017) (allowing Lazarenko to amend his claim to argue that the forfeiture of the proceeds of his offenses would violate the Excessive Fines Clause of the Eighth Amendment); United States v. All Asset Held at Bank Julius Baer & Co., 234 F.Supp.3d 115 (D.D.C. 2017) (ordering the disclosure of Lazarenko's tax returns); United States v. All Assets Held at Bank Julius Baer & Co., 2015 WL 4450899 (D.D.C. July 20, 2015) (holding that when a civil forfeiture complaint alleges that the defendant property was derived from criminal activity, and the claimant responds that the money came from legitimate sources, the Government has the right to compel the claimant to explain and document the sources from which the money came); United States v. All Assets Held at Bank Julius Baer & Co., 772 F. Supp. 2d 191, 199 (D.D.C. 2011) (holding that creditors with judgments against the wrongdoer lack standing to contest the forfeiture the assets traceable to his offense).

[70] United States v. All Assets Held in Account Number 80020796 (Doraville Properties), 83 F. Supp.3d 360 (D.D.C. 2015).

[71] Doraville Properties Corporation v. Her Majesty's Attorney General [2016] JRC128, Royal Court, Bailiwick of Jersey, (July 2016). For more detail on the Abacha case and the enforcement action in Jersey *see* Cassella, "Hurdling the Sovereign Wall: How Governments Can Recover the Proceeds of Crimes that Cross National Boundaries," J. Money Laundering Control, 22:1, pp. 5-13 (2019), https://doi.org/10.1108/JMLC-09-2017-0046 (paper presented at the Cambridge International Symposium on Economic Crime, Cambridge University, September 2016).

The United States has also brought actions to recover property derived from bribery or the misappropriation of public funds by public officials in Latin America and Asia. Some of the cases involved property located in the United States, and others involved property acquired elsewhere with assets that were laundered through U.S. financial institutions.

In a series of cases filed in Texas, the Government first filed a forfeiture action against an investment account in Bermuda, alleging that two individuals, both high-level government employees in Mexico, opened accounts at a bank in Texas, and used those accounts to transfer money to multiple offshore annuity accounts in Bermuda. The money, the Government alleged, was derived from several violations of Mexican law -- including bribery of a public official, misappropriation of public funds, theft, and the embezzlement of public funds -- and was subject to forfeiture because it was laundered through the United States.[72]

Several years later, the Government brought forfeiture actions against the Texas residence and Bermuda bank accounts of the former mayor of Matamoros, Mexico, alleging that he had laundered $2.4 million derived from bribery and kickbacks,[73] and against a Texas residence other assets of other officials who had stolen more than $1.9 million from the State of Tabasco.[74]

Finally, in *United States v. All Property . . . in the UBS Financial Services, Inc. Account*,[75] the Government alleged that two U.S. citizens bribed the former tourism minister of Thailand to obtain contracts to manage the Bangkok International Film Festival and perform other services for the Thai government in violation of the Foreign Corrupt Practices Act, and that the proceeds of the bribes were sent to bank accounts located in the United Kingdom, Singapore, and Switzerland that were held in the name of the minister's daughter. Because the bribery offense constituted a violation of federal law, the Government said, the money was subject to forfeiture as the proceeds of that offense under Section

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[72] *United States v. All Funds on Deposit at Old Mutual of Bermuda, Ltd.,* 2015 WL 3883979 (S.D. Tex. Jan. 29, 2015); United States v. All Funds on Deposit at Old Mutual of Bermuda, Ltd., 2014 WL 4101215 (S.D. Tex. Aug. 18, 2014); United States v. All Funds on Deposit at Old Mutual of Bermuda, Ltd., 2014 WL 1689939 (S.D. Tex. May 1, 2014). *See* also United States v. All Property . . . in the UBS Financial Services, Inc. Account, 2015 WL 9243838 (S.D. Tex. Nov 17, 2015) (forfeiture of $1.1 million in a brokerage account derived from the corruption of former public officials of the State of Tamaulipas, Mexico).

[73] United States v. All Funds on Deposit at Sun Secured Advantage, 864 F.3d 374 (5th Cir. 2017).

[74] United States v. All Assets . . . at Sun Life Financial Investments (Bermuda) Ltd., 2018 WL 4275214 (S.D. Tex. Sep. 7, 2018); United States v. Real Property Known as 615 Elmhurst, 2018 WL 3655081 (S.D. Tex. Aug. 1, 2018).

[75] United States v. All Property . . . in the UBS Financial Services, Inc. Account, 2015 WL 9243838 (S.D. Tex. Nov 17, 2015).

981(a)(1)(C) and as property involved in money laundering under Section 981(a)(1)(A).[76]

H. Initiating a request to commence an NCB forfeiture action

To initiate a request for the United States to commence an NCB forfeiture action against property derived from a foreign crime, the foreign Government must bring the matter to the attention of the Department of Justice. This may be done by making a formal request to the Department's central authority for international matters, the Office of International Affairs (OIA), or to the International Unit of the Money Laundering and Asset Recovery Section (MLARS). Or it may begin with an informal contact with a federal prosecutor – an Assistant U.S. Attorney – or with a federal law enforcement agent in the district where the property is located and where the forfeiture action is likely to be filed. The foreign Government does not have to be represented by counsel, but U.S. counsel may assistant the foreign Government in locating the assets to be forfeited and in making contact with the appropriate U.S. authority.

As noted earlier, identifying the assets in question, establishing their location, and assembling the evidence needed to prove both the foreign crime and the connection between the property and that crime are likely to be prerequisites to getting the attention of the federal prosecutor and his or her commitment to undertake the case.

If a person accused of committing the foreign crime giving rise to the forfeiture has been arrested or charged in the foreign country with that offense, it may be possible for the United States to use the arrest or indictment itself as the basis to restrain property "for such time as is necessary to receive evidence from the foreign country" in support of the commencement of a forfeiture action.[77] Otherwise, the foreign country will need to provide enough evidence to establish "probable cause" for the seizure or restraint of the property under U.S. law. In all events, the Government will want to be ensure that the property is immobilized before it files a complaint to so that it does not disappear while the case is pending. [78]

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[76] Complaint for forfeiture Case in No. 1:13-cv-00195-CRC filed 02/11/13 in the District Court for the District of Columbia.

[77] 18 U.S.C. § 981(b)(4).

[78] For a practical guide to requesting the commencement of an NCB forfeiture proceeding in another country, see William H. Byrnes & Robert J. Munro (eds), *Money Laundering, Asset Forfeiture and Recovery and Compliance—A Global Guide*, Ch. Topic 13 "Cross Border Civil Recovery of Tainted Property" (Simser, J).

IV. Conclusion

The United States is committed to assisting foreign countries in recovering the proceeds of foreign crimes that have been invested in, or laundered through, the United States. The two methods of providing such assistance – the enforcement of foreign forfeiture and confiscation orders and the commencement of NCB forfeiture actions under U.S. asset forfeiture law – while time-consuming and resource-intensive, have both proven to be effective ways of breaking down the barriers to international cooperation that criminals of all stripes have so gleefully exploited. Those who have been engaged for many years in the effort to overcome the obstacles to effective law enforcement created by principles of sovereignty can find encouragement in these successes, and have reason to hope that the coming decade will see many more such instances as practitioners learn how to use the tools that are now available, and as the movement to adopt such tools spreads throughout the world.