Seminar
Identifying, Restraining and Recovering
Stolen Assets in the OSCE Region
Session V
Mr. Dimosthenis Chrysikos,
UNODC

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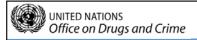


Identifying, Restraining and Recovering Stolen Assets in the OSCE Region

Vienna, 3-5 September 2012

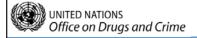
"Mutual legal assistance requests: good practices, pitfalls and pre-MLA cooperation"

> Dimosthenis Chrysikos UNODC/DTA/CEB/CSS



Mutual legal assistance under the UNCAC

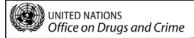
- Article 46: "States parties shall afford one another the widest measure of assistance in investigations, prosecutions and judicial proceedings in relation to offences covered by the Convention".
- Assistance also in relation to offences for which a legal person may be held liable.
- Article 43 (1): possibility for States parties to extend cooperation in ci9vil and administrative matters relating to corruption.



Use of the UNCAC as legal basis for MLA

Mutual legal assistance: Article 46, paras, 9-29

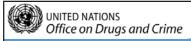
- Applicable if States parties are not bound by other MLA treaty;
- ➤ If other treaty exists, its provisions shall apply unless States parties agree to apply paras. 9-29;
- > UNCAC strongly encourages States parties to apply paras. 9-29 if they facilitate cooperation.



Spontaneous transmission of information (art. 46 (4)(5) UNCAC)

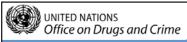
Transmission of information relating to criminal matters to the competent authority of a foreign State without prior request:

- Where such information could assist in undertaking or concluding successfully inquiries and criminal proceedings.
- Where such information could result in a formal MLA request at a later stage
- > Assurances for confidentiality unless the information transmitted is exculpatory to an accused person.



MLA (Art. 46 UNCAC

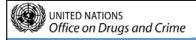
- I. Taking evidence or statements from persons;
 Facilitating the voluntary appearance of persons in the requesting State;
- II. Effecting service of judicial documents;
 Providing information, evidentiary items and expert evaluation;
 Providing originals or certified copies of relevant documents and records (including government, bank, financial, corporate or business records);
- III. Examining objects and sites;
 Executing searches and seizures, and freezing;
 Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;



Forms of MLA under the UNCAC

MLA (Art. 46 UNCAC)

- IV. Other types of assistance, not contrary to the domestic law of the requested State
- $V. \qquad \text{Identifying, freezing and tracing proceeds of crime in accordance with chapter} \\ V \text{ of the Convention}$
 - The recovery of assets in accordance with chapter V of the Convention



I. Witnesses and Experts

A. Taking evidence or statements from persons;

Special remarks in relation to UNCAC:

Protection of witnesses (art. 32)

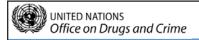
Agreements or arrangements for relocation of witnesses (art. 32(3))

Protection of reporting persons (art. 33)

Protection of persons cooperating with law enforcement authorities

Use of Video Conferences - UNCAC art. 46 (18)

- wherever possible and consistent with fundamental principles of domestic law
- at the request of the requesting State and with the permission of the requested State
- if it is not possible or desirable for the individual to appear in person in the territory of the requesting State
- eventually conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party



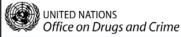
Forms of MLA under the UNCAC

I. Witnesses and Experts

Safe Conduct for (non-detained) witnesses, experts or other persons giving evidence in the Requesting State - art. 46 (27)

Such a person shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the requesting State for acts, omissions or convictions prior to the transfer

- unless person remains voluntarily in the Requesting State Party after being officially informed that his/her presence is not longer required (period of 15 consecutive days or period agreed upon to leave that country) or
- returns of his or her own free will to the Requesting State Party after having left it



. Witnesses and Experts

B. Facilitating the voluntary appearance of persons in the requesting Country; art. 46 (10-12)

Transfer of persons <u>being detained or serving a sentence</u> in requested State for purposes of identification, testimony or providing evidence

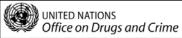
- Condition
- (a) the person freely gives his or her informed consent
- (b) the competent authorities of both State Parties agree, subject to such conditions as those State Parties may deem appropriate

- the Requesting State Party

- shall keep the person transferred in custody (unless otherwise requested or authorized by the transferring State)
- shall without delay return the persons to the custody of the transferring State
- shall not require the transferring State to initiate extradition proceedings for the return of the person

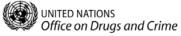
- the person transferred

- shall receive credit for the time spent in the custody of the requesting State
- shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the requesting State for acts, omissions or convictions prior to the transfer (unless transferring State agrees)



Forms of MLA under the UNCAC

- II. Effecting service of judicial and other documents
- -Providing originals or certified copies of bank and financial records: bank secrecy is not a ground for refusal of MLA requests (art. 46 (8))
- -Obligation for requested State party to provide to the requesting State party copies of government records, documents or information in its possession that under its domestic law are available to the general public (art. 46 (29))
- -Discretion for requested State party to provide to the requesting State party in whole, in part or subject to certain conditions copies of government records, documents or information in its possession that under its domestic law are **not** available to the general public (art. 46 (29))

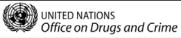


III. Examination, Tracing, Search, Seizure, Freezing

Examining objects and sites; Executing searches and seizures,

Encouragement to conclude bilateral or multilateral agreements or arrangements for using special investigative techniques - art.50 (2) Undercover Operations/ Electronic Surveillance (Audio - Video - Data)/ Controlled Deliveries

Encouragement to make, in the absence of an agreement or arrangement, decisions to use such special investigative techniques on a case-by-case basis - art. $50\,(3)$



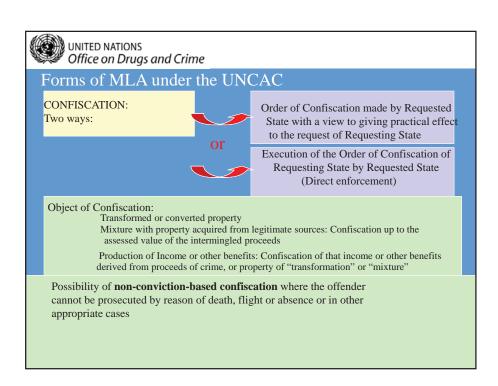
Forms of MLA under the UNCAC

III. Examination, Tracing, Search, Seizure, Freezing

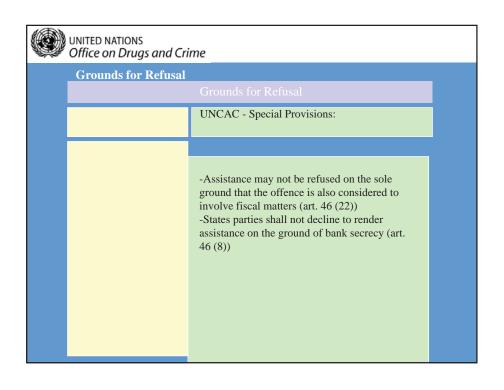
Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;

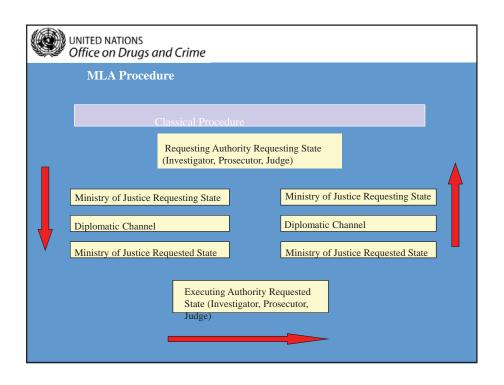
Freezing of proceeds of crime; Seizure of property, instrumentalities etc arts. 55 and 46

Protection of the rights of bona fide third parties art. 55 (9)



Grounds for Refusal	
	UNCAC - Special Provisions:
	Optional grounds for refusal (art. 46 (21):
	Request is not made in conformity with the Convention
	- Execution of the request is likely to prejudice the
	sovereignty, security, <i>ordre public</i> or other essential
	interests of the Requested State
	- Prohibition by the domestic law of the Requested State to carry out the action requested with regard
	to any similar offence, had it been subject to
	investigation, prosecution or judicial proceedings
	under the own jurisdiction
	- Contradiction to the legal system of the Requested State relating to MLA for the request to be granted
	Absence of dual criminality [discretion to provide
	assistance even if it is not fulfilled "where deemed
	appropriate" - Obligation to provide assistance if it





Office on Drugs and Crime MLA Procedure		
Improving the procedure		
Problems	UNCAC	
Complex and cumbersome Procedure	-Creation of a central authority (authorities) to ensure the speedy and proper execution or transmission of the requests received without prejudice to the right to require the requests to be addressed through diplomatic channels and (in urgent circumstances) through Interpol -Where possible: submission of requests by electronic media, in urgent circumstances oral communication, subject to written confirmation -Conclusion of bilateral or multilateral agreements or arrangements to serve the purposes of or to give practical effect to the provisions of the Convention.	
Language Problem	Request made in a language acceptable to the requested State Party	

UNITED NATIONS Office on Drugs and Crime MLA Procedure		
Improving the procedure		
Problems	UNCAC	
Refusal of MLA	Requested Party may request additional information	
Interference with an ongoing investigation, prosecution of proceeding in Requested State	MLA may be postponed after consultation with Requesting State to determine if the MLA can still be given subject to such terms and conditions as it deems necessary	

