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CONTROL COMMISSION

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Secretariat for Multidimensional Security

**XXXVI GROUP OF EXPERTS FOR THE CONTROL OF MONEY LAUNDERING**

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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**

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ORIGIN

## BACKGROUND

The need for 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 **or destination** 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 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.<sup>1</sup>

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 27<sup>th</sup> 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 considered, among others: 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 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 30<sup>th</sup> Meeting of the GELAVEX, held in May 2010, a progress report on the above mentioned task presented in the meeting of sub working groups, which was also reflected

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<sup>1</sup> Document on the background of GELAVEX since its inception, page 2.

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.

In addition, 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 **Stolen Asset Recovery Initiative** STAR initiative of the World Bank Institute/United Nations Office on Drugs and Crime.

At the 31<sup>st</sup> Meeting of GELAVEX, held in Costa Rica, in September 2010, at the meeting, the difficulties in consolidating information from all countries in the requested document were exposed; hence, 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 32<sup>nd</sup> GELAVEX Meeting, Annex 2, Report of the Sub-working group on Forfeiture, Washington, DC, May 26-27, 2011.

Last, at the 33<sup>rd</sup> GELAVEX Meeting, 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, which is a valuable input, meanwhile, introduces among others formal and informal mechanisms, in which each State locates and identifies assets abroad.

It should be noted, that 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](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)

As part of the Working Plan 2011-2012 of the Subgroup on Forfeiture, was also included 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 34<sup>th</sup> 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 in the aforementioned 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**

The previously mentioned works indicates the interest of States in exchanging and providing information regarding international cooperation, recognizing that it constitutes an essential mechanism to further investigations and achieve the forfeiture of assets that are proceeds of criminal activity.

Also, the effective use of international cooperation requires adequate planning to ensure that the cooperation mechanism chosen to provide it is the most appropriate one in order to the successful processing of the request.

Nevertheless, 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 matter; it could be considered the necessity of identifying 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 from one nation to another may be vastly different.

Taking into consideration this situation, this document 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 finally will describe the related proposal, which involves the development of a technical assistance program to be conducted by the Executive Secretariat.

## **FORMAL AND INFORMAL INTERNATIONAL COOPERATION MECHANISMS**

The development of new modalities or typologies used by transnational organized crime for money laundering, 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 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 leading to 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 another State. These mechanisms involve not only judicial authorities in each State but also administrative agencies.<sup>2</sup>

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 and procedures according to the provisions of international conventions or treaties, domestic legal systems and the principle of reciprocity. These are formal requests for assistance transmitted through the appropriate central authority in accordance with the provisions of the applicable international treaty, rule 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 that may be 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. In this sense, we can consider bilateral, regional and multilateral conventions, as will be briefly exposed.

Bilateral treaties may be written to reflect the willingness 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

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<sup>2</sup> 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.

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 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 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.

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.<sup>3</sup>

The central authority is the body 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 criminal cooperation and it is responsible for processing all requests, coordinating with judicial and administrative authorities and responding them. The advantage of having a central authority is that the State will have greater control over demands received and sent, and will generate uniform responses and avoid duplication of efforts.

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

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 to develop databases on other legal systems and their specific requirements, as they have experience with requirements abroad or due to their coordination and dissemination responsibilities.<sup>4</sup>

In a nutshell, formal international cooperation mechanisms are accessed via diplomatic channels; that is, through the Ministry of Foreign Relations and its counterpart in the State involved which will, in turn, forward it to the pertinent central authority, or directly with the appropriate central authority. These mechanisms are the appropriate means for obtaining 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.<sup>5</sup>

#### *Informal International cooperation mechanisms*

Alternative mechanisms for international cooperation are called "informal" not because their adequacy to international or local legislation, nor their involvement with government agencies. Indeed, such designation due solely to distinguish them to the judicial proceedings in which the order of international cooperation should be addressed through a warrant usually handled by the Ministry of Foreign Affairs of the countries involved in the terms already explained.

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.

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

<sup>5</sup> 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.



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 towards 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 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, although those orders must be later requested and justified through formal channels.<sup>6</sup>

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 valuable input since it provides, among others, a complete description of the formal and informal international cooperation mechanisms used by the States to detect 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.

## **RESTRICTIONS TO REQUESTS OF INTERNATIONAL COOPERATION**

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<sup>6</sup> 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.

Cooperation mechanisms provide tools that can be used if required international cooperation in the areas of prevention and suppression of money laundering, terrorist financing and recovery of criminal assets. Although international cooperation has been expanded and strengthened, there are certain obstacles that may impact the success of requests made, such as the following:

a) The **legal terminology** employed varies from State to State. 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*.<sup>7</sup>

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 States 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.

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<sup>7</sup> 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.

d) The **procedures to obtain assistance** also vary from State to State. 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).

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.

f) Absence of mechanisms that allowed increasing the incentives for collaboration, such as forfeiture assets with the jurisdictions which assisted in identifying assets that are subject of confiscation and recovery.

However, the weaknesses identified, could be minimized with the alternative proposed in this document.

## **THE NEED TO FACILITATE INTERNATIONAL COOPERATION IN THE RECOVERY OF ASSETS**

Usually, criminals who profit from crime in one State transfer those profits to another 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 assets<sup>8</sup> that will help identify and recover those assets located in different 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 an international agreement among countries of the continent in the sense of cooperating among each other to identify and recover assets of illicit origin,<sup>9</sup> and also willingness

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<sup>8</sup> 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.

<sup>9</sup> For instance: the United Nations Convention against Corruption.

to do so, there is no current legislation that allows confiscation and recovery of assets, nor specific judicial procedures detailing what to do when a State requests assistance to others; neither the mechanisms to share forfeiture assets have been spread with the authorities that assisted in identifying assets that are subject of confiscation and recovery.

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 State for the purpose of safeguarding property, documents or data that may be the target of forfeiture or used as evidence and therefore prevent their disappearance or transformation.

Although some international agreements provide detailed procedures to allow such procedure, in the Inter-American system there are no provisions on how should a national court react to execute such international requests to manage and administrate assets preventively forfeited. Addressing this issue in regional terms, that is, in the OAS region, is an available and feasible solution in order to ensure favorable results in the short and medium term.

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

1. Investigation of mutual evaluations to identify the problems of States in international cooperation in asset recovery.
2. Elaboration of a document with the framework, provisions, guidelines and / or best practices in international cooperation in asset recovery, resulting from the collection of information described in paragraph 1. above, which serve as a reference to all American States.
3. Training for the implementation of the provisions included in the above mentioned document.
4. Development of a structured database to facilitate international cooperation.

## **PROGRAM OBJECTIVES**

The program's objectives are:

### **General**

To collaborate with OAS States to optimize 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 continent and adequate the international standards on money laundering and terrorism financing.

### **Specific**

1. To compile the mutual evaluations in international cooperation in asset recovery;
2. Identify main weaknesses of States in the matter indicated and provide the necessary tools to solve asset recovery cases in which international elements concur.
3. To facilitate the exchange of experiences and best practices in asset recovery, using a different approach to ensure mutual assistance between all States;
4. Provide States of reference tools to ensure uniform legal framework to facilitate the exchange of information procedures and reduce the asymmetries of the various legal systems.
5. To contribute on the training of specialists in recovering assets abroad by previously accepted models and approved by States;
6. To implement integrated strategies that facilitate communication on asset recovery in the Hemisphere, both inside and outside the States;
7. To improve judicial cooperation among States in the area of money laundering;
8. To promote the adoption of mechanisms to share forfeited assets among States that participate and cooperate in the identification of assets and their recovery.

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.