

Significance of the Study

Nearly all grand corruption crosses borders: corrupt officials, the professionals that aid and abet them, the illicit funds generated and the instruments used to launder them might each be in different jurisdictions from one another. Thus, large scale corruption almost invariably engages different legal systems. One of the obstacles to recovering the proceeds of corruption, as shown both by StAR country experience and recent research is the inability to execute a confiscation order issued in one country in another country. This study examines this issue, and provides recommendations to address it.

Methodology:

The study is based upon an initial desk research including national legislative databases, country-specific asset recovery guides and publicly available reports and questionnaires completed by asset recovery practitioners from the selected jurisdictions. The sample of the 31 jurisdictions consulted ensures balanced geographical distribution and representation of different legal systems.

Main findings:

- The institutional, legal and practical challenges to enforcing confiscation orders in foreign jurisdictions remain severe. They include excessive procedural requirements, delays, lack of familiarity with foreign legal procedures, lack of trust between jurisdictions, and differences in confiscation regimes.
- To address these gaps, jurisdictions need to process MLA requests asking for direct enforcement of their confiscation orders. UNCAC article 54.1(a) specifically requires States parties to the Convention to have domestic legal mechanisms to enable “direct enforcement”.
- Furthermore, it is important that the delay between issuance of a confiscation order and its execution in another jurisdiction be as short as possible, and that any review by that jurisdiction focus only on procedural matters, ensuring the due process of law, but not relitigating the substance.

Principle Recommendations:

1. Establishing and enhancing legal frameworks:

- Assess the compliance of your domestic legal system with UNCAC and other treaties’ requirements.
- Introduce the possibility to directly enforce foreign confiscation orders after judicial verification that they were made following due process
- Provide for the possibility to confiscate property upon the request of a foreign party (‘indirect enforcement’).
- Consider introducing the possibility to directly enforce foreign freezing and seizing orders.
- When domestic restraint orders are issued by non-judicial bodies, consider subjecting them to judicial review for purposes of asset recovery abroad.

2. Effectively applying existing legal frameworks

- Take advantage of the UNCAC Implementation Review Mechanism to obtain guidance for the adoption of direct enforcement mechanisms.
- Work towards enhanced pre-MLA communication. If foreign orders cannot be directly enforced, to the extent possible, assist the requesting jurisdiction through other avenues.
- Consider cost-sharing arrangements and other cost-effective solutions for the management of assets subject to provisional measures.
- Develop specialized knowledge about the direct enforcement of foreign confiscation orders within competent authorities.