

Background paper (Wednesday 5 September, 14:30-15:45)

Challenges in Mutual Legal Assistance (MLA)

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1. Introduction

This paper is written from a practitioner's point of view. It is describing the situation in the Netherlands and the experience with the Asian Pacific region. The Dutch situation can be considered similar to some other European countries, but still there are more differences as there are similarities even in between European countries.

MLA is a tool we use and need in handling international corruption cases. It is an essential and crucial tool for we have to gather evidence and assets abroad.

2. Legal framework

MLA requests can be handled without a treaty. Only when coercive measures are requested a treaty is required. Ordering a bank or another financial institution to reveal information is considered to be a coercive measure.

Besides the formal requirements (dual criminality and human rights requirements) a request has to content:

- I. a brief but thorough description of the facts
- II. specified details of people and companies mentioned
- III. the law frame
- IV. a translation in Dutch, English, German or French

The central authority (Ministry of Justice) tend to put a very high standard to these conditions. Often MLA request are returned to sender fur further clarification as a consequence of these high standards. Of course this is a very time-consuming and frustrating process for the requesting country.

The UNCAC was ratified in the Netherlands in 2006. It is considered to be a treaty which all MLA requests in corruption cases cane be based upon, irrespective coercive measures or not. The UNCAC treaty is **not** a basis for extradition. The UNCAC treaty has not yet been transported in our extradition law. This is to be expected some time next year.

So with UNCAC MLA is possible with all other parties to the convention. This could be considered as big step ahead for the Netherlands in combating corruption, mainly in this region were there is only one bilateral MLA treaty between the Netherlands and Hong Kong.

3. Figures

In the year 2005 in the Netherlands approximately 36.000 incoming requests were handled. In that same year about 7000 requests were received by the Netherlands. This is to be considered an average year. Just a handful of these requests considered corruption cases. Of course this was the year before implementing the UNCAC treaty. In 2006 from the Asian Pacific region only 3 requests were sent to us, China, Indonesia and Hong Kong.

The average time to handle incoming requests is 2 months (uncomplicated MLA) to 6 months (complex when for instance coercive measures are involved). One does wonder how such a large number of requests can be so promptly dealt with. There are 5 regional expertise centres and there is 1 national expertise centre. Public prosecutors and specially trained police officers work together in these centres and only carry out MLA requests.

Apart from these MLA experts we have many good experts in seizure and confiscation. There is a national bureau which is part of the public prosecutors service in which accountants, civil lawyers, asset-tracers and public prosecutors work closely together. They support all public prosecutors in their special confiscation provisions. They can be reached on a 24/7 basis. This bureau also has an expert permanently stated with the central authority to assist when immediate seizure- or confiscation actions have to be taken in request of another country.

All the conditions are present to make MLA and asset recovery be a success. But it is not just a beautiful success-story. There are still a lot of challenges to consider.

4. Challenges

I. Personal contact

The standards that the Dutch central authority work with are very high as been mentioned before. The best way to prevent frustration and waist of valuable time is communication in an informal way before sending the formal request is to be advised strongly. Communicate the explanation on what is wanted and why, makes a big difference in the proceeding procedure. A good use can be made of the liaison officers of the Dutch federal police stationed by Beijing and in Thailand and in the near future in Indonesia. Every personal contact creates trust and responsibility.

II. Be patience

Inspired by OECD's second evaluation round Dutch authorities have sent out MLA requests in corruption cases in international trade to various counties with which they did not have a bilateral treaty. Notwithstanding personal contact not much efforts have been made and many requests still have to go through formal challenge. Also personal contacts are moved to an other office. Not a lot has happened in the passed year, so a lot of patience is required.

III. Priority choices

Receiving a MLA request in a complex corruption case takes far more resources and expertise of the requested country. There is a need for financial specialised police and specialised public prosecutors. Dealing with a case of foreign bribery could last many months and even years. This forces the public prosecutors service to make choices. When

the priority is set to the benefit of another country this means you cannot handle domestic cases. Those are difficult decisions to make that ask for political commitment.

IV. Incompatibility of legal systems

The most complicated hurdle is the incompatibility of legal systems. It is a big challenge to match requests for seizure and confiscation. As a requesting country in a drug-related case the Netherlands and Thailand are trying for over more than 10 years to overcome the differences in the confiscation laws. It is still ongoing and has caused a lot of lessons learned and there has been worked with a lot of creativity.

Within Europe a lot of MLA on seizure and confiscation is dealt with from the principle of asset sharing. For example between Belgium and the Netherlands there is an agreement that assets confiscated on request of one country in the other country will fully fall to the confiscating country. In a case last year in which the Dutch government suffered a loss of € 20 million because of fraud and embezzlement the Belgium authorities were asked to seize and confiscate property in which the suspects invested in on Belgium territory. The requests of Dutch government were handled fast and prompt, but the assets stayed in Belgium. Because of this principle there also a bridge to be crossed in MLA between European countries and countries in the Asian Pacific region.

To be able to confiscate illegally obtained profits or advantages in the Netherlands the suspect has to be convicted. Additionally, a person sentenced for an offence may also be ordered to pay a sum of money in confiscation of illegal obtained profits in relation to other similar offences or to offences punishable with the highest fine. The Netherlands do not know the separate offence of illegal enrichment. So for a requesting country asking for confiscation a conviction could be considered to be needed.

5. Conclusions

Thanks to UNCAC and other efforts there is a lot of improvement in the possibility of asset recovery through MLA. But still there is a lot to be done. Seminars on which countries from different regions meet help to provide first steps in this long way. Getting to know one another and showing political will can make changes possible, for changes have to be made.