



INTERNATIONAL ASSET RECOVERY

Freezing and Confiscating Criminal Assets



Session Objectives

- Recognise the different international models of confiscation
- Understand some of the differences in the way that these models are applied
- Understand the basic principles on which freezing orders are made
- Recognise non-conviction based confiscation and some of the ancillary orders
- Understand what channels are available to obtain intelligence overseas and the importance of conducting these checks
- Appreciate the key characteristics of mutual legal assistance and how you could start drafting an MLA request



Poll

Do you have you any experience of criminal
confiscation?



International Standards

Financial Action Task Force

- 40 Recommendations and Immediate Outcomes

UN Convention against Corruption (2003 – New York)

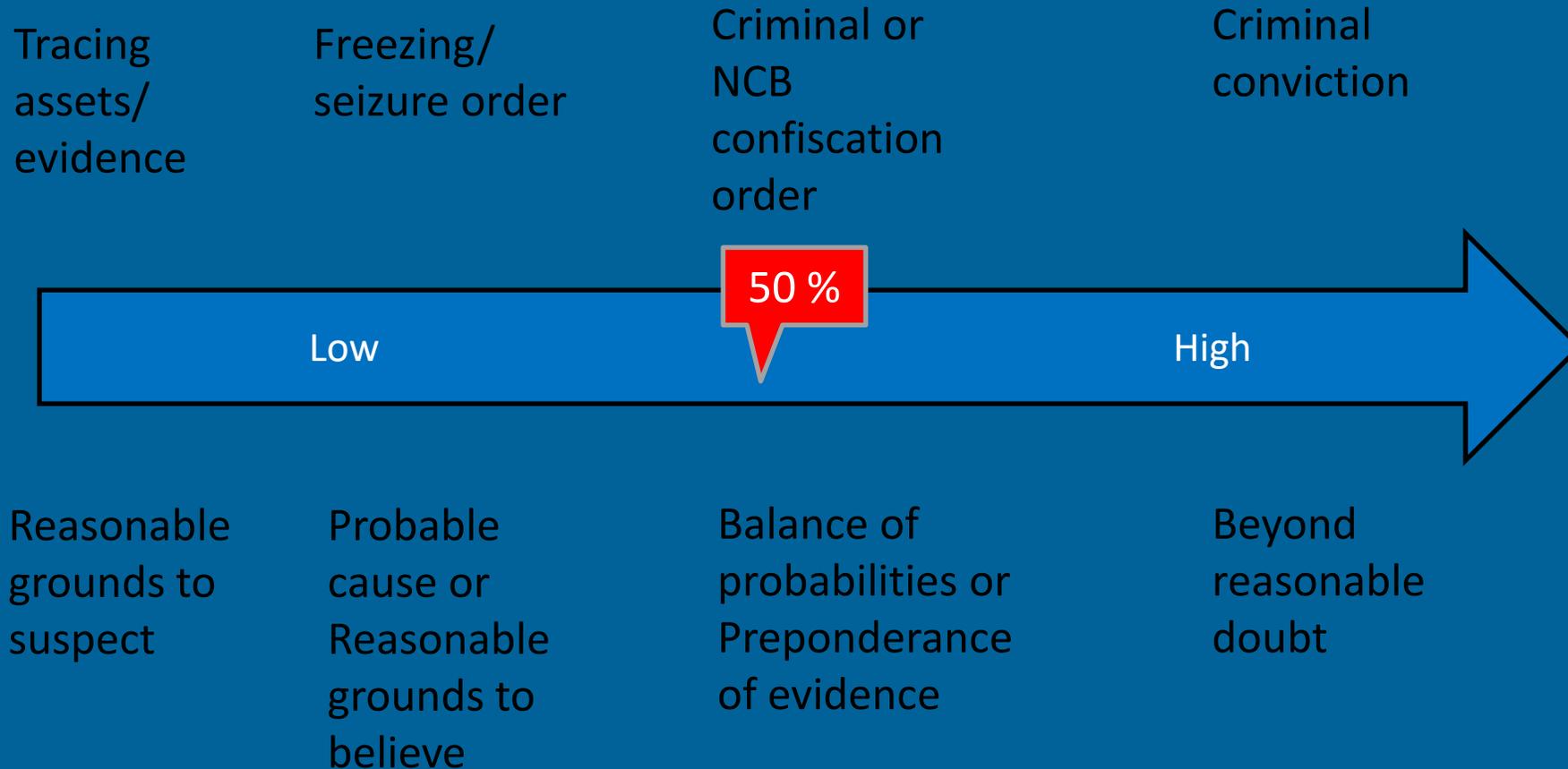
- Art. 23 Laundering of proceeds of crime
- Art. 31 Freezing, seizure and confiscation
- Art. 49 Joint Investigations
- Art. 52 to 57 Asset recovery

UN Convention against Transnational Organised Crime (2000 – Palermo)

- Art. 12 & 13 Confiscation and Seizure



Standards of Proof





CRIMINAL CONFISCATION



International Models

Two main methods of adopting international standards:



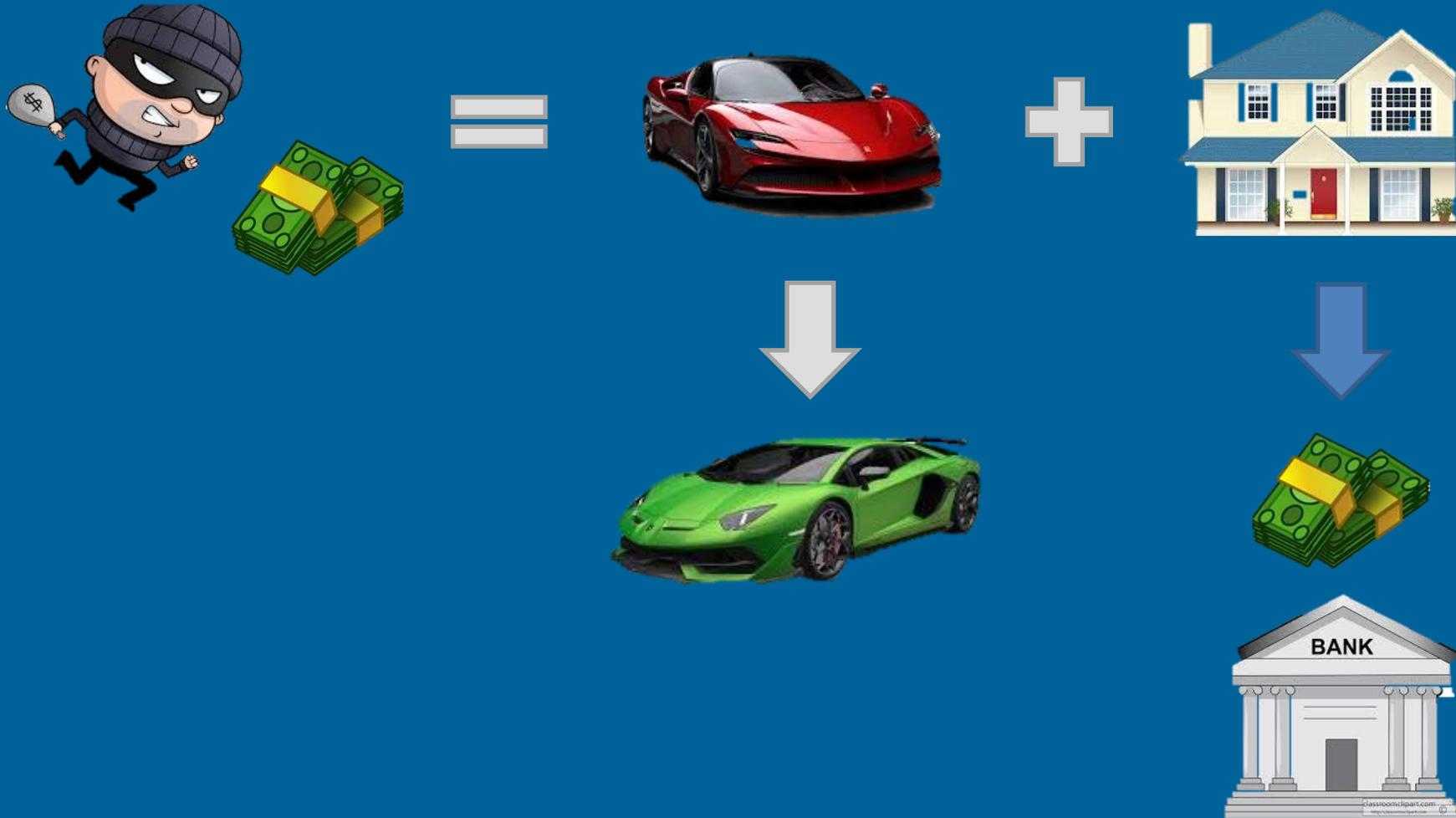
Property Based Systems



Value Based Systems



Property Based Systems





What is the amount of the benefit obtained?



What is the amount of the benefit?



Differences

	Property Based	Value Based
Requires tracing?	Yes	No
Confiscates direct/indirect proceeds only?	Yes	No
Expert evidence required?	Not Often	Sometimes
Choice of charges affects confiscation?	Not often	Yes
Money laundering prevents confiscation?	Sometimes	No
Confiscation of intangible benefit?	No	Yes



BREAKOUT

Groups to consider the following scenarios:

1. Dave has been convicted of smuggling tobacco but the boat he was using sank on the way up a inland river on the final leg of his journey. The tobacco was valued at \$1m and the duty evaded was \$400,000 Dave is facing confiscation in a property based system.
2. Same scenario as above but Dave is facing confiscation in a value based system.
3. Diana evaded her income tax to the value of £1m. The tax evaded was paid into her bank account where it mixed with legitimate funds. Money from the bank account was used to pay for food and bills, a Lamborghini and an apartment in Cape Town. Diana is convicted of income tax fraud in a property based system. What problems do you think the investigators might have in obtaining a confiscation order?
4. Using the same scenario. Diana is convicted of money laundering in a value based system, what is the benefit of her offending?



FREEZING ORDERS



What are Freezing Orders?

- Court orders to prevent the dissipation of assets belonging to a particular individual
- Provisional measure
- May involve seizure or placing the asset under the control of a receiver/curator.





Freezing Orders: Common Legal Requirements

- Proceedings have been instituted or are about to be instituted
- A risk that the assets will not be available ('risk of dissipation')
- The assets are potentially subject to confiscation
- Undertaking in damages



Freezing Orders: Scope

- Normally limited to assets controlled, held or gifted by the defendant to include:
 - Beneficial ownership of Property
 - Property held by corporate entities owned or controlled by the defendant
 - Property gifted to associate, company or family member
- Piercing/Lifting the corporate veil may be required
- Definition of ownership may change between different jurisdictions





Freezing Orders: Exceptions

Common exceptions:

- Living expenses
- Legal expenses (including/excluding those arising from related criminal or confiscation proceedings)
- Bona fide debts
- Business expenses



Often discretionary and dependant on non-availability of other assets which could be used for this purpose



CLASS DISCUSSION

Robert is under investigation for VAT Fraud. His company paid money under a false invoice to a lawyer in Spain for the purchase of a house. When he sold the property, the Spanish lawyer sent the proceeds of the sale to an account in the name of Robert's wife (who is presumed innocent).

What problems do you think that you might encounter when making your application for a freezing order?



NON-CONVICTION CONFISCATION



Non-Conviction based Confiscation

Confiscates

- Proceeds of or instruments of crime
- Property based



Common uses

- Offender dead, fled jurisdiction or is immune from prosecution
- Owner of the asset is unknown
- Acquittal or lack of prosecution
- Civil law jurisdictions may use it to confiscate assets in large or complex cases where criminal investigation is ongoing.



Non-Conviction based Confiscation

Ancillary orders

- Property freezing orders
- Disclosure orders
- Unexplained wealth orders



Unexplained wealth order

The Telegraph

Evening Standard. WEBSITE OF THE YEAR

Log in

News > UK

Wife of jailed banker loses legal challenge over UK's first 'McMafia' wealth order

HARRIET BREWIS | 8 minutes ago | 0 comments

Click to follow The Evening Standard



3

Banker's wife loses £11m challenge

Zamira Hajiyeva has lost her challenge over the UK's first unexplained wealth order (PA)

Zamira Hajiyeva is attempting to overturn an Unexplained Wealth Order against the property in central London



ANY QUESTIONS?



INTERNATIONAL COOPERATION



OVERSEAS INTELLIGENCE REQUESTS



Mutual Administrative Assistance

“police to police or prosecutor to prosecutor...”

‘informal assistance’, as it does not involve the issuing of the formal letter of request that forms the basis of a mutual legal assistance request...used when making evidence-gathering requests to a state where no coercive power...it does not mean that the form of the evidence obtained is informal or non-evidential”

Council of Europe



MUTUAL ADMINISTRATIVE ASSISTANCE

Forms of MAA include:

- Intelligence sharing
- Identification and location of potential witnesses
- Public records, such as Company House records, Electoral Roll information, or Land Registry searches, for use as evidence
- Obtaining a voluntary witness statement or interview and the voluntary production of documents held by a witness (in some jurisdictions) for use as evidence



Overseas Intelligence Requests

A number of international avenues exist to facilitate the exchange of information on an intelligence only basis, the most common are:

- The Egmont Group of Financial Intelligence Units
- Inter-Agency Asset Recovery Networks
- Overseas law enforcement liaison officers
- International law enforcement networks



Egmont Group

The Egmont Group is a platform for the secure exchange expertise and financial intelligence to combat money laundering and terrorist financing.

It presently has 166 member financial intelligence units.

- Information can be obtained from other FIUs on request or shared spontaneously
- Can only be accessed through the FIC
- Information is provided on an intelligence only basis meaning that it cannot be used as evidence



Inter-Agency Asset Recovery Networks





International law enforcement networks

International Liaison Officers



Command and Coordination Centre





BREAKOUT

Mr Green is the managing director and sole shareholder of Yellow Inc. He is suspected of creating fraudulent tax returns which suppressed the taxes he has paid. He is believed to have evaded tax to the value of US\$4m. At his home address you find a photo of him and his wife standing next to a large yacht moored in an exotic location. The rear of the photo bears the text “Antigua, 2019”. In the picture, the boat is called “Blue Waters”. You also find documents which show that a company called Blue Antigua Inc. purchased an expensive yacht of the same model. The signature on the document bears a similarity to the other examples of Mr Green’s signature.

In your groups come up with at least 4 enquiries that you would make as a result of the above facts and what channels you could use. You will be asked to feedback on one of those enquires which has not been covered by the other groups.



MUTUAL LEGAL ASSISTANCE



MLA – what is it?

“a process by which States seek and provide assistance in gathering evidence for use in criminal cases”

UNODC

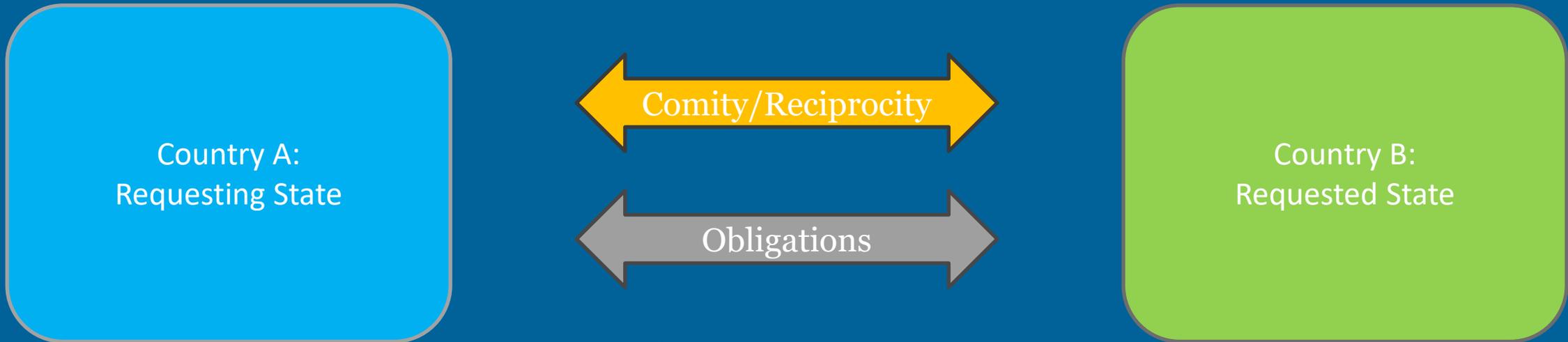
“sometimes known as ‘judicial assistance’ is the formal way in which states request and provide assistance in obtaining evidence located in one state to assist in criminal investigations or proceedings in another state”

Council of Europe



MLA – Why is it necessary?

Fundamentals of International Law



Jurisdiction at International Law:

- Prescriptive jurisdiction
- Enforcement jurisdiction
- Adjudicative jurisdiction



International Basis for MLA

- Comity and Reciprocity
- Agreements
 - The Commonwealth Scheme for Mutual Assistance in Criminal Matters ('Harare Scheme')
- Bilateral Treaties
 - i.e South Africa has treaties on Mutual Legal Assistance in Criminal Matters with US, Bangladesh, Canada, Lesotho, France, Algeria, Nigeria, Egypt, Iran, India, South Korea, Argentina, Hong Kong, Mexico, SADC and UAE
- Multilateral Treaties
 - UN Convention Against Corruption
 - UN Convention Against Transnational Organised Crime



MLA – What can it do?

“States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings...”

UN Convention against Transnational Organised Crime (2000 – Palermo), Art. 18(1)

UN Convention against Corruption (2003 – New York), Art. 46(1)

“Taking evidence or statements from persons”

“Examining objects and sites”

“Providing information, evidentiary items and expert evaluations”

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

“Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records”

“Any other type of assistance that is not contrary to the domestic law of the requested State Party”

“Executing searches and seizures, and freezing”

“Effecting service of judicial documents”

“Facilitating the voluntary appearance of persons in the requesting State Party”

UN Convention against Transnational Organised Crime (2000 – Palermo), Art. 18(3)

UN Convention against Corruption (2003 – New York), Art. 46(3)



Drafting the MLA

- Introduction and legal basis for request
- Subject of the Request
- Summary of the Facts
- Assistance requested
- Additional requirements
- Contact details and sign off
- Appendices





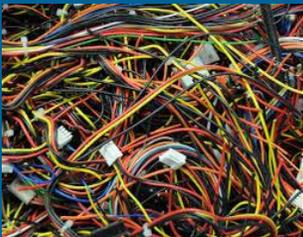
Drafting Deficiencies

Some of the common deficiencies in MLA drafting are as follows:

The request is not specific enough

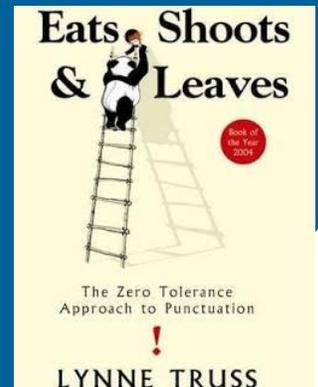
The request does not contain sufficient information or is unclear

The request does not cite the international law basis



The request fails to show a clear nexus between the investigation and the assistance requested in the other jurisdiction

The request has not been translated (or not properly translated)





MLA Drafting Tool

UN Office on Drugs and Crime MLA Writing Tool
<https://www.unodc.org/mla/>

UNODC
United Nations Office on Drugs and Crime

CELEBRATING UNODC@20

Home About UNODC Quick Links Field Offices Site Map

Mutual Legal Assistance Request Writer Tool

Mutual legal assistance is one of the most decisive weapons States have to fight serious international crime. For mutual legal assistance requests to be effective, they often need to be generated quickly and in such a way as to avoid legal obstacles that can arise when criminal justice practitioners from different legal systems attempt to work together.

The Mutual Legal Assistance Request Writer Tool (MLA Tool) has been developed by UNODC to assist States to draft requests with a view to facilitate and strengthen international cooperation.

The MLA tool:

- Requires virtually no prior knowledge or experience with drafting mutual legal assistance requests
- Helps to avoid incomplete requests for mutual legal assistance and therefore minimizes the risk of delay or refusal.
- Is easily adjustable to any country's substantive and procedural law
- Enables the user to retrieve key information on treaties and national legislation
- Features an integrated case-management tracking system for incoming and outgoing requests

Step by step, the MLA Tool guides the casework practitioner through the request process for each type of mutual assistance, using a series of templates. Before progressing from one screen to the next, the drafter is prompted if essential information has been omitted. Finally the tool consolidates all data entered and automatically generates a correct, complete and effective request for final editing and signature.

The MLA Tool is currently available in English, French, Spanish, Russian, Portuguese, Bosnian, Croatian Montenegrin and Serbian



Grounds for Refusal

The following are grounds upon which States may refuse to assist:

Lack of Dual Criminality

Contrary to the legal system or laws of the Requested State

Prejudice to Sovereignty, security, public order or other essential interests

Human rights considerations or severity of punishment

Political Offences

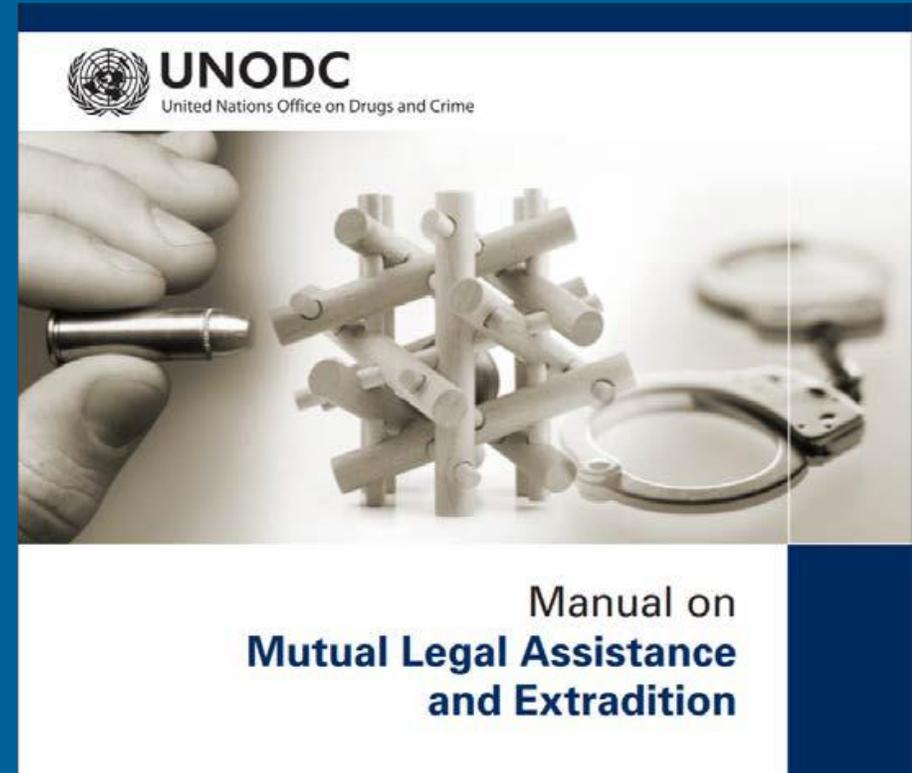
Double jeopardy

Fiscal Offences and Banking Secrecy



Useful Guidance

https://www.unodc.org/documents/organized-crime/Publications/Mutual_Legal_Assistance_Ebook_E.pdf





BREAKOUT

Following your enquiries with Antigua, you have the following information:

1. A certified copy of the registration documents for 'Blue Waters' and an affidavit from law enforcement producing it. This shows that Blue Antigua Inc is the registered owner of Blue Waters.
2. A report stating that a police officer spoke to the boat salesman who stated that they dealt with Mr Green regarding the sale of the boat and that the price paid was \$1m by bank transfer from account IBAN GB29NWBK60161331926819.
3. A certified copy of the company register showing that Mr White is the sole director and shareholder of Blue Antigua Inc. It is produced in the same affidavit as the boat registration document.
4. A report stating that Blue Antigua's bank account contains \$2m and that suspicion transaction reports have been made on the basis that the company accounts do not appear to show any expenses despite receiving large amounts.



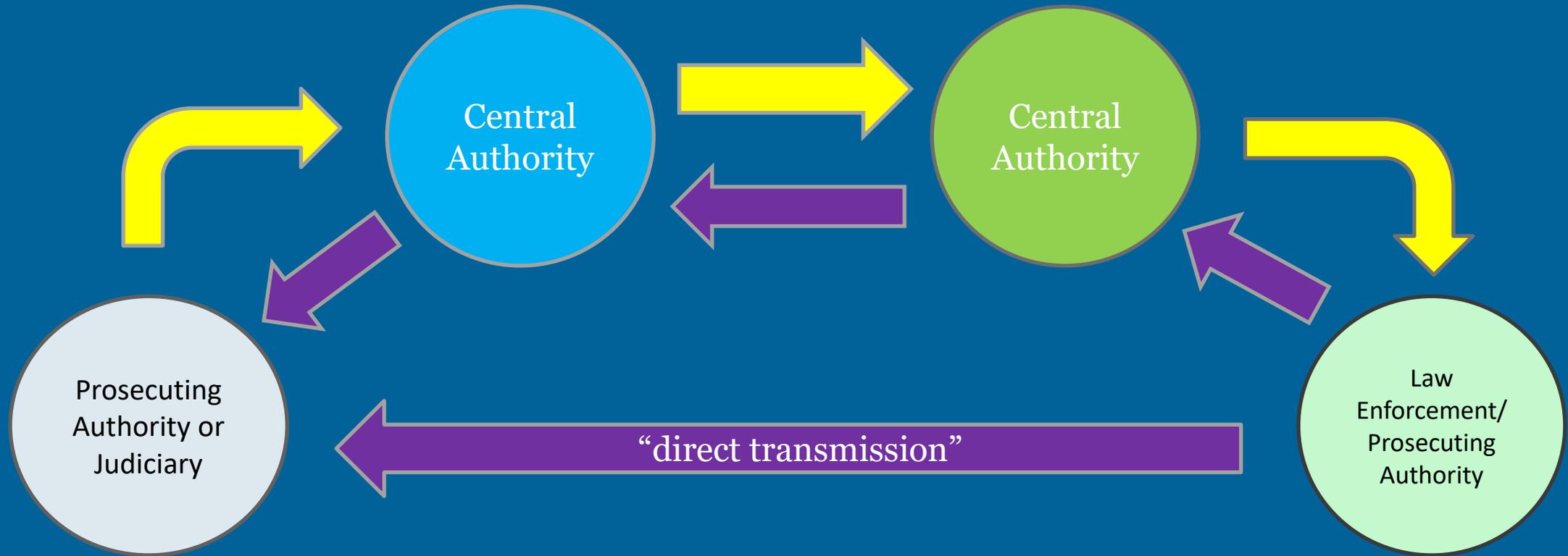
BREAKOUT TASK

In your groups:

1. Which documents are evidence and which are intelligence?
2. What further enquiries would you ask to be made as a result of this?
3. You are going to write an MLA, what would you ask for?
4. When you write your MLA, what are the key points that you would include in information you provide?



MLA – Mechanisms and Processes





MLA – Response Times

A number of factors will influence the response:

- Accurate drafting of the request and basis upon which it is made
- Whether the requested state needs further information
- Chosen methods of communication
- Bureaucracy
- Nature and complexity of the request
- Number of requests received by the requested state and the resources they have to deal with them
- Effectiveness (see next slide)

Time Estimates – 6 months to 3 years depending on jurisdiction



THE END

Thank you for listening. Any questions?

Diana Cottrell
UK Liaison Prosecutor, South Africa
+27 63 257 7650
Diana.Cottrell@cps.gov.uk