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**DEPARTMENT AGAINST TRANSNATIONAL ORGANIZED CRIME (DTOC)
ORGANIZATION OF AMERICAN STATES (OEA)**

**50th (VIRTUAL) MEETING OF THE GROUP OF EXPERTS
FOR THE CONTROL OF MONEY LAUNDERING
July 13 – 14, 2021
Washington D.C. – USA.**

**OEA/Ser.L/L. 4.50
DDOT/LAVEX/doc.4/21
July 13th, 2021
Original: Spanish**

PROGRESS REPORT

Model for sharing assets between countries based on mutual criminal assistance

Working Sub-Group on Forfeiture and International Cooperation

2020

INTRODUCTION

The Group of Experts for the Control of Money Laundering (GELAVEX), in its XXIV Plenary meeting that took place from November 7th to 9th 2007, in the city of Santiago in Chile, defined as its areas of action the confiscation, extinction, or loss of domain, organisms for asset recovery, coordination and integration between financial intelligence units (FIU) and prosecution and investigation agencies, and financing of terrorism.

The GELAVEX prepared the Strategic Plan for the Triennium 2021-2023 of the Group for the XLIX Meeting celebrated in a virtual format from Asunción, Paraguay, on the 10th of November, 2020.

In agreement with the approved 2021-2023 work plan, the Working Sub-Group on International Cooperation and Confiscation assumed the commitment to: 1) Initiate the creation of the asset management network with the support of the Technical Secretariat and 2) Initiate the creation of a model agreement or reference standards for the sharing of assets.

In the virtual work session in Paraguay, before the presentation of the study of the working subgroup, the delegations of Mexico and in some way that of Brazil, suggested the creation of some type of prototypical agreement for the sharing of goods between countries, when these are generated in one country and enjoyed in another.

Having embraced this suggestion, the working subgroup is charged with developing a model regional document to serve as an effective instrument to facilitate the confiscation of assets and the sharing of criminal assistance between participating states.

GENERAL OBJECTIVE

The objective of the study is to create a model of asset-sharing for the use of countries in the region, which would ensure a more agile sharing of goods between intervening countries, not only at the level of application of the national regulations of each State, but also in relation to logistical aspects and formal and informal contact with the institutions and corresponding instances in each State.

METHODOLOGY

With the goal of establishing a draft of minimum criteria for the sharing of assets and its subsequent presentation to the plenary meeting of GELAVEX for its observations and improvement, a review was conducted regarding the various legal instruments that deal with mutual legal assistance and international cooperation in the seizure and forfeiture of assets.

Such a review included:



- United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988
- United Nations Convention Against Transnational Organized Crime
- Framework Agreement for the Disposal of Assets Confiscated from Transnational Organized Crime.

THEORETICAL FRAMEWORK

The States should promote international technical and economic cooperation through its competent bodies and by all legal means at its disposal, in order to arrange bilateral and multilateral agreements to improve the efficiency of international cooperation and strengthen asset recovery mechanisms and their eventual sharing, in cases in which it should not operate the restitution of goods.

The true dismantling of criminal groups necessarily implies the annihilation or at least the weakening of their economic and patrimonial structures. Those resources that are recovered in judicial processes must return to the States, but they must also be able to be shared with the States that implement the policies and actions necessary for the prevention and repression of the crimes prosecuted, as well as the execution of public policies along the same lines.

In the region, as a result of previous regulatory studies, it has been determined that there are independent and non-unified efforts to achieve the adequate, timely, and efficient sharing of seized or forfeited assets, as a product of the execution of processes of international cooperation or mutual legal assistance. Even several of the requirements for normative developments established in international conventions and treaties have not been carried out by some of the States.

However, for the proposed model of property sharing, the starting point is that the sharing of goods can be carried out directly through the international instruments that each country has subscribed to and in application of its own internal right. To do this, initially, common regulatory instruments in the region were reviewed, to extract from them the most generalized criteria on sharing and restitution of assets, in order to present a proposal to the members of GELAVEX on which to work. Knowing the proposed and enriched discussion taking place in the plenary meeting and in the following weeks, in fulfillment of the commitment for 2021, the model will be exposed in the session of the second semester of the current year, being a product of the work of the working subgroup and of the observations and enrichment through standards, data, information, and criteria that will be requested from the Member States of the group of experts.



General Criteria for International Instruments

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances - Vienna 1988

In addition to establishing guidelines on the confiscation of property among the participating States, this opens the possibility of sharing or participation of goods. That possibility is clearly based on the notion that States will act in accordance with their domestic law and administrative procedures.

“Article 5

CONFISCATION

1. Each Party shall adopt such measures as may be necessary to enable confiscation of:

(...)

5. a) Proceeds or property confiscated by a Party pursuant to paragraph 1 or paragraph 4 of this article shall be disposed of by that Party according to its domestic law and administrative procedures.

b) When acting on the request of another Party in accordance with this article, a Party may give special consideration to concluding agreements on:

i) Contributing the value of such proceeds and property, or funds derived from the sale of such proceeds or property, or a substantial part thereof, to intergovernmental bodies specializing in the fight against illicit traffic in and abuse of narcotic drugs and psychotropic substances;

ii) Sharing with other Parties, on a regular or case-by-case basis, such proceeds or property, or funds derived from the sale of such proceeds or property, in accordance with its domestic law, administrative procedures or bilateral or multilateral agreements entered into for this purpose.

6. a) If proceeds have been transformed or converted into other property, such property shall be liable to the measures referred to in this article instead of the proceeds. b) If proceeds have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to seizure or freezing, be liable to confiscation up to the assessed value of the intermingled proceeds. c) Income or other benefits derived from:

i) Proceeds;



ii) Property into which proceeds have been transformed or converted; or

iii) Property with which proceeds have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds.

(...)

8. The provisions of this article shall not be construed as prejudicing the rights of bona fide third parties".

United Nations Convention Against Transnational Organized Crime

The study takes this into account, because it includes restitution to the State from which they were abducted for committing crimes of corruption.

"Article 14. Disposal of confiscated proceeds of crime or property

1. Proceeds of crime or property confiscated by a State Party pursuant to articles 12 or 13, paragraph 1, of this Convention shall be disposed of by that State Party in accordance with its domestic law and administrative procedures.
2. When acting on the request made by another State Party in accordance with article 13 of this Convention, States Parties shall, to the extent permitted by domestic law and if so requested, give priority consideration to returning the confiscated proceeds of crime or property to the requesting State Party so that it can give compensation to the victims of the crime or return such proceeds of crime or property to their legitimate owners. (...)"

United Nations Convention Against Corruption

The regime promoted by the Convention is quite clear in relation to the actions of States parties when assets must be returned to their legitimate owners.

"Article 57.

Return and disposal of assets

1. Property confiscated by a State Party pursuant to article 31 or 55 of this Convention shall be disposed of, including by return to its prior legitimate owners, pursuant to paragraph 3 of this article, by that State Party in accordance with the provisions of this Convention and its domestic law.



2. Each State Party shall adopt such legislative and other measures, in accordance with the fundamental principles of its domestic law, as may be necessary to enable its competent authorities to return confiscated property, when acting on the request made by another State Party, in accordance with this Convention, taking into account the rights of bona fide third parties.
3. In accordance with articles 46 and 55 of this Convention and paragraphs 1 and 2 of this article, the requested State Party shall:

a) In the case of embezzlement of public funds or of laundering of embezzled public funds as referred to in articles 17 and 23 of this Convention, when confiscation was executed in accordance with article 55 and on the basis of a final judgement in the requesting State Party, a requirement that can be waived by the requested State Party, return the confiscated property to the requesting State Party; (b) In the case of proceeds of any other offence covered by this Convention, when the confiscation was executed in accordance with article 55 of this Convention and on the basis of a final judgement in the requesting State Party, a requirement that can be waived by the requested State Party, return the confiscated property to the requesting State Party, when the requesting State Party reasonably establishes its prior ownership of such confiscated property to the requested State Party or when the requested State Party recognizes damage to the requesting State Party as a basis for returning the confiscated property; (c) In all other cases, give priority consideration to returning confiscated property to the requesting State Party, returning such property to its prior legitimate owners or compensating the victims of the crime.

4. Where appropriate, unless States Parties decide otherwise, the requested State Party may deduct reasonable expenses incurred in investigations, 48 prosecutions or judicial proceedings leading to the return or disposition of confiscated property pursuant to this article.

5. Where appropriate, States Parties may also give special consideration to concluding agreements or mutually acceptable arrangements, on a case-by-case basis, for the final disposal of confiscated property.

Framework Agreement for the Disposal of Assets Confiscated from Transnational Organized Crime in Mercosur

It is an instrument signed by Argentina, Brazil, Paraguay, and Uruguay, States in Mercosur. Its purpose is to create an appropriate legal framework to distribute the assets seized from transnational organized crime.

“Article 7



Negotiation

Negotiation on the disposition of the proceeds and instruments of crime between the Party that decided on the forfeiture and the other Parties that would have cooperated in the investigation, prosecution, and recovery of assets that ultimately would have resulted in the seizure.

Article 8

Negotiation parameters

8.1. The Negotiation and Distribution Authorities will agree in each case on the percentage of confiscated assets that will be distributed, taking into account the cooperation provided and in accordance with the following parameters:

- a) The nature and importance of the assets;
- b) The complexity and importance of cooperation;
- c) The impact of the cooperation provided on the outcome of the case

8.2. In all negotiations, special emphasis will be placed on safeguarding the rights of third parties in good faith and compensation for damages to victims.

8.3. In cases where the goods are disposed of, the costs of maintenance, administration, and conservation of the forfeited assets will be reimbursed to the Party that paid them.

8.4. The Negotiation and Distribution Authorities may agree not to dispose of the goods seized when their value is small or negligible.

8.5. In determining the amount to be transferred, the party in possession of the goods confiscated may include any interest and revaluation that has occurred thereof.

8.6. In the case of crimes of corruption, the Parties may give special consideration to the possibility to enter into mutually acceptable agreements or arrangements, on the basis of each particular case, with a view to the final disposal of the confiscated assets. In all cases, the costs of maintenance, administration, and conservation of the assets they will be paid to the Party that paid them.

8.7. In cases in which the confiscated property has been auctioned or auctioned, the object of the distribution will be the amount obtained.

8.8. The Parties may agree to the usufruct of the property by the party who has custody of the same".



Proposal of Minimum Criteria for a Model of Property Sharing in the Region

The cooperation between States is essential for the success of the recovery of assets that they have been hidden abroad. The international community has signed multiple treaties multilateral organizations and has agreed instruments that ask States Parties to cooperate with each other with others in investigations, in the requisition or seizure of evidence, in the measures provisional and in the confiscation and return of assets. However, it has been little or no specific in relation to the sharing of assets between the States executing legal assistance mutual or international cooperation actions.

Due to this, the following minimum criteria are proposed for the elaboration of a good sharing model for the region:

- Normative aspects: The States will act in accordance with and in respect of their national legislation and apply the international legal instruments that have been respectively approved by them.
- Definitions: In order to have clarity about the scope of the concepts, it will be necessary to define terms to standardize them at the regional and model level.
- Defining whether a general criterion will be established for the sharing of assets, or, if it fails, whether it will be a task where special criteria are applied according to the case under examination.
- Defining the negotiation mechanisms between the States of the region.
- Defining through whom it is negotiated: if it will be done through a Central Authority or through the property administration institution in each State or other institution. In this case, it is important to create a directory with the contact information of each country in the region or to consider that the Network of Administrators for the region, also part of the GELAVEX project, also serves as an informal communication channel to initiate talks.
- Defining who will benefit from the sharing of assets: whether it will depend on the degree of participation of each State party or if there will be a distribution in accordance with the regulations of the OABIs in this regard.
- Defining payment of administration expenses: if they will be settled prior to the negotiation of property sharing.
- Defining mechanisms that guarantee a good-faith basis for the respect of the rights of third parties and the compensation for damages to victims.
- Defining what is distributed: goods, monetary currency, and financial products, the product of the disposition and/or administration of the goods.
- Definition in relation to the assets to be shared: if their monetization will be carried out prior to sharing (necessary for real estate) or if the shared goods will be delivered physically.
- Defining the form of payment: in the currency of the State where the confiscated goods are located; and its execution by electronic transfer.