

Cases – Problems and Solutions

The TRT Case – The forfeiture of the assets of Nicolau Dos Santos Neto in Switzerland

Inaugural conference on
INTERNATIONAL FRAUD & ASSET RECOVERY AND TRANS-BORDER
INSOLVENCY COOPERATION

Escola Superior do Ministério Público de São Paulo

30 November – 2 December 2011

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1999: investigations begin in Brazil and Switzerland

- February:** Criminal investigation of the Attorney General of Brazil regarding suspicions of embezzlement in the building of the São Paulo Labour Court building between 1992 e 1998.
- March:** Opening of a Parliamentary Investigation into the Judiciary (the Tribunal of the Accounts of the Federation estimates the embezzlement to R\$169.491.951,05).
- May:** On the basis of press articles on the Brazilian investigations, Banco Santander (Suisse) SA reports to the Attorney General of Geneva the existence of a bank account in the name of Nicolau Dos Santos Neto, the judge in charge of supervising the tender and the works.
- May:** Five days after receiving the information, the Attorney General of Geneva initiates an investigation into money laundering, freezes the bank account and orders Banco Santander to produce all relevant documents.

Swiss legal provisions on money laundering

Article 9 of the Federal Law on Money Laundering of 10 October 1997

Duty to report

1 A financial intermediary must immediately file a report with the Money Laundering Reporting Office of Switzerland (“the Reporting Office”) if he or she knows or has reasonable grounds to suspect that assets involved in the business relationship:

- 1. are connected to an offence in terms of Article 260ter 1 [criminal organization] or 305^{bis} [money laundering] of the Swiss Penal Code,*
- 2. are the proceeds of a felony,*
- 3. are subject to the power of disposal of a criminal organization (...)*

Article 305^{bis} of the Swiss Penal Code (23 March 1990)

Money laundering

Any person who carries out an act that is aimed at frustrating the identification of the origin, the tracing or the forfeiture of assets which he knows or must presume are proceeds from a felony, shall be liable to a custodial sentence not exceeding three years or to a monetary penalty.

Beginning of cooperation between Brazil and Switzerland

July 1999: Switzerland sends a rogatory request to Brazil, requesting evidence in respect of the criminal origin of the transfers received on Dos Santos' account with Banco Santander between 1992 and 1994.

January 2000: Brazil sends a rogatory request to Switzerland, on the basis of the information contained in the Swiss rogatory, and request the freeze of Dos Santos' account with Banco Santander and the sending of documentary evidence regarding the account.

Swiss law on mutual assistance

Article 74a of the Federal Act on International Mutual Assistance in Criminal Matters of 20 March 1981

Handing Over of Property for the Purpose of Forfeiture or Restitution

1 Upon request, the objects or assets subject to a precautionary seizure may be handed over to the competent foreign authority after conclusion of the mutual assistance proceeding for the purpose of forfeiture or return to the person entitled.

2 The objects or assets referred to in paragraph 1 include:

- a. instruments which served to commit the offence;*
- b. products or profits of the offence, their replacement value and an illicit advantage;*
- c. gifts and other contributions which served to instigate the offence or recompense the offender, as well as their replacement value.*

3 The handing over may intervene at any stage of the foreign proceeding, as a rule based on a final and executable order of the requesting State.

Continuation of MLAT cooperation between Switzerland and Brazil

2003: Switzerland concludes the MLAT proceedings and transmits to Brazil the documentary evidence relating to Dos Santos' account with Banco Santander.

2002: first convictions in Brazil against Dos Santos for money laundering and currency evasion with forfeiture of his assets.

2005: Dos Santos is convicted on appeal for money laundering, traffic in influence, fraud, passive corruption and currency evasion, with forfeiture of his assets.

Appeals continue since then, and the forfeiture orders are not final yet .

Participation of Brazil as injured party in the Swiss criminal investigation

2001: Brazil is admitted as injured party in the Swiss criminal investigation into money laundering (preparation of the action for damages before a criminal court or mere support of the accusation).

Right to consult the file, to participate in the acts of investigation, to make determinations on the cause, and to request investigative acts from the examining magistrate:

- investigate other bank accounts in Switzerland;
- question bank employees so as to assess their criminal liability.

Forfeiture of Dos Santos' assets in Switzerland

- **2007:** the Geneva Examining Magistrate concludes his investigation and transmits the file to the Attorney General of Geneva.
- **2008:** Brazil requests the Attorney General of Geneva to issue a non-conviction based forfeiture order against Dos Santos' account with Banco Santander and to allocate them in compensation of its damage.
- **2009, 2010 & 2011:** the Geneva judicial authorities order and confirm the forfeiture on appeal. An appeal is still pending before the Federal Court, Switzerland's highest court.

The non-conviction based forfeiture proceedings

Swiss Penal Code

Art. 70 Principle

The court shall order the forfeiture of assets that have been acquired through the commission of an offence or that are intended to be used in the commission of an offence or as payment therefor, unless the assets are passed on to the person harmed for the purpose of restoring the prior lawful position.

Art. 73 Allocation to the injured party

If a crime caused damage to a person which is not covered by insurance, and if it must be presumed that the offender will not compensate it, the aggrieved person is entitled to receive, upon its request, up to the amount of the damages established by a judgment or by agreement with offender:

(...)

b. the forfeited assets (...)

Conclusion

The mutual assistance proceedings, even if conducted in an exemplary manner, as in the TRT case, has the following flaws:

1. Slow (more than three years were necessary to transmit the documentary evidence to Brazil).
2. Absence of sufficient interactivity between the requesting authorities and the requested State.
3. Does not allow to obtain evidence of liability of third parties (bankers, etc.)
4. Necessity of a final decision of forfeiture.

Alternative proceedings are necessary to obtain compensation of the damage caused by the crimes, whether the victim is the State, a person or a company.