

# Stolen Asset Recovery Initiative (StAR)



## Non Conviction Based Forfeiture A Good Practices Guide

Regional Capacity Building  
Sofia, Bulgaria  
December 12-14, 2009

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# Stolen Asset Recovery

A GOOD PRACTICES GUIDE FOR  
NON-CONVICTION BASED ASSET FORFEITURE

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# Governments Must

- Hit where it hurts – money and greed.
- The process of criminal investigation and prosecution, especially involving the use of money laundering and confiscation laws (criminal and non-conviction forfeiture), must – along with other tools - be used to fight crime.

*Governments must act to disrupt and dismantle organized crime networks by, among other things:*

- Identifying, investigating and prosecuting important cases, obtaining significant terms of imprisonment and fines, and **seizing and forfeiting proceeds and instrumentalities of crime**;
- Using laws against corruption, money laundering, fraud, organized crime, as well as **criminal and non-conviction based asset forfeiture**;
- Ensuring **effective coordination and cooperation** among law enforcement agencies, including anti-corruption agencies and Financial Intelligence Units;
- Providing timely and effective responses to requests for **international legal assistance** to developing as well as developed countries and jurisdictions.

## Asset Forfeiture → Critical Tool to **Fight Corruption** and for **Asset Recovery**

- Deprives violators of the proceeds of offences, the instruments of offences, and benefits derived from offences
- Need to enact and implement laws that provide for tracing, freezing, confiscation and for mutual legal assistance.
- Recognized in International Conventions (UNCAC, UNTOC, Vienna Convention)

# Limitation of Criminal Forfeiture

Cannot always forfeit property that was derived from crime or was used to commit a crime in a criminal prosecution. Defendant may be:

- Dead
- A fugitive
- Immune from criminal prosecution

Limitations on types of international judicial assistance when there is no criminal investigation pending.

# Criminal and NCB Forfeiture

| <b>Conviction Based or Criminal Forfeiture</b><br>(Common law jurisdictions)       |                | <b>Non-Conviction Based or Civil Forfeiture</b>   |
|--|----------------|---|
| Against the person (in personam)<br>→ Part of the criminal charge against a person | Action         | Against the thing (in rem)<br>→ Judicial action filed by a government against the thing as the wrongdoer    |
| Criminal   | Jurisdiction   | Civil   |
| Imposed as part of sentence in criminal case                                       | When           | Filed before, during, or after criminal conviction, or even if there is no criminal charge against a person |
| Criminal conviction → <u>beyond a reasonable doubt</u>                             | Proof required | Unlawful conduct → <u>balance of probabilities</u> . Criminal conviction not required                       |
| Forfeit defendant's interest in property   | Forfeiture     | Forfeit the thing itself, subject to innocent owners  |

# NCB Forfeiture is a Critical Tool

## **UNCAC Article 54(1)(c)**

Consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other cases.



# NCB Forfeiture

## → Available when criminal conviction is not possible

### Examples:

- Defendant is a fugitive
- Defendant is dead
- Defendant is immune from criminal prosecution
- Defendant is unknown and assets are found (e.g., courier)
- Defendant has been acquitted of the underlying criminal offense due to lack of admissible evidence
- the assets are held by a third party who has not been charged with a criminal offense but is aware—or willfully blind—that the property is tainted.
- the forfeiture is uncontested

# NCB Guide Overview

- I. Prime Imperatives
- II. Defining Assets & Offenses Subject to NCB Asset Forfeiture
- III. Measures for Investigation and Preservation of Assets
- IV. Procedural & Evidentiary Concepts
- V. Parties to Proceedings & Notice Requirements
- VI. Judgment Proceedings
- VII. Organizational Considerations and Asset management
- VIII. International Cooperation and Asset Recovery

# Elements in NCB Forfeiture Law

- NCB should never be used as substitute for criminal prosecution
- Proceeds when property owner is dead, has fled, or is immune from prosecution
- Define relationship between NCB forfeiture case and any criminal proceedings
- Statute of limitations

# Defining Terms

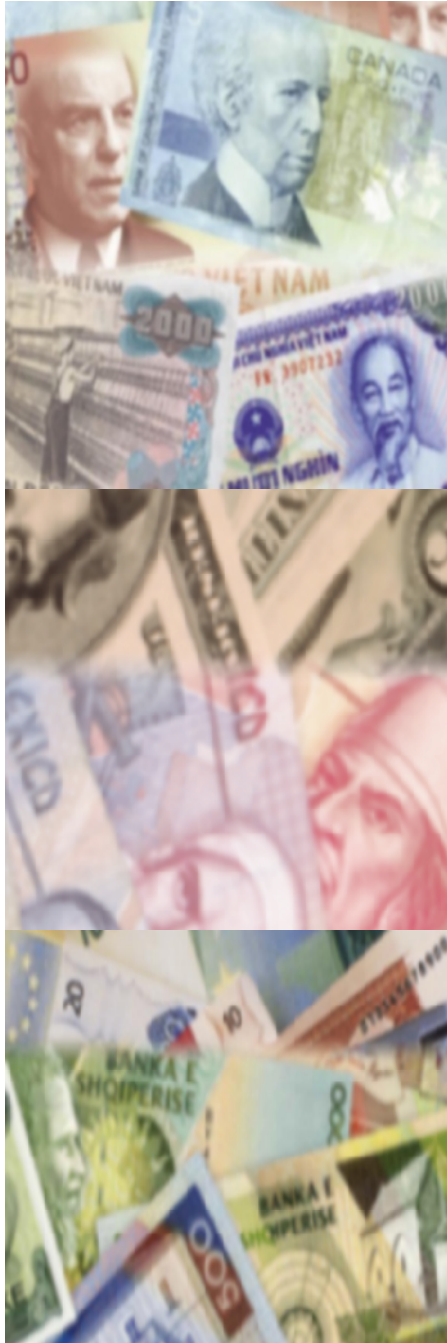
- Wide range of criminal offences
- Broad category of assets (proceeds, instrumentalities, substitute assets, tainted assets acquired prior to enactment of law)
- Specify agencies with jurisdiction to investigate and prosecute forfeiture

# Specify Procedural and Evidentiary Concepts

- The elements the government/law enforcement must establish for tracing, freezing, forfeiture of assets
- Notice requirements (to parties with interest in asset);  
Time requirements for filing defenses
- Standard of proof (Balance of probabilities)
- Presumptions
- Defenses
- Access to restrained funds for legal expenses
- Hearsay, circumstantial evidence
- *Ex parte* provisions for restraint orders
- Default judgments

# International Co-operation and NCB Forfeiture

- Laws are written to achieve maximum enforceability in other countries.
  - Allow enforcement of foreign judgments
  - Demonstrate interested parties had opportunity to challenge forfeiture action (e.g., notice, due process)
  - Procedures are clearly outlined (e.g, defenses, standard of proof, etc.)
- Final judgment of forfeiture must connect the crime to the proceeds and explain why each asset is forfeited.
- Provide mutual legal assistance and the ability to restrain and confiscate at request of foreign jurisdiction



# Thank You

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