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PROPOSED BEST PRACTICES WITH RESPECT TO THE GATHERING OF STATEMENTS,
DOCUMENTS AND PHYSICAL EVIDENCE, WITH RESPECT TO MUTUAL LEGAL
ASSISTANCE IN RELATION TO THE TRACING, RESTRAINT (FREEZING) AND
FORFEITURE (CONFISCATION) OF ASSETS WHICH ARE THE PROCEEDS OR
INSTRUMENTALITIES OF CRIME AND FORMS ON MUTUAL LEGAL ASSISTANCE IN
CRIMINAL MATTERS

EXPLANATORY NOTE

This document is a guide or a set of non-binding guidelines, which have been made available to the Member States, so that they may make use of it pursuant to their domestic provisions

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**BEST PRACTICES
WITH RESPECT TO THE GATHERING OF STATEMENTS, DOCUMENTS AND
PHYSICAL EVIDENCE**

Foreword: It is recognized that some of the suggestions that follow will have greater relevance for some Member States than others, depending on the particular legal system and requirements that apply in a given situation. Therefore, as a complement to this summary of best practices, it is highly recommended that each Member State post, either a detailed summary of its requirements generally (ideally with examples), or that it highlight its particular requirements by reference to particular paragraphs of the best practices, in their final form, that are especially important for that Member State. This information should be posted either on the private page of the OAS website on mutual assistance, or in a designated space on the Groove Network.

1. General:

- 1.1 When drafting requests for mutual assistance, Member States should endeavour to establish as clearly as possible, with reference to any evidence available in support of essential elements at least, the appropriate links between the individual alleged offenders, the individual alleged offences and the individual means of assistance requested;
- 1.2 In cases where the relevant authorities in the Requesting State have had little or no experience in dealing with a country from which they wish to seek assistance, before drafting the request, they should consider contacting the Central Authority in the target country to obtain clarification about its requirements in the given situation;
- 1.3 Central Authorities in Member States should provide these Best Practices and any subsequent collection of best practices to the competent authorities who wish to prepare a request for assistance so that they may be used, together with the attached Forms (“*Formularios*”) as tools to assist their authorities in the drafting of the request;
- 1.4 Member States should allow an appropriate period of time for the execution of their request unless the request is particularly urgent, in which case, the grounds for urgency together with any essential time period (e.g., limitation period, trial date, etc.) should be given in the request.

Communications Between Requesting and Requested States and other General Matters

Where it is practicable, Member States should consider doing the following:

- (a) Acknowledging receipt of requests for mutual legal assistance;
- (b) Providing to the Requesting State, when acknowledging receipt of its request, the name and function of the authority and, where possible, the name of the person responsible for the execution of the request together with the applicable telephone number, fax number and e-mail address. Such communications should be coordinated by the Central Authorities of the Requested and Requesting states;

- (c) Including in the above-noted acknowledgement of receipt, to the extent that it does not contravene the legislation of the Requested State, data with respect to the Court or prosecution office that is the “point of contact”;
- (d) Providing to the requesting authorities, when it is not possible to execute the request either in whole or in part, a written or oral explanation of the obstacles to execution and, where possible, an offer of joint consideration of the request with the requesting authority with a view to finding ways to resolve these difficulties;
- (e) Providing to the requesting authority, to the extent possible, when it becomes clear that it may be impossible to provide all of the assistance requested within the timetable set forth by the requesting authority in its request and that this will result in prejudice to its proceedings, a written or oral explanation of when it might be possible to provide the assistance which has not yet been provided;
- (f) Refraining from marking a request for assistance as “Urgent” without clearly explained justification for urgency;
- (g) Checking a request for compliance with the terms of the relevant treaty;
- (h) Providing the requested authority, when presenting a request for assistance, with the name and coordinates of the authority and, where possible, identifying the person responsible for making the request, including the applicable telephone number, fax number and e-mail address;

2. Alternative or Collateral Means of Cooperation

- 2.1 It is recommended that Member States recognize the vital importance of other, less formal, methods of assistance, including cooperation between the police forces of the respective Member States and that provision be made for preserving and enhancing such direct cooperation to the extent possible.
- 2.2 Recognizing the celerity and efficiency of the above-mentioned methods of assistance, it is recommended that each Member State endeavour to identify general categories of assistance which it might provide without the need for a formal request for mutual legal assistance. It is recommended that, to the extent possible, each Member State make known to other Member States, either through the Groove network, the OAS website or otherwise, any such categories of assistance that could be provided by those methods.
- 2.3 It is recommended that formal requests which are the result of initial direct communication and cooperation among local authorities in the Requesting and Requested Members States identify, to the extent appropriate, the officials in each country that have been involved in exchanges which precede the presentation of the formal request.

3. Taking Statements from Witnesses, Suspects and Defendants

When a Member State seeks a statement from a witness, a suspect or a defendant, it should provide the Requested State with the following information with respect to the witness, suspect or defendant and the statement:

- 3.1 as much information as possible about the identity and the whereabouts of the witness, suspect or defendant, more specifically, whenever possible, the complete address, full name, mother's name, birth date and any other information available, such as passport or other identity number and place of birth.
- 3.2 a statement setting forth the relevance of the witness's, suspect's or defendant's statement with reference to the investigation or prosecution;
- 3.3 a statement about whether the person is to be considered a witness, a suspect or a defendant; in cases where a suspect is to be interviewed the Requesting State should indicate whether it is prepared to provide immunity (such as "use derivative use immunity") to the witness regarding his/her statement;
- 3.4 a statement about whether the witness, suspect or defendant is to provide a statement under oath or otherwise (the particular oath or other formula should be provided if applicable);
- 3.5 a statement about whether a verbatim transcript or electro-magnetic recording of the statement is required, or whether a summary of the statement signed by the witness, suspect or defendant will suffice;
- 3.6 a statement about whether officials or other parties (including the defence) from the Requesting State wish to be present for the taking of the statement and, if so, identification of such officials and others and the grounds for seeking their presence in the Requested State;
- 3.7 a statement about whether officials and others in the Requesting State wish to participate in the questioning of the witness, suspect or defendant, whenever authorized under the legislation of the requested state, and the grounds for seeking such participation;
- 3.8 if officials from the Requesting State do not intend to be present for the taking of the statement, a questionnaire (containing all of the questions to be put to the witness, suspect or defendant) should be provided. If such officials intend to be present, the Requesting State should seek information as to whether the prior transmission of a questionnaire is required under the legislation of the Requested State, regardless of the presence of the requesting foreign authority;
- 3.9 a statement to be read to the witness, suspect or defendant with respect to his/her right, if applicable, to remain silent, to be represented by a lawyer and, if applicable, the penal consequences of providing a false statement;
- 3.10 in cases where live-video link is sought for the taking of the statement, from the witness, suspect or defendant, an explanation of why a statement in this form is required or preferable together with the coordinates of the appropriate technical personnel in the Requesting State for the purposes of arranging the video-link.

4. Documents

When a Member State requests that documents be provided it should provide:

- 4.1 A statement setting forth the nexus between other evidence gathered or the investigation carried out in the Requesting State and the documents requested;
- 4.2 A statement describing in sufficient detail the documents requested, having regard to their nature and the relevant time period;
- 4.3 Information identifying the location of the documents and the individual or corporation which has custody of them;
- 4.4 When a Member State requests bank records, it should provide as much information as possible with respect to the following matters:
 - 4.4.1 the identity of the account-holder;
 - 4.4.2 the name, address and branch of the bank in which the records are believed to be located;
 - 4.4.3 a description of the particular categories of documents required, e.g. signature cards, transfers, account statements, etc.;
 - 4.4.4 the period of time for which the records are required together with the justification for such period;
- 4.5 When a Member State seeks to obtain electronic records held by an Internet Service Provider (ISP) , it should highlight any information it has about the short-term risk of destruction or deletion of these records and, if appropriate, inquire about the possibility of expedited preservation of the records in anticipation of their subsequent acquisition;
- 4.6 A statement relating to any certification that may be required and, if applicable, attaching a certificate form to be completed by officials in the Requested State;
- 4.7 If an original document is required, a statement setting forth the reasons why a copy will not suffice and an indication of whether the Requesting State will return the documents upon conclusion of the investigation or prosecution described in the request.

5. Search, Seizure and the handling of physical evidence

When a Member State seeks to obtain objects including documents and other physical evidence by means of the search of a place (including a person's body for the collection of DNA) it should provide as much information as possible with respect to:

- 5.1 The location and identity of the place (or person) to be searched;
- 5.2 The nexus between the evidence gathered or the investigation carried out in the Requesting State and the things to be searched for, including the grounds for the belief that the things will be found in the place or person to be searched;

- 5.3 Whether officials from the Requesting State wish to be present for the search, details of the identity of any such officials and specific information about any participation such officials may be seeking with respect to the search, together with justification for the requested presence or participation, (bearing in mind that presence or participation of foreign officials may or may not be permitted under the law of the Requested State);
- 5.4 Whether the search should ideally precede any other measure that may form part of the same request in order to reduce the risk of the destruction or disappearance of evidence;
- 5.5 Whether it is recommended that the Requested State limit the number of individuals who may handle the evidence in the Requested State in order to minimize the number of witnesses required in the Requesting State's proceedings and reduce the risk of contamination of certain forms of evidence (e.g., DNA evidence).

**FORMS ON MUTUAL LEGAL
ASSISTANCE IN CRIMINAL MATTERS***

1. BASIC INFORMATION:

1) REQUESTING CENTRAL AUTHORITY:

Country: _____
Department: _____
Address: _____
Telephone number: _____
Fax number: _____
E-mail: _____
Person in charge: _____

2) REQUESTED CENTRAL AUTHORITY:

Country: _____
Department: _____
Address: _____
Telephone number: _____
Fax number: _____
E-mail: _____
Person in charge: _____

3) REQUESTING JURISDICTIONAL OR INVESTIGATIVE BODY:

Court / Secretariat / Office of Public Prosecution: _____
Address: _____
Telephone number: _____
Fax number: _____
E-mail: _____

4) REQUESTED AUTHORITY: (JUDICIAL / PUBLIC MINISTRY)
– *if known*–

Identification: (Court/ Secretariat/ Ministry/ Office of Public Prosecution): _____
Name: _____
Address: _____

* These forms were presented by the Delegation of Paraguay during the II the Meeting of Central Authorities and Other Experts on Mutual Legal Assistance in Criminal Matters and Extradition held in Brasilia, Brazil, September 1-3, 2005 (Document PENAL/doc.5/05).

5) REFERENCE:

5.1. PROCEEDING:

Name: _____

Number: _____

Year: _____

Any other information which can assist in singling it out: _____

6) PUNISHABLE ACT OR OFFENCE FOR WHICH ASSISTANCE IS REQUESTED:

6.1) DESCRIPTION OF THE PUNISHABLE ACT: (Brief summary of the act under investigation, including transcript of the applicable legislation in the Requesting State, description of the individuals under investigation, etc.)

6.2) DESCRIPTION IN THE REQUESTING STATE: (Clear description of the legislation which describes the crime, stating the name, number and date of the law, so that it can be identified in the Requested State).

7) DESCRIPTION OF THE REQUESTED ASSISTANCE

8) GROUND ON WHICH THE REQUEST FOR ASSISTANCE IS BASED

9) OBJECTIVE OF THE REQUEST FOR ASSISTANCE

10) SPECIAL PROCEDURES

11) INFORMATION AND RULES ON STATUTE OF LIMITATIONS

12) ADDITIONAL INFORMATION (Lapse of time in which assistance must be executed, lapse of time in investigation, etc.)

13) ENCLOSED DOCUMENTS: (Description of the enclosed documentation)

14) TRANSLATION: (when necessary)

15) CONFIDENTIALITY: (when necessary, providing the reasons)

16) TREATY INVOKED: (reciprocity in case there is no treaty)

Date and Venue: _____

Signature and stamp of the Requesting
Authority

Signature and stamp of the Requesting
Central Authority

2. ADDITIONAL INFORMATION FOR VARIOUS CASES:

- ADDRESSEE OF THE ASSISTANCE MEASURE:

Name: _____

Address: _____

ID card: _____

- DESCRIPTION OF THE DOCUMENTS TO BE SERVED: (Original or copy)
- DATE OF THE HEARING:
- LIST OF QUESTIONS:
- In case of service of witnesses or experts, register the type of service and whether a request is one of voluntary appearance.
- AUTHORITY WHICH SHOULD EXECUTE THE ASSISTANCE: (Judicial or Public Ministry).
- THE RESOLUTION WHICH ENFORCES THE ASSISTANCE AND THE RECEPTION / PRODUCTION OF THE DESCRIBED EVIDENCE:
- EVIDENCE TO BE RECEIVED OR PRODUCED:
- AUTHORITIES OR PEOPLE AUTHORIZED TO PARTICIPATE IN THE PROCEEDING:

Description / Position: _____

Name: _____

Address: _____

Identification Document: _____

Safe conduct: _____

- PROVISIONAL OR OTHER MEASURES CONCERNING ASSETS:

Description of the assets on which the measure is requested: _____

Venue: _____

Bank : _____

Account number: _____

Other descriptions: _____

Type of measure to be taken and assets on which the measure will apply: _____

Authorities designated to execute the measure: _____

- Identification: _____

- Address: _____

Authorities designated to take custody of the assets: _____

- Identification: _____

- Venue of Custody: _____

3. CERTIFICATION OF THE EXECUTION OF ASSISTANCE:

1) THE CENTRAL AUTHORITY OF THE REQUESTED STATE:

State: _____
Department: _____
Address: _____
Telephone number: _____
Fax: _____
E-mail: _____
Person in charge : _____

2) CENTRAL AUTHORITY OF THE REQUESTING STATE:

State: _____
Department: _____
Address: _____
Telephone: _____
Fax: _____
E-mail: _____

3) FROM THE JUDICIAL AUTHORITY / PUBLIC MINISTRY:

Name: _____
Address: _____

4) FROM THE JUDICIAL AUTHORITY/ PUBLIC MINISTRY:

Name: _____
Address: _____

5) ABOUT THE REQUEST:

Cover / Title: _____
Number: _____

6) COURT PROCEEDING:

Identification: _____
Court/Secretariat: _____

A. The Authority (Judicial or Public Ministry) undersigning this certification is pleased to address the Authority (Judicial or Public Ministry) of _____ concerning the referenced request for mutual legal assistance, and informs that the requested measure WAS / WAS NOT executed Totally / Partially by the Requested Authority (Judicial or Public Ministry).

B. The measure was executed in accordance with the following details:

1. Executing Authority (Judicial or Public Ministry): _____
2. Venue and date of its execution: _____

C. Enclosed documents:

D. Reasons why the requested assistance could not be executed:

Venue and Date: _____

Signature and stamp of the Requesting
Authority

Signature and stamp of the Requesting
Central Authority

BEST PRACTICES WITH RESPECT TO MUTUAL LEGAL ASSISTANCE IN RELATION TO THE TRACING, RESTRAINT (FREEZING) AND FORFEITURE (CONFISCATION) OF ASSETS WHICH ARE THE PROCEEDS OR INSTRUMENTALITIES OF CRIME

Foreword:

The tracing, freezing and confiscation of assets¹ represent a distinct area of mutual assistance which raises particular considerations with respect to the efficient preparation and processing of requests of this nature. Therefore, there is a need to develop specific recommendations in this regard which, while recognizing the applicability of the general (draft) best practices already proposed, address additional challenges in relation to this area of mutual legal assistance. The draft proposed below is in response to this need. Although the WG's decision to prepare this draft was not prompted by other OAS organizations, the Working Group seeks nonetheless to harmonize its efforts with those of other OAS entities, such as the work to facilitate international cooperation in confiscation matters that is already under way in the Money-Laundering Experts Group of the Inter-American Drug Abuse Control Commission (CICAD) of the OAS.

I. Internal Legal, Administrative and Law Enforcement Infrastructure

It is recognized that international cooperation with OAS Member States with respect to the tracing, freezing and confiscation of assets requires as a starting point that each Member State have the essential tools and structures that will enable it to carry out this process. It is recognized that unless a given member State is able to trace, freeze and confiscate assets for the purposes of its own investigations and legal proceedings, it will likely not be able to take these measures on behalf of foreign State in response to a request in this regard. It is noted that model legislation, including the CICAD's Model Regulations to Combat Money-Laundering and Other Offences, is available to assist Member States in their efforts to enact effective confiscation procedures.

It is also recognized that bringing about deep changes in the legislation of each delegate or expert's Member State is beyond the mandate of the WG. Nonetheless, as the basis for better cooperation in this area, it is recommended that the experts from each Member State of the WG and of the OAS generally take the following steps:

1. Consult either individually or in the context of the WG meetings with delegates of other Member States about other Member States' abilities to identify, trace, restrain and confiscate criminal assets and to provide effective mutual assistance in such matters;
2. Consider, within the limits of its constitution and other legislation of general application, whether additional legal instruments are required in this regard;
3. Make recommendations to the relevant authorities of the delegate's own Member State about legal tools that have been identified as useful or necessary in this regard;

¹ Within this document, reference to "assets" or criminal assets should be considered to mean a reference to property (including liquid assets, real property and personal property) which constitutes either the proceeds of a criminal offence or property which facilitated the commission of the offence.

4. Make recommendations to the relevant authorities of the delegate's own Member State about legal tools that have been identified as useful or necessary for the purpose of efficiently responding to foreign requests in this regard;
5. Together with the CICAD Money Laundering Experts Group (MLEG), review the submissions of Member States in response to that group's questionnaire regarding its legislation and/or treaties authorizing it to identify, trace, restrain and confiscate criminal assets and to provide effective mutual legal assistance in such matters.²

II. International Cooperation

1. Steps to be taken in advance of preparing a request

- a) the investigation within the Requesting State should be carried out as thoroughly as possible within the time limits that apply in order that the most complete information possible can be collected in relation to the identification of the assets, their precise nexus to the offences allegedly committed and their current location;
- b) to the extent possible under the legal systems of the Requesting State and the Requested State law enforcement and other agencies should engage in as much informal exchange of information and cooperation as possible;
- c) the Financial Intelligence Unit of the Member State should be used to the extent possible for gathering relevant information to support its claim that the assets in question have been derived from crime;
- d) the relevant authorities in the Requesting State should consult all reliable sources that are available, including any information posted on the OAS website for mutual assistance (either on the public or confidential page) and on the MLEG website to determine what the requirements are in the Member State to which the request is to be addressed;
- e) the relevant authorities in the Requesting State should contact and consult with the relevant authorities in the Requested State in advance of making the request in order to help ensure that the request will be made in a manner that will be in conformity with the requirements of the requested State and facilitate execution by the Requested State to the greatest extent possible.

2. Drafting of a request for the tracing, restraint and confiscation of assets

- a) The request should strike the ideal balance between providing a summary of all relevant information, but not making the request overly long by including superfluous information. The amount of detail required will vary in accordance above all with the requirements of the Requested State and, to a lesser extent, with the requirements of the Requesting State.
- b) Where appropriate requests of this nature should specify that they are to be considered confidential in both the Requesting and Requesting States and handled accordingly. Whether

² OAS Member States should be encouraged to ensure that they have provided an updated response to the MLEG questionnaire.;

the request is marked confidential or not, both the Requesting State and the Requested State should avoid making public statements about the existence or contents of the request, as the request should be considered a State-to-State communication.

- c) With respect to identifying and tracing assets, particularly the contents of bank accounts, as much detail as possible should be provided with reference to bank account numbers together with the financial institutions and branch offices where such bank accounts are held, if available. Reference should be made to the precise grounds for the belief that the information or assets sought are in fact related to a particular offence and the grounds for believing that the assets are located in a given location in the Requested State, if available. Certain States may require a reference to the evidence in support of these assertions.
- d) For those States requiring dual criminality as the basis for assistance with respect to the freezing of assets, the illegal conduct alleged by the Requesting State as the source of the assets will need to be carefully and thoroughly described, with reference, in States that require it, to the evidence in support of the allegation of criminal conduct;
- e) With respect to requests for restraint or freezing of assets in relation to a criminal prosecution, all available relevant information should be provided in relation to the criminal origin of the assets, including, wherever available a statement of the measures taken to eliminate any non-criminal activity as the source of the assets. In States that require it, allegations of the criminal provenance of the assets must be supported by references to the evidence in support of this allegation (e.g., testimonial, documentary or surveillance evidence);
- f) With respect to requests for restraint or freezing of assets, the maximum sentence for the underlying offence should be clearly stated with reference to the relevant legislative provision under the Requesting State's law. The procedural point reached in the Requesting State's investigation/prosecution should be identified, e.g., whether the relevant offender has been arrested or charged. A copy of the charging document should be provided where available.
- g) With respect to requests for restraint or freezing of assets in connection with "*in rem*" or other non-conviction based confiscation proceedings, where such proceedings are authorized, a description of the underlying criminal activity, an explanation of the status of the proceedings to date, as well as an explanation of the relevant legislation should be provided.
- h) With respect to requests for restraint or freezing of assets, any grounds for urgent action should be carefully laid out, including information about whether the target of the investigation is aware of the investigation in relation to his/her assets.
- i) If direct enforcement of an order for restraint or freezing of assets is sought, a copy of the order together with any relevant explanation should be provided in addition to the information listed in the paragraphs above.
- j) With respect to request seeking the confiscation of assets, a statement about whether a criminal conviction has been entered and if so, the details of the conduct which is the basis for the conviction and a copy of the certificate of conviction.

- k) If direct enforcement of an order of confiscation in the Requesting State is requested, a copy of the order should be provided together with any explanation that may be appropriate, including the extent to which such an order is final and may have been partially enforced already;

III. Disseminating information with respect to the ability and requirements in each Member State in relation to the tracing, freezing and confiscation of assets

Member States' delegates should make efforts to provide to the WG and the MLEG an explanation of that member State's requirements with respect to tracing, freezing and confiscation of criminal assets and to keep the posted information up to date. Member States should make efforts to provide a response to the MLEG questionnaire.