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Organization of American States

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Secretariat for Multidimensional Security

XLIII MEETING OF THE GROUP OF EXPERTS FOR THE CONTROL OF MONEY LAUNDERING
September 28-29, 2016
Punta Cana, Dominican Republic

OEA/Ser.L/XIV. 4.43
DDOT/LAVEX/doc.9/16
26 September 2016
Original: Spanish

STUDY ON CHALLENGES AND SOLUTIONS IN THE MANAGEMENT OF COMPLEX ASSETS

STUDY ON CHALLENGES AND SOLUTIONS IN THE MANAGEMENT OF COMPLEX ASSETS

**SUB-WORKING GROUP ON INTERNATIONAL COOPERATION
AND FORFEITURE AND PROJECT BIDAL
GELAVEX / 2016**

Xiomara Cordero Artavia, Forfeiture Sub-Working Group Coordinator
Dennis Cheng, Project BIDAL Director CICAD/OAS



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Antecedents

Strategic Plan - Line of
Action 2015-2017:

- Management of
Complex Assets



*“Study on Challenges and
Solutions in the
Management of Complex
Assets”*

✓“Companies still in
operation”

✓“Some that, by their
characteristics, are
considered to be difficult
to manage”

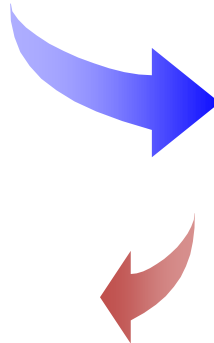


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STUDY ON CHALLENGES AND SOLUTIONS IN THE MANAGEMENT OF COMPLEX ASSETS



Solutions Guide
(concrete cases)



Identify the mechanisms and substantive requirements that specialized agencies must have for the efficient management of complex assets so as to analyze the main challenges and practical and legal solutions that were implemented in Member States' experience and during the execution of the project BIDAL.



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OBJETIVOS ESPECÍFICOS

1. Identify OAS Member States with experience managing complex assets.

2. Compile experiences from Project BIDAL regarding the implementation of substantive requirements for specialized agencies that allow for complex asset management.

3. Share concrete cases that are examples of main challenges in the management of complex assets.



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OBJETIVOS ESPECÍFICOS

4. Become familiar with the most common challenges faced by the countries in the project.

5. Analyze the main practical solutions for the management of complex assets that States have used efficiently.

6. Analyze the legal tools that specialized agencies use for the management of complex assets.



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METHODOLOGY

This study was developed with participation of project BIDAL and several Member States that have experience with these matters, such as: the United States, Colombia, Honduras, Mexico, and Venezuela. (Specialized Agency/ Hiring Third Parties)



Questionnaire

Concrete Case Experiences

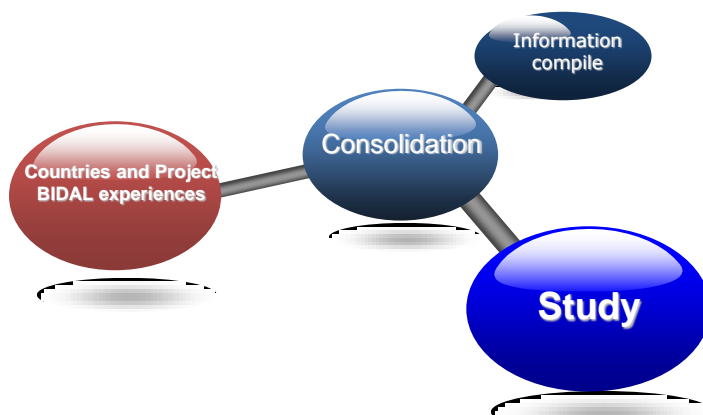


BOLIVIA, BRAZIL, COSTA RICA, COLOMBIA, EL SALVADOR, UNITED STATES, GUATEMALA, HONDURAS, JAMAICA, MEXICO, PANAMA, PARAGUAY, PERU, DOMINICAN REPUBLIC, URUGUAY AND VENEZUELA



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Study's Results

BOLIVIA, BRAZIL, COSTA RICA,
COLOMBIA, EL SALVADOR, UNITED
STATES, GUATEMALA, HONDURAS,
JAMAICA, MEXICO, PANAMA,
PARAGUAY, PERU, DOMINICAN
REPUBLIC, URUGUAY AND
VENEZUELA



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Information Analysis



- I. Source of Funds to Maintain and Preserve Seized and Forfeited Assets
- II. Priority Management Decisions
- III. On the Productivity of Assets
- IV. Coordinating with the General Attorney's Office the Receipt and Management of Complex Assets
- V. Difficulties and Problems Identified in the Receipt and Management of Operating Companies
- VI. Difficulties and Problems associated with the Management of Complex Assets
- VII. Contracting Specialized Third Parties
- VIII. Chart showing the weaknesses and strengths regarding the management of forfeited companies by country.



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Origin of the budget for the management of complex assets



- The first challenge encountered by the specialized agencies is the source of the funds or the budget/financial allocation that are subject to the processes and regulations of public spending
- that some countries have a special fund composed of the money awarded by the judges' rulings and, in some cases, the interest accrued from the investments made with the forfeited money is incorporated.
- Special Assets Corporation (Sociedad de Activos Especiales, SAE), an asset management agency established as a partially government-owned corporation at the national level and authorized by law. It has unique characteristics and is subject to private law.



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Origin of the budget for the management of complex assets

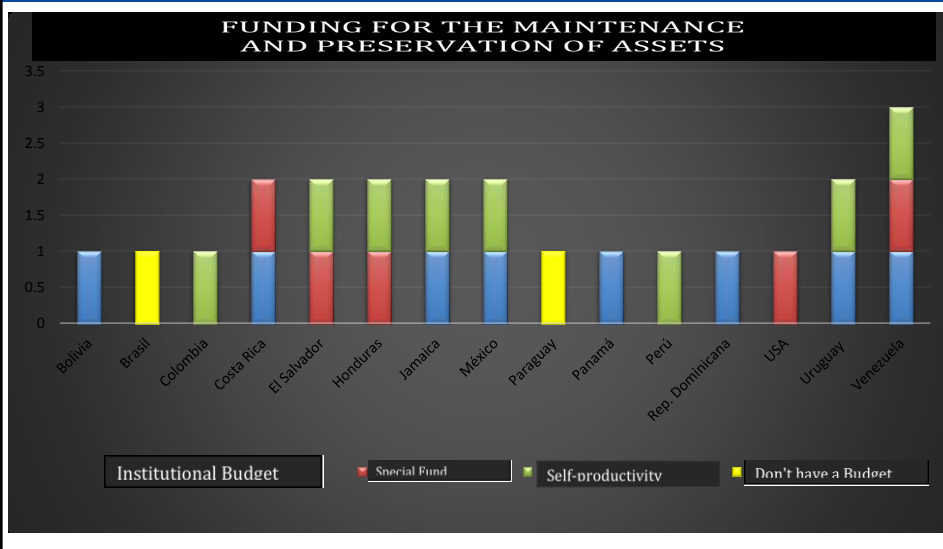


- For Costa Rica, El Salvador, Honduras and Guatemala, their legislations allow them to make investments in term certificates of deposit using the forfeited money and the percentage difference of the interest accrued to support the maintenance and preservation program of the seized and forfeited assets.
- The expenses estimated for the management and disposal of the assets are included in the annual allocation planned for the participants in the program, among which is the US Marshall Service, who is responsible for the management of the forfeited assets under its custody.



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Information analysis by country



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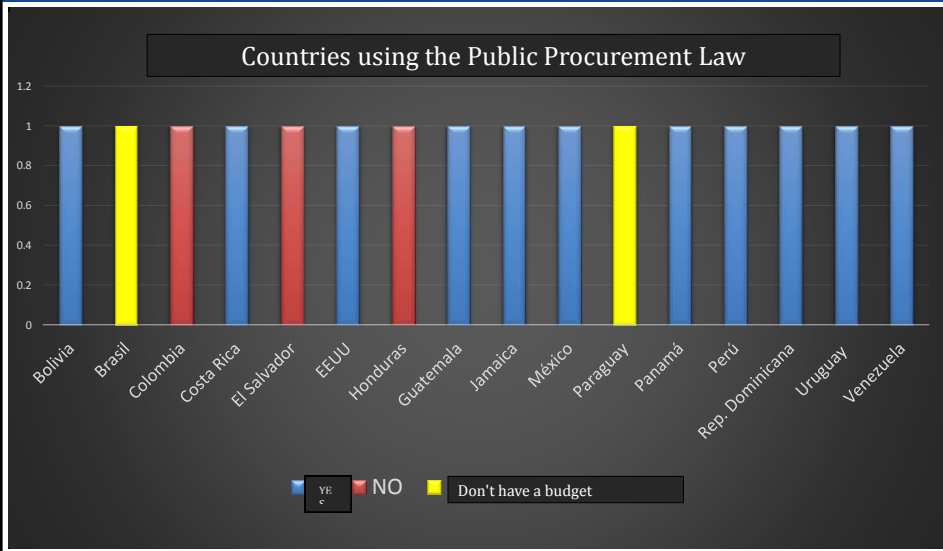
Excluidos de la Ley de Contrataciones Públicas

- In El Salvador and Honduras, the procurement of goods and services in connection with the management of seized and confiscated assets is possible by establishing regulations and alternative procurement processes containing the principles of public procurement but with no time or amount restrictions, thus resolving the above mentioned issues.
- Both countries have two budgets: the institutional budget, used for the regular operation of the agency, such as for the purchase of goods and services and current expenditures; and the special budget and fund, used for the expenses involved in the maintenance and preservation of the forfeited assets and for the management of the seized operating businesses and companies.



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Information analysis by country



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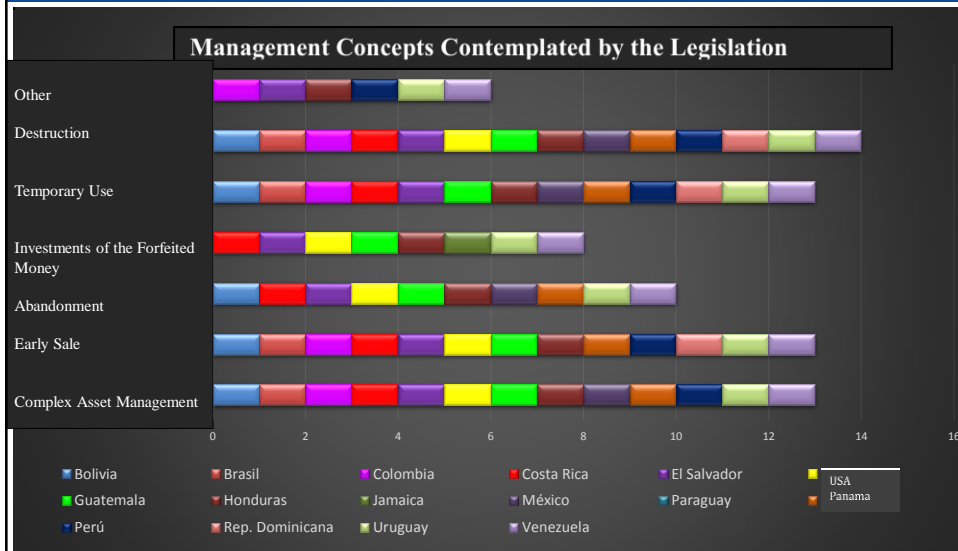
Priority Management Decisions

- With respect to the management decisions of the countries regarding the maintenance and preservation of assets during the confiscation process, some progress was made in their decisions, since traditionally they used the civil law concept of "deposit". This concept was widely improved with the creation of specialized agencies for the management of assets. There was an increase in the legal tools available.
- It is important to note that there was an increase in the implementation of concepts such as "management of complex assets, abandonment, early sales, and investments with forfeited cash".



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Information analysis by country



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Priority Management Decisions

PRIORIDADES

1.
2.
3.

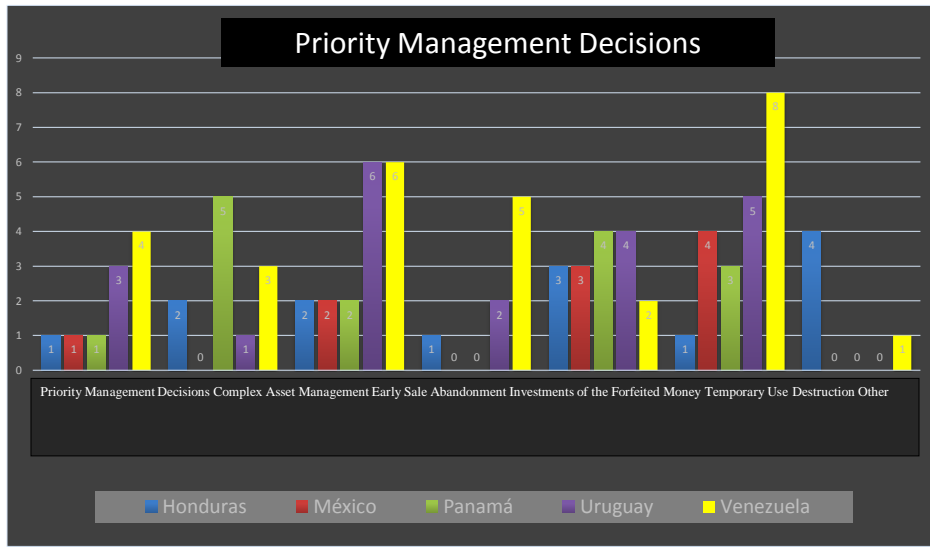


- However, in spite of the existence of a wide variety of legal concepts as stated above, no priorities or policies have been established with regard to said management decisions, except in Honduras, Mexico, Panama, Uruguay, and Venezuela, where there is an order of priority for the use of these assets according to its productivity and characteristics.



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Information analysis by country



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On the Productivity of Assets

- the implementation of trusts, renting real property, and hiring specialized third parties may help such assets generate proceeds to cover maintenance and management costs. In general, any remaining amounts eventually serve the same final purpose as the assets.
- In the case of countries which do not have such capabilities, asset maintenance and preservation expenses are covered by the institutional budgets, and, in other cases, with the income derived from the sale of the confiscated assets.

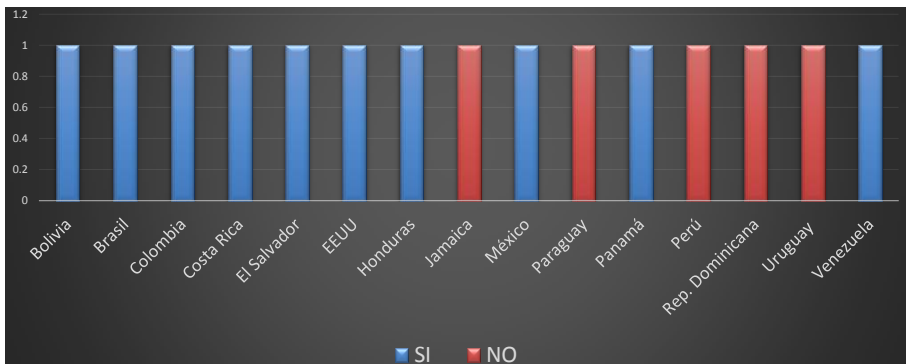


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Information analysis by country

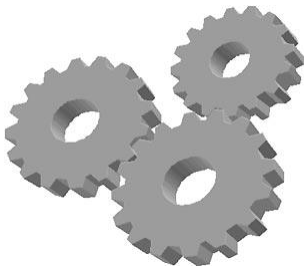
Countries Allowing the Use of the Proceeds of the Assets for their Maintenance and Preservation



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Coordinating with the General Attorney's Office the Receipt and Management of Complex Assets



However, by analyzing the answers provided by the countries we may conclude that most of them do not share the following information previously:

- Data regarding the economic activity of the company or business;
- Physical and legal identification of the company or business;
- Identification of partners, executive officers, and legal representatives;
- Suspension of alienability of the holders of rights;
- Identification of the account number and financial products;



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Delegation of the United States

- Regarding the policies of USAO, AFMLS, and USMS is worth noting. In such cases, prior planning is necessary for the forfeiture and the coordination, in particular for the management of complex assets. In almost all cases, agencies work together to identify assets, examine potential property titles, and determine the probable value of assets (if possible), as well as to evaluate the capabilities of the government to store an asset (for example, storage space) and plan the logistics necessary to use that particular asset.
- Furthermore, during the pre-seizure and pre-retention phase, the Attorney General and the US Marshall Service complete an analysis on the net equity in order to prevent situations in which the seizure and forfeiture of an asset may imply a significant loss for the government.



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Difficulties and Problems Identified in the Receipt and Management of Operating Companies



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GUÍA PARA LA ADMINISTRACION DE
EMPRESAS INCAUTADAS

CICAD/OEA
PROYECTO BIDAL 2014
Banks Group Consultant and Specialist
Management of Assets and Foreclosure Assets

Commercial or business aspects: they refer to the identification of the commercial or industrial activity of the company, the business strategy, clients, suppliers, manner of operation, etc.

Organizational Aspects: they refer to the organizational structure of the company, human resources, processes and production means, and assets in general.

Financial Aspects: they refer to the financial position and assets, financial statements, accounting documents, cash flow, account balances and investments, loans, mortgages, collaterals, and assets and liabilities of the company in general.

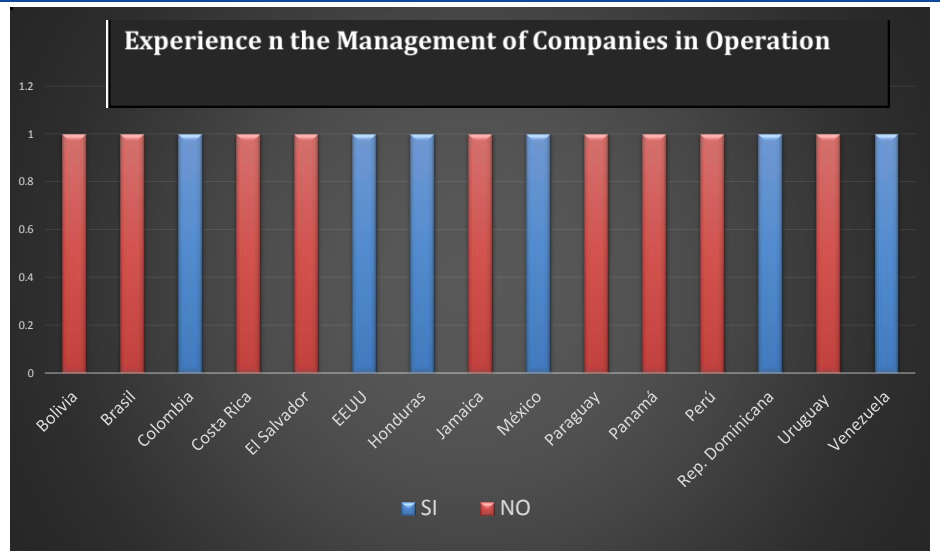
Fiscal Aspects: they refer to income tax declarations and declarations of turnover submitted to the Treasury or the Internal Revenue Service which may provide important information in connection with the financial profits declared for tax purposes.

Legal or Judicial Aspects: they refer to the evaluation of the company's compliance with the requirements for the operation of the company; sanitary, fishing, environmental, commercial, and mining permits, and in general, government concessions in connection with certain activities.



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Data analysis by country



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Problems identified



- no information prior to receiving the company;
- errors in the physical delivery of the company (inventory preparation, acknowledgment of financial statements, etc.);
- no registration of the precautionary measures in the corresponding registry;
- the company's bank accounts are not insured or frozen;
- not very reliable information;
- financial situation of the company not including illegal capital;
- no payment of the business or company's taxes;
- labor, administrative and/or commercial processes conducted without sufficient background;
- insufficient economic or financial resources;
- resistance by the company's employees;
- no payment of the contributions and social security taxes of the workers;
- no confiscation of the assets of the company or business;
- the need to maintain the operational continuity of the company.



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Good Practices



- The countries' answers reveal that most of the specialized agencies which have been successful in the management of the confiscated operating companies or businesses had their legal and administrative control. In this regard, they opened bank accounts or changed signatures, made payments to suppliers and employees, and made management decisions to maintain or improve the companies, in many cases, turning them into financial groups with various lines of business.



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Good Practices

- On the other hand, as a way to promote and preserve the jobs as an institutional policy, the specialized agencies in Honduras and Venezuela have the capability of “injecting capital” into an operating business or company to allow it to continue its commercial or business activities, provided such loan can be reimbursed into the special fund, taking into consideration the market research and accounting analysis conducted on the confiscated company.

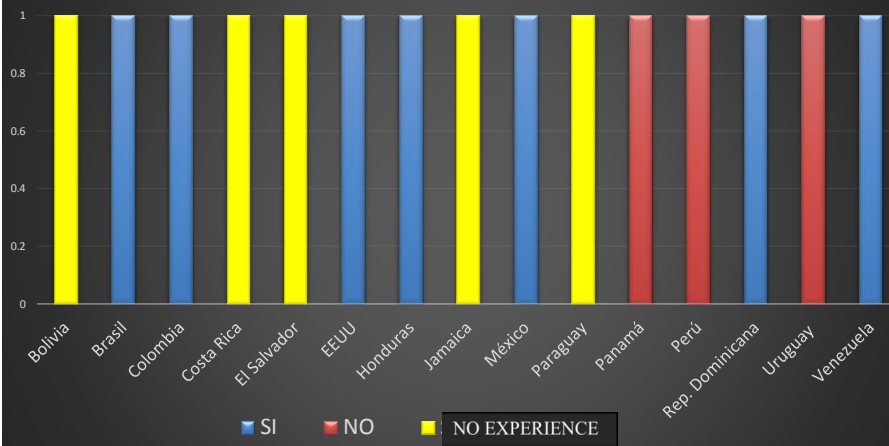




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Information analysis by country

Legal and Administrative Management of the Company



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Difficulties and Problems associated to the Management of Complex Assets



- improper asset identification and characteristics;
- lack of registration of frozen, encumbered or insured forfeited assets in the corresponding registry;
- the procedure to take possession of the asset;
- the maintenance which may require specialized technical personnel;
- lack of resources to preserve the assets in the same condition as they were received, except for normal wear and tear;
- identification of the area and the personal property incorporated into the premises;
- provisional registration;



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Difficulties and Problems associated to the Management of Complex Assets

- risk of deterioration or loss of value during the forfeiture process;
- complexity in the management of the assets;
- insufficient space for the custody of the assets in warehouses and deposits;
- taxes on the sale of the assets;
- costs associated with the assets prior to the seizure;
- receipt and proper handling of cattle or any other type of animal.



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Early Sale

- To resolve many of the above mentioned problems, some legal concepts such as "early sale", which is the monetization of personal property intended to prevent the loss of value of the forfeited asset, may help specialized agencies manage assets more efficiently.
- There were cases in which the decision regarding the early sale was made through a duly reasoned and grounded administrative resolution issued by the managing agency itself. In other more protective countries, the decision is made by a competent judge at the request of the specialized agency or the Public Prosecutor's Office.





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Contracting Specialized Third Parties

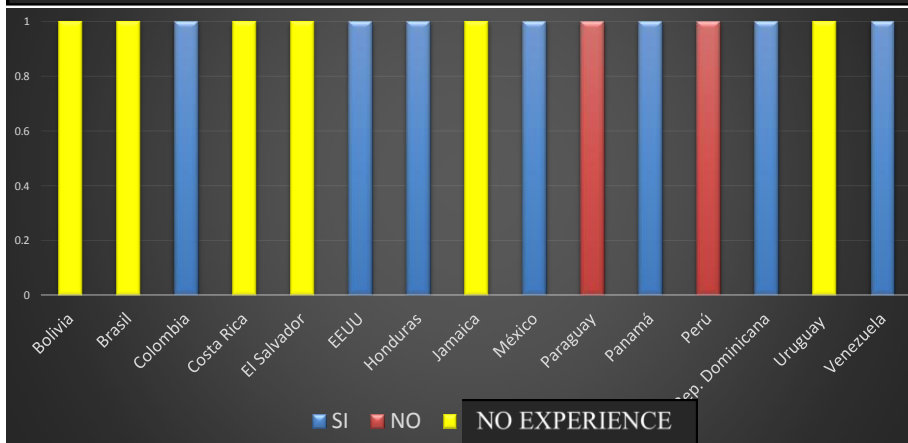
- Third parties do not have practical experience in most countries. This may be due to problems regarding the identification of the funding source and the proper procuring process. This gives rise to some concerns. Since these are "private funds" the public agencies should decide which process to apply. Should they be governed by the Public Procurement Law or the Commercial Code?
- Shall the company or the productive asset be subject to public contracting procedures?
- Should the government adjust to the manner in which the company or the productive asset has been operating?



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Information analysis by country

Power to Hire Specialized Third Parties





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OABI/HONDURAS



OFICINA ADMINISTRADORA DE
BIENES INCAUTADOS
OABI

- **“Article 4.- Scope of Application.-** The OABI may enter into agreements to hire professionals or third parties, as well as to procure goods and services by means of the methods set forth in these regulations. They shall be funded by the so-called Corporate Equity and any resources derived from or generated by the productive assets, which shall be governed by these regulations.
- The contracts regarding professional services, construction works, and provision of goods and services entered into by OABI during the performance of its duties which are funded through the General Budget of Revenue and Expenditure of the Republic, shall be subject to the Government Contract Law and the Law on Efficient and Transparent Acquisitions through Electronic Means and its Regulations.
- **Article 5.-Exceptions.-** Those companies which have been forfeited under OABI's administration shall not be subject to the provisions of these regulations with regard to the procurement of goods and services or the construction of works, provided such expenditures are operational or investments, and such payments are made with funds derived from the company's corporate equity.”



Thank You!!!

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