

**DRAFT LEGISLATIVE GUIDELINES:**  
**BASIC ELEMENTS OF MUTUAL ASSISTANCE**

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## INTRODUCTION

*These guidelines contain the basic elements that should be included in standards on mutual assistance; that is, provisions designed to ease legal cooperation between two or more states with a view to ensuring the effectiveness of measures and actions to prevent, detect, and punish acts of corruption recognized in the Convention.*

*The preparation of these guidelines took into account, inter alia, the applicable provisions contained in the United Nations Convention against Corruption as well as those found in the Model Law on Mutual Assistance in Criminal Matters.<sup>1</sup> The latter, under the leadership of the Argentine Republic, was developed by the Working Group on Mutual Assistance in Criminal Matters in the framework of the Process of Meetings of Ministers of Justice or of Ministers or Attorneys General of the Americas (REMJA).*

*Furthermore, as the title suggests, the contents of these guidelines are the basic elements that should be included in the legal framework of this nature and, consequently, are not exhaustive.*

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<sup>1</sup> The text of the Model Law on Mutual Assistance in Criminal Matters is available for consultation at: [http://www.oas.org/juridico/mla/en/model\\_law.pdf](http://www.oas.org/juridico/mla/en/model_law.pdf)

## 1. MUTUAL ASSISTANCE

### 1.1. Scope

Provisions that recognize the possibility of requesting mutual assistance for any of the following purposes:

- a) Summons of witnesses, persons under investigation, and experts;
- b) To take statements or hear testimony;
- c) Notification of procedural acts;
- d) To deliver the originals or certified copies of documents and court records;
- e) To provide information and evidence;
- f) To perform forensic tests;
- g) Location and/or identification, *inter alia*, of persons, property, and instruments for evidentiary purposes;
- h) To seize, attach, and confiscate property;
- i) To examine objects, persons, and places;
- j) To facilitate the voluntary appearance of persons in the requesting State, in order provide statements or cooperate with enquiries;
- k) To identify, seize, attach, and confiscate criminal proceeds;
- l) To recover assets;
- m) To provide any other form of assistance in accordance with the domestic law of the requested State.

### 1.2. General provisions

#### 1.2.1. *Absence of a treaty or convention*

Domestic legal provisions that govern all mutual assistance procedures unless provided otherwise in an international treaty or convention.

#### 1.2.2. *Principle of reciprocity*

Provisions that guarantee the principle of reciprocity among States in mutual assistance matters and which, unless stipulated in an international treaty or convention, expressly include a statement by the requesting State with respect to its offer of reciprocity in cases of this nature.

#### 1.2.3. *Central authority*

Provisions that provide for the appointment of a central authority to take charge of processing requests for mutual assistance and act as a clearinghouse for information thereon. This fact shall be notified to other states.

#### 1.2.4. *Direct communication*

Provisions that facilitate direct transmission of requests and communications among

Central Authorities and enable the requested State to provide assistance to the requesting State in the preparation of requests.

*1.2.5. Dispensation with document certification*

Provisions that provide that documents transmitted through diplomatic channels or through the Central Authorities designated for that purpose shall not require certification.

*1.2.6. New technologies*

Provisions that permit the use of new communication technologies among Central Authorities, in particular information exchange and official transmission (in a secure and certified manner) via electronic mail of requests for assistance and responses thereto.

*1.2.7. Absence of double criminality*

- a) Provisions that provide that assistance may be rendered even if the deed that gives rise to it is not a criminal act in the requested State, bearing in mind the purposes of the Inter-American Convention against Corruption, as set forth at Article II thereof.
- b) Provisions that limit assistance, where not consistent with the basic concepts of the State's legal system, to measures that do not entail coercive action.

*1.2.8. Conditions and manner of compliance*

Provisions that govern the conditions and manner in which requests for assistance should be carried out.

*1.2.9. Special conditions and manner of compliance*

Provisions that permit requests for assistance to be carried out in the conditions and manner required by the requesting State, provided that said conditions and manner do not violate guarantees and rights recognized in the domestic law of the requested State.

*1.2.10. Formal requirements*

Provisions that provide that requests for mutual legal assistance shall contain at least:

- a) The identity of the authority making the request.
- b) The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding.

- c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents.
- d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed.
- e) Where possible, the identity, location and nationality of any person concerned; and
- f) The purpose for which the evidence, information or action is sought.

*1.2.11. Expenses*

Provisions that provide that regular expenses incurred by the execution of the request for assistance shall be defrayed by the requested State, while any special expenses shall be borne by the requesting State.

*1.2.12. Safe conduct*

Provisions that provide that any person who, in any capacity, appears in response to a summons in the requesting State may not, without the approval of the requested State, be indicted or prosecuted for a crime committed prior to receipt of the assistance request, unless:

- a) The appearing party, in the presence of legal counsel, freely and expressly waives that immunity before a diplomatic or consular official of the requested State;
- b) The appearing party fails, despite having the possibility to do so, to depart the territory of the requesting state of their own free will within 30 consecutive days counted from the moment they fulfill the purpose for which they were summoned, or if they voluntarily return after having left it.

*1.2.13. Confidentiality*

Provisions that require the requesting State to stipulate in its request that both the request for assistance and its reply should be treated with confidentiality.

*1.2.14. Limits on the use of the information or evidence obtained*

Provisions that determine that the requesting State shall not use the information or evidence obtained under a request, or any other information arising therefrom, for any purposes other than those specifically stated in the request, unless it receives the express consent of the requested State to do so.

*1.2.15. Use of videoconferences*

Provisions that permit the use of videoconference or similar technology to take statements or hear testimony.

### **1.3. Denial of assistance**

#### *1.3.1. Grounds for refusal*

Provisions that determine that the following shall be grounds for refusal of a request for assistance in criminal matters:

- a) When the request is founded on the investigation of an act that, based on the circumstances included in the request, may be classed as a political crime or an offense related thereto.

For these purposes, the following shall not be considered political crimes:

- i) War crimes, crimes against humanity, genocide, and other crimes against international law;
  - ii) Acts of terrorism;
  - iii) Acts against the life, physical integrity, or liberty of a head of state or government, or of a member of their family, or of diplomatic staff or other internationally protected persons;
  - iv) Crimes against the safety of civil or commercial aviation or maritime navigation.
- b) When the circumstances included in the request suggest that one or more persons are being persecuted on account of their race, religion, nationality, or gender.
  - c) When the request suggests that the person under investigation has already been convicted for the same act in the requested State. The foregoing is without prejudice to any treaty-based exceptions to this principle.
  - d) When the request is founded on the investigation of an act that, based on the circumstances included in the request, may be classed as a military crime or an offense related thereto.
  - e) When the request has been issued at the request of an ad hoc tribunal.

#### *1.3.2. Bank secrecy*

Provisions that stipulate that neither invocation of bank secrecy nor the fact that the offense is a tax crime are grounds to refuse a request for assistance.

#### *1.3.3. Timely communication of refusal*

Provisions that require the requested State promptly to communicate any denial of assistance, providing a clear explanation of the grounds for its refusal.

#### *1.3.4. Assistance in the event of total or partial denial of the request*

Provisions that permit the requested State, should it deny the request or any part thereof, to consider the request jointly with the requesting authority with a view to finding ways to overcome the obstacles to its execution.