



Organization of
American States

Inter-American Drug Abuse Control Commission

BIDAL PROJECT

Best practices document on management of
seized and forfeited assets

(Draft)

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Introduction

Criminal organizations obtain huge profits from their illicit business. These illicit proceeds motivate criminal organizations and provide them with the resources to continue to prey upon our communities. For this reason, the international community, has recognized the importance of depriving these organizations of their criminal proceeds through seizure, restraint and forfeiture. However, as governments pursue the seizure, restraint and forfeiture of criminal property, proper management and accounting for the vast number and variety of assets presents additional challenges for law enforcement and judicial authorities.

We have observed through the analysis of CICAD/OAS Experts of the Sub Working Group on Forfeiture, the urgent need for the creation or strengthening of specialized government entities responsible for the management, maintenance and custody of seized and forfeited assets in order to preserve their value. Countries, particularly in the Americas and Europe, have opted for the creation of specialized asset management groups, sometimes known as Forfeited and Seized Asset Management Offices or Assets Recovery Agencies, responsible for the receipt and maintenance of assets.

These agencies include professionals and technicians dedicated to the identification, tracing, seizure, management and conservation of the instruments related to drug trafficking, organized crime and other offenses. The work of these agencies, coordinated with the work of investigatory, prosecutorial and judicial authorities, can be a cornerstone in the effort to deprive the perpetrators of illegal profits and assets -- and therefore, a crucial element . This effort should be made in order to ensure that once the criminal proceedings are over the crime as a lucrative activity is avoided.

The primary objectives of asset forfeiture are to disrupt and dismantle criminal organizations by denying them criminal profits and resources to commit further crimes, and where appropriate, to compensate victims.

The desired result may be more effective if it increases the exchange of information between different agencies at national and international levels and strengthens international cooperation in the area.



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General Objective

This document seeks to aid CICAD/OAS member states by offering relevant information in order to guide and improve the legal systems. This tool is designed to guide and improve the establishment and implementation of structures to promote transparency and accountability of asset management, based on the success in some countries with the management of seized and forfeited assets, in accordance with the Model Regulations. It also provides information drawn from laws and regulations of different countries which have opted for the creation of specialized units for managing seized and forfeited assets.

These principles are not intended to be binding on any state, but they offer to identify some practices that some nations have found useful in the administration of seized and forfeited assets.



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CHAPTER I: Asset investigation and Precautionary Measures

1. Asset investigation as an indispensable tool of law enforcement

Both the Police and the Public Prosecutor's Office, as part of the criminal investigation, should seek to identify criminal proceeds and instrumentalities at an early stage of the investigation in order to enable the timely restraint, seizure and forfeiture of criminal property by the court. Concurrent with the criminal investigation, these asset investigations should seek to demonstrate that the assets result from or were used in the commission of a crime, thus establishing the causal link of the assets and the offense to support forfeiture and to strengthen the underlying criminal investigation. In addition, the asset investigation should seek to identify nominees used to conceal the proceeds or instruments of the crime and strive to distinguish them from bona fide third parties.

For this purpose, the competent authority for this type of investigation should have access to sources of information that may allow the accurate and detailed identification of the assets of the criminal organization. Where appropriate and properly authorized in the course of a criminal investigation, access to information obtained through the use of special investigative techniques, such as: wire taps, undercover operations, controlled delivery, informers, etc., may also be beneficial for an asset investigation.

2. Pre-restraint Planning and Discretionary Authority



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Where possible, prior to restraint or seizure, assets should be analyzed for pre-assessment and future management in order to anticipate the costs of and resources required for their management. The competent authority should not be required to seize every asset identified, and should have discretion to judiciously choose not to submit assets of little law enforcement or monetary value to forfeiture proceedings. Similarly, different mechanisms to restrain assets or to prevent their alienation, may be appropriate alternatives to seizure. Appropriate planning, can help avoid unnecessary expenditure on asset maintenance.

3. Seizure of assets of economic value

The law enforcement objective of taking the proceeds or instrumentalities of crime should be paramount. Consequently, there will be cases in which the competent authority should seize criminal proceeds and instrumentalities even though it will be unable to recover the resulting asset administration expenses.

In other cases, unless it is a seizure of prohibited substances or a seizure for public health reasons, states should endeavor to seize assets that have economic value and that the asset management unit can be responsible for their care, custody, management, preservation and disposal. Therefore, assets should be appraised by experts in order to determine market value.

To avoid storage, maintenance and custody of assets of small value, some states use minimum value thresholds for determining whether to pursue forfeiture, subject to appropriate exceptions allowing for seizure of low or negative value assets in the public interest..

4. Ex parte restraint or freezing of assets

When related to assets registered in the National Public Registry or financial products, States should ensure that they have adequate legal procedures to immediately, and without prior notice or hearings, ask the appropriate agencies or



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judicial authority for a precautionary restraint or freezing of assets in order to preserve the availability of assets resulting or used in the commission of illicit activities.



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CHAPTER II: Seized and Forfeited Asset Management

1. Establishment of a central agency dedicated to the management of seized assets

States should ensure the establishment of a competent national specialized unit responsible for receiving, managing, maintaining, and guarding seized or restrained assets, and should not modify, alter or dispose of any asset as long as it remains under this condition, unless they are fungible assets that are perishable in order to avoid its deterioration, loss or destruction.

The agency's purpose is to ensure transparency in management and administration of seized assets.

The asset management unit should have professional and highly qualified personnel in order to perform the specific tasks of the institution, which may include lawyers, managers, accountants, appraisers, mechanics, engineers, inspectors, among others. The specialized unit should also have the possibility to hire outside services in order to fulfill its mission.

Distributing the proceeds of seized assets and money should be made according to national law.

2. Legal provision for delivery to custody

Seized assets should be turned over to a central and specialized management agency under a legal provision that delineates the legal responsibilities for their management and custody.

The appointment of custodians or administrators, should be the exception to the general rule. Where such outside managers are appointed, they should be



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supervised by the Special Administrative Authority and should submit regular reports on the supervision, maintenance, and custody of the assets.

3. Registry of seized and forfeited property

States should consider using software to maintain a registry of seized and forfeited assets, sometimes called Asset Management Systems (AMS). This technological tool will be used to record income, transfers, judicial proceedings, legal situation, identification of objects, and the location of each asset in custody, in order to permit quick verification of its current status.

An AMS also will permit the generation of reports on the amount of real estate and personal property, as well as the preparation of statistics on assets seized and forfeited, accountability, management costs, and financial statements.

It also seeks to promote transparency and good governance in management of seized and forfeited assets, because the data recorded in the system will be subject to public scrutiny.

4. Seized assets fund

The Special Administrative Authority should maintain a single and central account into which all competent judicial authorities deposit cash seized in connection with drug trafficking, money laundering, or other crime, as well as liquidated assets, when domestic legislation authorizes it.

Exceptions should be permitted for evidentiary purposes.



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In any case, when the competent judicial authority orders devolution of the money, accrued interest should be included where applicable¹.

5. Forfeited money and assets fund

Similarly, the asset management entity should maintain a single and central account of forfeited assets to administer resources from judgments or final judicial rulings that specify the disposition of seized cash or the proceeds from the auction or sale of forfeited assets. The amounts generated from proceeds from the auction, or disposal of forfeited property should also be incorporated to those funds.²

6. Appropriate resources for maintenance of seized assets

Funds deposited into the asset forfeiture funds should serve as an alternative source for financing the management of seized and forfeited property.

The Special Administrative Authority (SAA) should be adequately financed to ensure that they are properly carrying out their functions. As well, national legislation should anticipate that external financing will be necessary, at least in the first years of operation, in order to sustain the management asset program. After said program is in operation, it is expected to be self sufficient. As such, it is desirable that the

¹ When cash seizures are ordered released some countries nevertheless retain interest accrued on the cash deposits because it was not accruing interest at the time of seizure. Some such systems use interest accrued on cash deposits for administration, custody and maintenance of seized assets administration, as well as the strengthening of preventive or enforcement activities in the combat against drugs and others. The fund must be expressly authorized by law for the purpose of deriving maximum benefit and preventing corruption and diversion in its use and distribution.

² The SAA can invest the resources to maximize the forfeited money at its disposal and distribute the capital as authorized by national legislation.. Each State will determine at its discretion what percentage of the forfeited money fund should be distributed. It should take into consideration the need to finance projects in the supply control and demand reduction areas and the fight against criminal activity.



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legislation ensure that some of the forfeited assets are to be used to further support the asset forfeiture program and the functions of the SAA.³

Interest, revenue or income from seized businesses or companies should be used for maintaining the corporation. Business profits generated in excess of expenses should be maintained in an interest bearing account and released or forfeited along with the business itself.

7. Existence of controls

States should ensure strict controls over management of seized or forfeited assets, in application of the transparent public administration principles.

There must be a clear division of tasks to ensure that no one person has exclusive authority over management of the assets, and actions involving the assets should be supervised by a higher authority. To this end there should be an internal audit or external audit as applicable, as least once a year.

No person officially responsible for the seizure of assets should receive a personal financial reward connected to the value of a seizure, nor should funds from any mechanism for the administration of seized assets be used for personal purposes.

Some states may wish to require decisions on alienation, lease, management, and end use of forfeited assets be made by a collective body rather than an individual.

³Some countries have adopted different approaches in assigning resources for maintaining these assets. Such approaches include providing an autonomous budget to the entity responsible for managing the assets, at least until the asset forfeiture funds are self-sufficient; by providing a percentage of the monetary funds that have been forfeited; in accordance with regulations, letters of understanding or inter-institutional agreements, through institutions that have been provided assets for their provisional use; by deduction or collection from the owner and/or lawful third party at the time to order their return for the expenses in managing and keeping custody of the seized assets; when the seized assets are profitable through their own budget; and through different provisionary preventive measures, such as the immobilization, freezing or entry registration in a real estate registry. These approaches allow for authorities to avoid transferring assets without incurring costs for their maintenance.



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CHAPTER III: Loss of the products or instruments of the crime

1. Legislative authority for prior alienation or auction of seized assets

Under its domestic law, each State may take legal action for the SAA to sell or auction seized assets before judicial sentence. Legal authorization should be made through the competent authority and rely on the idea of preserving the value of assets whether forfeited or ultimately released by preventing deterioration of seized asset during the criminal procedure or loss of its commercial value due to depreciation, risk of loss or destruction, or because of its excessive or costly administration.

In such cases, the proceeds of the sale or auction should be deposited in the seized fund account until the competent authority orders its return or forfeiture.

2. Forfeiture by Default or Abandonment

States should establish clear legal procedures for asset forfeiture orders, if, after due notice a person fails to claim the assets.

The competent authority may issue a final decision ordering definitive forfeiture of the assets to the State when:

If after a reasonable length of time from the seizure of the asset, it has not been possible to identify the author or perpetrator of the act or that person has abandoned assets of economic value, or the elements and means of transport used or resulting from said actions. In this case, the competent authority should order the definitive forfeiture of the assets, which will be turned over to the management entity for the applicable purposes.

If after a reasonable length of time from the end of the criminal proceeding persons who might have legitimate legal interest in the assets of economic value have made



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no effort to claim the assets, and therefore the interested party's deadline for making a claim is over, the SAA is entitled to dispose of the assets, subject to authorization by the legal authority.

In any of these cases, the due process of law should be followed in order to guarantee their rights, either through notification, publication or declaration of default or abandonment.

3. Forfeiture as an additional consequence to a crime

States may wish to consider establishing procedures for the forfeiture of property in the absence of a conviction where there is sufficient proof to demonstrate that the assets are proceeds of or involved in an illegal activity.

Traditionally, the legal nature of forfeiture is tied to the criminal process as an additional sanction, requiring a conviction to order the forfeiture of an asset or instrument to the crime.

Current practice in some legislation regarding seizures has changed the legal nature of the sanction from an additional consequence of the crime to an additional legal consequence of the act.

In contrast to the sanctions or the security measures, the additional consequence is a coercive act in its own right, which implies that the basis is not in culpability, but rather in the objective danger of certain material things, such as the instruments and legal consequences of an offense, unjust enrichment or the maintenance of illicit wealth, which allows for the seizure of assets of a person not criminally responsible for a crime, so long as there is sufficient evidentiary proof to demonstrate that the se are proceeds or were instruments of an illegal activity.

This being the case, the forfeiture of assets as an additional consequence should be maintained through the following parameters:



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A forfeiture cannot be ordered when the assets, goods or instruments belong to a bona fide third party not responsible for the crime.

The illicit origin in relation to the crime through an asset investigation should be demonstrated.

A forfeiture order can only be issued by a competent Tribunal at the request of the Public Ministry or by the accusatory party.

The assets should be identified and individualized in a precise manner in a charge that it is a good or instrument of a crime.⁴

Some states may wish to adopt procedures based upon *in rem* jurisdiction to adjudicate the interests in property, while others may wish to adopt procedures to extinguish individual ownership interests due to its origin as proceeds of or use as an instrumentality of offense conduct.

⁴ Proposed by CICAD's ES



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CHAPTER IV: Special provisions on seized and forfeited asset administration

1. Considerations on provisional use of seized asset

The best practice recommended is the anticipated disposal of property when the domestic legislation permits it, and if not the assets should be reasonably kept under the same conditions as of when they were seized.

Some States, applying Article 7 paragraph 6 of CICAD/OAS Model Regulations, have adopted certain procedures that permit the provisional use of seized assets, and only permitting it in exceptional circumstances, when established by the domestic legislation.⁵

Some States believe that the provisional use of seized assets jeopardizes the integrity of the forfeiture system because it makes it more vulnerable to corruption and abuse, subjecting it to public criticism, additionally its use could be incompatible with fundamental rights, such as due process of law.⁶

In these cases, the Specialized Administrative Authority shall establish responsibilities of the receiving institution regarding the assets' use, conservation and preservation of its reasonable value, through the creation of regulations, letters of understanding or inter-institutional agreements on gratuitous loan and bailment, which explain the duties and rights of the parties regarding the use of seized assets.

Under no circumstances should the personal use of an asset be authorized.

⁵ a) The categories of seized assets which may be intended for temporary use under the responsibility of the State; b) The time limits for temporary use; c) Authorized institutions that may request of Specialized Administrative Authority temporary use of assets; d) The purpose or purposes for which such use is allowed; e) The appropriate control mechanisms to meet those purposes, and the protection of the accused's or third party rights f) creation of regulations, letters of understanding or inter-institutional agreements on gratuitous loan and bailment, which explain the duties and rights of the parties regarding the use of seized assets.

⁶ United States and Canada.



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2. Tax exemption

When seized assets are not income-producing, States may consider exempting them from all taxes, stamps, or any assessment from the time of seizure. The assets should be considered covered by the principle of tax immunity, because in the case of assets seized and pending criminal proceedings, the State is managing property it does not own.

States should not be liable for tax obligations incurred prior to the assets' seizure⁷.

3. Contracting Authority of the Special Administrative Unit

The Special Administrative Unit should have adequate contracting authority to appropriately and expeditiously administer external services when the management of the asset is beyond its capacity or expertise.

In order to do this, the unit could rely on alternative mechanisms for recruitment, when authorized by the supervising agency.

This is intended to allow more flexible contracting while protecting, maintaining, and guarding the seized and forfeited assets.

Contracting authority for this specialized agency should be sufficiently flexible to enable the agency expeditiously to protect, maintain, and serve as custodian of seized and forfeited assets while also ensuring adequate control measures.

⁷In the experience of some asset management units unpaid taxes can be equal to or greater than the value of the assets, rendering them unproductive even if they are still in good condition.



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4. Bona fide third parties⁸

Where pre-judgment liquidation of assets is appropriate to preserve value, States should establish procedures for bona fide third parties to contest the liquidation of unique, non-fungible property. Such procedures should include adequate advance notice, subject to appropriate exceptions for perishable and rapidly depreciating assets or assets with costly maintenance.

5. Assets subject to lien or foreclosure

It is recommended that when a seized asset is the subject of a lien or foreclosure proceeding in favor of a bona fide third party, the SAA unit may appear before the proceedings and request a stay, when by the initiation of a criminal proceeding, its outcome may necessarily influence the final decision in the civil one.

In this regard, payment for guarantees and mortgages may be made to bona fide third parties, at least in the following circumstances:

- a) When forfeiture of the asset is ordered, the State may pay the borrower or mortgagee creditor the amount owed to remove the respective liens.
- b) When the asset remains seized, the asset management entity, in application of the principle of sound resource management, may pay the amount due the creditors provided that there is a high likelihood that the asset will be forfeited at the end of the proceeding.

⁸ Art. 10 of CICAD Model Regulations refers to the sanctions and measures applied to bona fide third parties. It is therefore important to summon third parties to appear in the criminal proceeding to assert their rights to the seized assets, because if they fail to appear, this could constitute a procedural error that might affect the grounds for forfeiture because the parties were not allowed to exercise the right of defense and effective legal protection guaranteed in each country's constitution. To comply with these principles, third parties should be informed personally or by means of published notices.



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In any case, if the judicial authority orders return, the SAA should have the right to retain the asset until the sum paid by the management is reimbursed.

Liens should not be paid out of the SAA budget.



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CHAPTER V: Disposition of Forfeited Assets

1. Disposition of Forfeited Assets

Through the Special Administrative Authority, the member states should consider adopting regulations or legislation allowing for forfeited movable or immovable assets to be:

- a) Maintained to carry out their objectives.
- b) Donated to agencies whose purposes are for the prevention of crime, the control of drugs; the fight against money laundering, organized crime, the financing of terrorism and exceptionally to public interest agencies.
- c) Put up for public auction or sale.
- d) Shared with other countries where joint operations are conducted, in accordance with the principles that govern international legal cooperation or through the application of bilateral or multilateral agreements.

Securities, cash and proceeds from publicly auctioned or sold assets that have been forfeited should be:

- a) Assigned a portion to support and maintain the program for the administration of assets.
- b) Where appropriate, used to compensate victims of the crime giving rise to the forfeiture of the particular asset.
- c) In accordance with its national legal system, destined for strengthening agencies whose purposes are for: the prevention of crime, the control of drugs; the fight against money laundering, organized crime, the financing of



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terrorism and, when national legislation permits, a percentage for the financing of international agency projects in these areas.

d) Shared with other countries where joint operations are conducted, in accordance with the principles that govern international legal cooperation or through the application of bilateral or multilateral agreements.

Decisions regarding the disposal of forfeited assets should be made transparently subject to appropriate oversight and accountability.

2. Registration of forfeited assets

When forfeited assets are subject to registration in the National Public Registry, an order from the competent judicial authority is all that is required to register or transfer the asset to the Special Administrative Authority. The asset registration will be exempt from all taxes or contributions. The National Registry will lift all liens or corresponding notes in order to enter this record.

3. International Cooperation

International cooperation may be necessary for the identification and administration of assets located abroad.

The administration of seized property at the request of a foreign government, should be treated according to the principles governing international legal cooperation, or through the implementation of bilateral or multilateral agreements.

Pre-seizure planning and coordination through formal mechanisms or informal networks may be particularly important to ensure timely identification, restraint, and administration of assets located abroad.