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**STUDY TO IDENTIFY INTERNATIONAL COOPERATION MECHANISMS (FORMAL AND INFORMAL) THAT
PROVIDE AN ADEQUATE EXCHANGE OF INFORMATION TO PREVENT AND COMBAT MONEY
LAUNDERING, THE FINANCING OF TERRORISM AND THE RECOVERY OF ASSETS OF CRIMINAL ORIGIN**

STUDY TO IDENTIFY INTERNATIONAL COOPERATION MECHANISMS (FORMAL AND INFORMAL) THAT PROVIDE AN ADEQUATE EXCHANGE OF INFORMATION TO PREVENT AND COMBAT MONEY LAUNDERING, THE FINANCING OF TERRORISM AND THE RECOVERY OF ASSETS OF CRIMINAL ORIGIN

BACKGROUND

The need for member States of the Organization of American States (OAS) to join forces to achieve international cooperation in areas relating to money laundering and the recovery of assets of criminal origin has been evident since the Group of Experts for the Control of Money Laundering (GELAVEX) was first formed.

Beginning in 1990, the General assembly of the OAS has recommended that member States, within the framework of their respective legal systems, take into consideration the development of bilateral and multilateral cooperation mechanisms and procedures to prevent money laundering connected to drug trafficking and to facilitate the identification, tracing, seizure and forfeiture of such assets.¹

As time passed, the topics addressed by GELAVEX have been oriented toward the development of work plans that, among other things, analyze the aspects previously mentioned.

Evidence of the preceding was clear in the final report of the 27th Meeting of GELAVEX held in Montevideo, Uruguay, in October 2009, where the plan of action of the Sub-working group on Forfeiture, 2010-2011, had, among other objectives: *to analyze mutual legal assistance with regard to identifying and locating assets abroad and to try to develop the procedures to request mutual legal assistance, as well as information based on the data central authorities*

¹ Document on the background of GELAVEX since its inception, page 2.

gather from the various instruments on money laundering and connected offenses, and assigning this task to the delegation of the United States.

Later, during the 30th Meeting of the Group of Experts for the Control of Money Laundering held in May 2010, a progress report on the above mentioned task presented in the meeting of sub working groups, which was also reflected in the final report, indicated the need to set a new deadline for the delegations to submit the required information in order to analyze it and, in turn, submit the corresponding report.

During that meeting, the group also addressed topics relating to the core subject; specifically:

1. "Strengthening international juridical cooperation in areas relating to mutual legal assistance regarding seizure," under the Hemispheric Information Exchange Network for Mutual Assistance in Criminal Matters and Extradition of the Department of Legal Cooperation of the OAS.
2. "Strengthening international juridical cooperation on seizure and recovery of assets," developed by CICAD/OAS and the STAR initiative of the World Bank Institute/United Nations Office on Drugs and Crime.

Based on the preceding, as well as on the experiences shared by the various delegations, a determination could be made that it would serve the interest of the countries to conduct a study on the internal procedures of each state regarding mutual legal assistance for the administration of seized/forfeited assets.

At the 31st Meeting of GELAVEX, held in Costa Rica in September 2010, due to the fact that the delegation of the United States was unable to consolidate the information of all the countries in the requested document, the Sub-working group on Forfeiture and the Executive Secretariat were assigned jointly the task of coordinating the compilation of information from the delegations that had not answered the questionnaire. A new deadline of one year was set for the completion of the final report with a progress report to be presented at the

following meeting of the sub working groups. However, it was not possible to present a progress report at that meeting.

As a result, at that meeting of the sub working groups held in Washington, DC, in May 2011, the Sub-working group on Forfeiture, following the methodology approved by the delegates to work in situ, produced a draft guide which was delivered to the United States delegation as an input for consideration and later use in the production of the report and whose content is included in the Final Report of the 32nd Meeting of the Group of Experts for the Control of Money Laundering, Annex 2, Report of the Sub-working group on Forfeiture, Washington, DC, May 26 and 27, 2011.

Last, at the 33rd Meeting of GELAVEX held in Caracas, Venezuela, in September 2011, the United States delegation presented the document "Internal Guide on Procedures for Soliciting Mutual Legal Assistance in Locating and Recovering Assets," which was attached to the final report of that meeting as Annex III.

However, the Executive Secretariat updated the information and also included information of those countries that had not previously submitted it. That final document can be found at the following link:

http://www.cicad.oas.org/lavado_activos/grupoexpertos/Decomiso%20y%20ED/DOC_3_Draft_Internal_Guide_on_Procedures_for_Soliciting_Mutual_Legal_Assistance_in_Localizing_and_Recovering_Assets%20ESP.pdf

Also included at that meeting as part of the Working Plan 2011-2012 of the Subgroup on Forfeiture was, the *"Preparation of a progress report on the implementation of the various asset forfeiture systems and on the identification of efficient mechanisms to share forfeited assets among countries."* The progress report on that document was presented at the 34th Meeting of GELAVEX held in Washington, DC, in May 2012. It was approved by the Plenary of the Commission as indicated in the report of the meeting of GELAVEX held in Argentina, in September 2012, and can be found on the CICAD web page

The work plan of the Sub-working Group on Forfeiture adopted at the above mentioned meeting held in Argentina, included the "Development of a study to identify international cooperation mechanisms (formal and informal) that provide an adequate and efficient exchange of information to prevent and combat money laundering, the financing of terrorism and the recovery of assets of criminal origin," which is the objective of this study.

JUSTIFICATION FOR THE STUDY

All the previously mentioned work that has been carried out serves to underscore the interest of member States in availing themselves of information regarding international cooperation, recognizing that it constitutes an essential mechanism to further investigations and achieve the forfeiture of assets that are the proceeds of criminal activity. The effective use of international cooperation, however, requires adequate planning to ensure that the cooperation mechanism chosen is the most appropriate one in order for the processing of the request to be successful.

Given the number of different conventions to which States have subscribed that establish the legal framework for international cooperation among States, and the abundant doctrine on the subject, it would seem that what is needed is knowledge of which international cooperation mechanisms are the most effective ones. But this could lead to the wrong choices because we would face different realities considering that the experiences of one nation may be vastly different from those of other nations.

Taking this situation into account, this study will provide States a proposal which will consist of: first, a brief identification of international cooperation mechanisms (formal and informal) pointing out the benefits of each one; second, outline the limitations of international cooperation, and last, a description of the proposed program.

FORMAL AND INFORMAL INTERNATIONAL COOPERATION MECHANISMS

The development of new modalities of criminal economic activity, globalization and the economic integration process, the liberalization of financial markets, the increased sophistication of instruments which makes it possible to hide the ownership of assets and the ability to carry out complex financial and banking transactions electronically, among other factors, have brought about significant changes in the strategies used by criminals to avoid prosecution.

In fact, nowadays, criminals resort predominantly to strategies whose purpose is to hide the product of crime across various jurisdictions and through sophisticated legal and financial mechanisms while the criminals themselves remain on the very territory where the crimes under investigation were perpetrated.

In order to keep pace with this phenomenon, international cooperation mechanisms in the criminal area have been expanded and strengthened. There is today a wide range of international cooperation options available within the framework of criminal investigations – both, to obtain relevant information and evidence as well as to carry out legal measures in other countries. These mechanisms involve not only judicial authorities in each country but also administrative agencies.²

In this regard, formal and informal international cooperation mechanisms are addressed.

Formal international cooperation mechanisms

Formal international cooperation mechanisms are those which States access through diplomatic channels according to the provisions of international conventions or treaties, domestic legal systems and the principle of reciprocity.

² Practical Guide to International Cooperation in Criminal Matters of the Regional Fund for the Promotion of Transparency and the University of San Andrés, page 4.

These are formal requests for assistance transmitted through the appropriate central authority in accordance with the provisions of the applicable international treaty or agreement.

For many years now, treaties have been the basis for international cooperation around the world and they are the most formal of the instruments available. Treaties make it possible to focus resources and to cooperate on certain types of crime or take into account regional concerns and the legal systems of a specific geographical area. They obligate parties to cooperate among themselves in accordance with international law as long as requests are made as provided for in the treaty.

Bilateral treaties may be written to reflect the wishes of the States parties and have a high degree of certainty with regard to the obligations and expectations involved in the processes of providing or receiving assistance. This type of treaty is subscribed to when the States parties share the same legal tradition. One of the problems with this type of treaty is the expense and effort involved in actually making it a reality.

In the case of regional treaties, States parties tend to share the same geographical concerns; for example, a concern with certain types of crime or they share the same legal tradition. These aspects have led to the creation of regional instruments that make enforcement of the treaty viable; for instance, one of the instruments is the European arrest warrant which has changed the way persons are extradited within the European Union.

Multilateral conventions are also instruments of international cooperation and are applied to a type or specific group of crimes, such as conventions against terrorism, or they can be specific with regard to the acts covered, such as the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The United Nations conventions were the first to require international cooperation among member States and to urge them to do so. They also

established that requirement in all later criminal conventions, including the United Nations Convention against Transnational Organized Crime.

Certain States turn to their domestic legislation with regard to mutual legal assistance when regulating procedures to process requests received for such assistance. In certain countries around the world, their domestic legislation provides for specific norms that make it possible to comply with requests for assistance without resorting to a treaty or may provide guidelines with regard to the application of a treaty.

For its part, the principle of reciprocity, as a principle, is basically a promise that, in the future, the State requesting assistance shall provide the State being requested the same type of assistance. This principle has been incorporated into treaties, memoranda of understanding and into domestic law.³

The Central Authority is the authority established in each State for the purpose of handling mutual legal assistance. This authority must receive all the information regarding the processing of a State's international legal cooperation and is responsible for processing all requests, coordinating with judicial and administrative authorities and responding to the requests. The advantage of having a central authority is that the State will have greater control over requests received and sent, and will generate uniform responses and avoid duplication of efforts.

The requirements for requests for assistance are generally established by the conventions, and central authorities also provide guidance with regard to domestic requirements. Furthermore, central authorities also help develop databases on other legal systems and their specific requirements, be it because they have experience with requirements abroad or due to their coordination and dissemination responsibilities.⁴

³ Manual on Mutual Legal Assistance and Extradition, United Nations Office on Drugs and Crime, pages 19-23

⁴ Manual on Mutual Legal Assistance and Extradition, United Nations Office on Drugs and Crime, pages 29-31

In summary, formal international cooperation mechanisms are accessed via diplomatic channels; through the Ministry of Foreign Relations and its counterpart in the country in question which will, in turn, forward it to the pertinent central authority, or directly with the appropriate central authority. This is the appropriate channel to obtain evidence and to execute coercive measures, such as: to subpoena records, execute searches, seizures or warrants, and to obtain sworn testimony through judges abroad. In addition, legal assistance is necessary to execute attachment, forfeiture or confiscation orders, among others.⁵

Informal International cooperation mechanisms

Informal cooperation channels supplement formal legal cooperation. These new international cooperation mechanisms involve various judicial, law enforcement and administrative agencies such as: judges, prosecutors, police entities, financial intelligence units, information networks and regulatory authorities.

The denomination of "informal" only serves to distinguish them from those legal procedures for which the request for international cooperation must be processed through diplomatic channels, but it does not mean that those alternative mechanisms are not contemplated in international law or in domestic legislation.

These mechanisms are used, primarily, as a tool during the investigation of the crime. Information obtained in this manner is not directly admissible as evidence in criminal proceedings, but it helps move investigations forward, verify facts, determine which leads merit further investigation, and to gather information to later make a formal request for legal assistance to obtain the necessary proof.

This type of cooperation is suitable for executing non-coercive investigative measures, for instance: to obtain information on the public record, to implement

⁵ Practical Guide to International Cooperation in Criminal Matters of the Regional Fund for the Promotion of Transparency and the University of San Andrés, page 9.

surveillance measures or to access information provided by the financial intelligence units. In urgent cases, it is even possible to execute attachment or lien orders for a brief period of time but those orders must be later requested and justified through formal channels.⁶

Establishing informal contacts from the beginning of investigations will help to find out what elements must be gathered in order to make cooperation more effective and it will help foreign counterparts take the necessary steps to respond to a request when it is received.

On this topic, the *Guide on Procedures for Requesting Mutual Assistance in Locating and Recovering Assets*, mentioned in the Background section of this document, constitutes a very valuable input since it provides, among other things, a very complete description of the formal and informal international cooperation mechanisms used by the States to locate and identify assets abroad.

It should be noted that, among the formal mechanisms, most countries use diplomatic channels and work with the central authorities depending on the applicable convention on the matter in question: the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the United Nations Convention against Transnational Organized Crime. In the case of informal mechanisms, the ones generally mentioned are: the Egmont Group, the Ibero-American Network for International Legal Cooperation (IberRed), GAFISUD Asset Recovery Network (RRAG) and Interpol.

LIMITATIONS TO REQUESTS FOR INTERNATIONAL COOPERATION

Although international cooperation has been expanded and strengthened, there are certain obstacles that may impact the success of requests made, such as the following:

⁶ Practical Guide to International Cooperation in Criminal Matters of the Regional Fund for the Promotion of Transparency and the University of San Andrés, pages 8 and 9.

a) The **legal terminology** employed varies from country to country. In fact, difficulties can be encountered in several areas, such as:

- Differences in the terms used for *criminal offenses*, something that can create problems when evaluating double incrimination which needs to be done in order to provide or receive international cooperation;
- Differences in the way *precautionary measures* aimed at the seizure of assets are called given that certain countries use the term *attachment* while others refer to *seizure, freezing, forfeiture, etc.*;
- Differences in the term used for *forfeiture* because some countries request cooperation within the framework of *forfeiture* or *civil forfeiture* proceedings.⁷

b) **Differences in legislation** are also relevant especially with regard to the requirements that requests for cooperation must meet. In fact, such differences may cause important delays especially when requests are returned at the same time that additional information is being requested.

c) The **level of proof required** varies from system to system as does the standard of proof. The legislation of the countries in the hemisphere varies with regard to the type of evidence that must be presented. It is therefore necessary to harmonize these requirements and/or train legal professionals to become familiar with the various levels of proof required in the different systems.

d) The **procedures to obtain assistance** also vary from country to country. Many times, even when there are treaties or conventions in force, domestic legal systems limit the possibility of providing assistance because of differences in procedures or due to legal limitations as indicated in paragraph (b).

⁷ In certain countries, the reference to the civil nature of the mechanism is immediately connected to civil proceedings which results in cooperation not being provided because the matter is not considered criminal even though it is a measure taken in connection to the commission of criminal acts. The problem is further complicated when dealing with countries in Latin America where the term "in rem forfeiture" is used, which is a term not established in the legislation of countries in other regions.

e) In addition to the preceding, personnel responsible for processing assistance requests have encountered obstacles stemming from the degree of willingness of countries to provide assistance.

THE NEED TO FACILITATE INTERNATIONAL COOPERATION IN THE RECOVERY OF ASSETS

Usually, criminals who profit from crime in one country transfer those profits to another country and, once they are abroad, those assets go through multiple transformations. For instance, they may be deposited in a bank account in the criminal's name, or in the name of relatives or of front men; deposited in a safety box, or used to acquire real estate or start a business. In that regard, the most serious challenge is to conduct investigations of financial and real estate assets⁸ that will help identify and recover those assets located in different member States and, often times, in the name of persons other than the perpetrator of the crime and who, on occasion, have acted in good faith.

Although there is broad agreement among the countries in the Hemisphere with regard to the need to cooperate with each other in order to locate and recover assets of criminal origin, and even though there seems to exist the willingness to do so, currently there is no adequate legislation that makes it possible to proceed with the forfeiture and recovery of assets, nor are there specific legal proceedings outlining the steps to be followed when one country requests assistance from another.

In such circumstances, it is hoped that a legal authority abroad will be able to issue an attachment/freezing order within the framework of criminal proceedings and request that the order be executed in another OAS member State for the purpose of safeguarding property, documents or data that may be the target of

⁸ A financial and real estate assets investigation is a cross-cutting analysis carried out by all the agencies involved in the investigation of a money laundering case and becomes a key tool in proceedings for seizure, prosecution, sentencing, management and disposition of assets that are the product of crime. The thrust of the analysis is centered on the identification, location and individualization of the assets as well as assessing their value and the identification of ownership and other persons connected to them.

forfeiture or used as evidence and therefore prevent their disappearance or transformation.

Although some international agreements establish detailed procedures to make it possible to carry out this action,⁹ there are no provisions in the Inter-American system that outline the steps to be followed by the national judicial entity that executes the order to administer and process assets that are the subject of preventive seizure. Addressing this question in regional terms, that is, within the framework of OAS member States, appears to be a viable and feasible solution in order to ensure favorable results in the short and medium term.

In that regard, the need to optimize international cooperation in the recovery of assets could be addressed with a program developed by the Executive Secretariat, with the support of GELAVEX, that would include the following elements:

1. A document establishing the general norms for international cooperation in the recovery of assets that would serve as reference for all the countries in the hemisphere.
2. Training in the application of the norms included in the above mentioned document.
3. Develop a database aimed at facilitating international cooperation.

PROGRAM OBJECTIVES

General

To assist OAS Member States to adapt their legal systems in order for the recovery of assets of criminal origin to be carried out in an effective, speedy and harmonious manner throughout the hemisphere.

⁹ Such as, for instance: the United Nations Convention against Corruption.

Specific

- I. To provide Member States with a homogenous legal framework to facilitate the exchange of information and reduce the differences between their legal systems;
- II. To facilitate the exchange of experiences and best practices in matters relating to the recovery of assets with a different and singular focus that guarantees mutual assistance between all Member States;
- III. To train specialists in asset recovery abroad based on models that have been previously accepted and approved by Member States;
- IV. To implement integration strategies to facilitate communication in the area of asset recovery in the hemisphere, both within and outside Member States;
- V. To provide the necessary tools to solve asset recovery cases that involve international elements;
- VI. To improve legal cooperation among Member States in the area of money laundering.

All the mechanisms described provide tools that may be used in the event that international cooperation is required in the areas of preventing and combating money laundering, financing of terrorism, and the recovery of assets of criminal origin. However, some weaknesses have been identified that could be minimized by resorting to the alternatives proposed in this document.

Based on the preceding, it is proposed that this Group of Experts recommend to the GELAVEX Plenary to approve this initiative for later adoption by the Commission.