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EFFECTIVE USE OF INTERNATIONAL COOPERATION AT THE INVESTIGATION STAGE IN PREPARATION FOR ASSET RECOVERY AND FRAMEWORKS FOR INTERNATIONAL COOPERATION

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I. CURRENT SITUATION AND GOOD PRACTICES

The Government of India, being signatory (ratified on 09/12/2005) to the United Nations Convention against Crime (UNCAC), is committed to International Cooperation in corruption cases in terms of its Article 43 to Article 50. Further, India is also a member of INTERPOL and the Financial Action Task Force which promotes effective implementation of legal, regulatory and operational measures in Members States. The Government of India has amended or enacted various statutes including the Prevention of Money Laundering Act for effective implementation of asset recovery. It has also set up administrative and judicial mechanisms for effective and speedy implementation of requests received for international cooperation including confiscation of properties acquired through proceeds of crime and return of the same to the requesting States. In terms of Article 51 of UNCAC regarding Asset Recovery, India is committed to affording the widest measure of cooperation and assistance including return of assets.

The Government of India has adopted several good practices and has been a pioneer in developing a robust judicial system for international cooperation in investigation of criminal cases and attachment and forfeiture of properties acquired through the process of crime committed beyond Indian boundaries. The important mechanism / statutes applicable in India qua Asset Recovery and international cooperation may be highlighted as below:

- *The Code of Criminal Procedure* was amended from time to time to include Provisions under section 166-A which deals with Letter of Request to the Competent Authority for investigation in a country or place outside India. Further, provisions under section 166-B of the Code provides for Letter of Request from a country or place outside India to a court or an authority for investigation in India. Provisions under section 105 of the Code have been amended for reciprocal arrangements for assistance in certain matters and procedure for attachment and forfeiture of property within a contracting State, i.e. any country or place outside India.¹ The Ministry of Home Affairs, Government of India, acts as a Central Agency and all such requests are routed through it.²
- *The Prevention of Money Laundering Act, 2002* (Chapter-IX) has been fully devoted to such reciprocal arrangements for assistance and forfeiture of properties, including assistance for the transfer of accused persons.³
- *The Fugitive Economic Offender Act, 2018* (Section 12) deals with confiscation of the properties, and courts are empowered to declare an individual a fugitive economic offender and confiscate the properties.⁴
- *The Lokpal and Lokayuktas Act, 2013* deals with corruption-related issues of the public servants committed within India or outside India. The Act contains provisions for attachment / confiscation of

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¹ https://www.indiacode.nic.in/handle/123456789/16225?sam_handle=123456789/1362

² <https://www.mha.gov.in/en>

³ https://www.indiacode.nic.in/handle/123456789/2036?sam_handle=123456789/1362

⁴ https://www.indiacode.nic.in/handle/123456789/4035?view_type=search&sam_handle=123456789/1362

assets, proceeds, receipts and benefits arisen or procured by means of corruption.⁵

Besides the Narcotics Drugs and Psychotropic Substance Act-1985 (sections 68A,68E,68F,70C), the Customs Act (sections 28BA,127D), the Smuggler and Foreign Exchange Manipulator (Forfeiture of Property) Act-1976 (sections 6,7) and the Unlawful Activities (Prevention) Act-1967 (sections 24,26,33,43) also contain provisions for attachment, forfeiture, confiscation and recovery of stolen assets both in India and outside.⁶

In terms of Article 52 of UNCAC, India is committed to prevention, detection and transfer of proceeds of crime. The Reserve Bank of India which is the central bank of Government of India and the Regulatory Authority for all the banks and Non-Banking Financial Institution of India, has been issuing circulars / directions from time to time to verify the identity of the customers and to take reasonable steps to determine the identity of beneficial owners of funds deposited into high value accounts. There are sufficient regulations in India, including the Code of Conduct, which make it obligatory for public servants / Government servants to disclose high value financial transactions including any transaction with a foreigner, foreign government or foreign organization.

In terms of Article 53 of UNCAC, the Government of India has enacted several statutes for direct recovery of property.

- The Civil Procedure Code of India permits foreign State parties to file civil suits in Indian courts when the defendant resides in India or the cause of action arises in India.
- The Criminal Procedure Code of India (Section 357) empowers courts to direct payment of compensation to any person for any loss or injury caused by the offence.
- The Prevention of Money Laundering Act, 2002, provides for attachment, seizure and confiscation etc. of property in contracting states and India.

In terms of Article 54 of UNCAC, i.e. Mechanisms for recovery of property through international cooperation and confiscation, the Ministry of Home Affairs, Government of India, is notified as the Central Agency to receive such requests and decide the Competent Authority which may give effect to the request. The Ministry has issued comprehensive guidelines for dealing with Mutual Legal Assistance requests. Some of the statutes enacted in India dealing with the matter include the Prevention of Money Laundering Act, 2002, the Narcotics Drugs and Psychotropic Substances Act, 1985, the Unlawful Activities (Prevention) Act, 1967, the Customs Act and the Smugglers & Foreign Exchange Manipulation Act, 1976. Bilateral Agreements signed with different countries contain provisions for transfer of assets to requesting states.

In terms of Article 55 of UNCAC, i.e. International Cooperation for Purposes for Confiscation, Indian law fully provides international cooperation for confiscation. In such cases also, the Ministry of Home Affairs acts as the Central Authority for incoming requests and gets them executed through International Police Cooperation Cell (IPCC) under the Central Bureau of Investigation (CBI).

In terms of Article 56 of UNCAC, i.e. "Special Cooperation", there is no bar to transmit to another state party, with prior request, information which may be relevant for that party for initiating or carrying out investigations or prosecutions of judicial proceedings. India is a Member of INTERPOL, the Egmont Group, the G20 Anti-Corruption Working Group, the Global Cooperation Network of Anti-Corruption Law Enforcement Authorities etc. There has been regular exchange of information through these channels. Besides, International Police Liaison Officers located in foreign missions in India also provide input regularly.

In terms of Article 57 of UNCAC, i.e. "Return & Disposal of Assets", the Indian Standard Draft for Treaty on Mutual Legal Assistance (the principle guiding document) has been recently revised. Its Article 19

⁵ https://www.indiacode.nic.in/handle/123456789/2122?sam_handle=123456789/1362

⁶ https://www.indiacode.nic.in/handle/123456789/1791?sam_handle=123456789/1362

https://www.indiacode.nic.in/handle/123456789/2475?view_type=browse&sam_handle=123456789/1362

https://www.indiacode.nic.in/handle/123456789/1490?view_type=browse&sam_handle=123456789/1362

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provides that the requested State shall return the seized or confiscated assets, after deducting any cost of realization to the requesting State. The Government of India has been proposing this provision for incorporation into the Treaties on Mutual Legal Assistance which are being negotiated with other countries. The Government of India is guided by the provisions of bilateral agreements or mutual agreements or on the principle of reciprocity on case-by-case basis.

In terms of Article 58 of UNCAC, the "Financial Intelligence Unit" was set up by Government of India in the year 2004 as the Central National Agency responsible for receiving, processing, analysing and disseminating information relating to suspected financial transactions. It is also responsible for coordinating and strengthening efforts of national and international intelligence, investigation and enforcement agencies in pursuing global efforts against money-laundering.

In terms of Article 59 of UNCAC, i.e. "Bilateral & Multilateral Agreements", India has been continuously engaging with the other State parties for entering into bilateral Mutual Legal Assistance Treaties / Agreements. India has so far entered into such agreements with 45 countries. These treaties have appropriate provisions for confiscation of proceeds of crime and disposal of the same on the requests of the requesting States.⁷

II. CASE STUDY

The Central Bureau of Investigation (CBI) has been investigating various corruption-related cases having international ramifications. One of such cases pertaining to allocation of 2nd Generation (2G) Spectrum to various telecom companies was investigated by the CBI. A number of applicant companies including joint ventures with foreign companies, viz. Telenor (Norway) and Etisalat (UAE), applied for the said 2G Spectrum licenses.

Investigation revealed huge foreign remittances in various companies holding the applicant companies. Such holding companies were registered or situated in foreign countries, viz. Republic of Mauritius, Isle of Man (United Kingdom), Republic of Singapore, Cyprus, Switzerland, France etc. Further, some of such companies were financed by mutual funds based in Switzerland etc. It was suspected that proceeds of crime through corruption were laundered, routed or parked outside India through these companies.

In order to ascertain the ultimate beneficial owner of such foreign entities, source their funding, recover assets etc., letters rogatory (LRs) were sent to different countries including Republic of Mauritius, Republic of Singapore, Isle of Man (United Kingdom), Switzerland, France, Cyprus etc.

One such LR was sent to the Republic of Mauritius on 4 January 2011 and 18 May 2011 to ascertain the ultimate beneficiary of equity shares of M/s. Swan Telecom Pvt. Ltd. (applicant company) purchased by M/s. Delphi Investments Ltd., Mauritius from M/s. Reliance Telecom Ltd. for USD 4 million (suspected to proceeds of crime). The information was sought from the office of the Registrar of Companies, Financial Service Commission, Mauritius, office of concerned companies, foreign banks etc.

The execution report was received on 20 June 2011. However, it did not contain any useful information to ascertain the ultimate beneficiary of said equity shares. The supplementary LR was sent on 20 October 2012 with some additional information. The second execution report was received vide letter dated 18 April 2017, i.e. after a gap of about five years.

The execution report did not contain any information or document from any office except the Registrar of Companies, Mauritius. Scrutiny of the execution report revealed that the status of M/s. Delphi Investment Ltd., Mauritius (wholly owned subsidiary of M/s Mavi Investment Fund Ltd., Mauritius) was changed from "Close Ended Fund" to "Open Ended Fund" and the class of shares other than founder shares were allotted by M/s. Mavi to various companies. However, the class of such shares and addresses of the allottees were not available. Further, the details of investments by M/s. Mavi into M/s. Delphi were also not available in

⁷ <https://www.unodc.org/unodc/en/corruption/uncac.html>

the execution report. As such, the letter rogatory process continued for about five years and still the execution report did not contain sufficient information which could be helpful in detecting the ultimate beneficiary of proceeds of crime through corruption.

III. CHALLENGES

The Government of India and its investigating/law enforcement agencies have been facing challenges in respect of international cooperation in corruption-related matters and recovery of assets. Some of the challenges faced recently may be highlighted as below:

- There are barriers to domestic as well as international cooperation. Letters rogatory issued by Indian Courts to foreign countries in corruption-related matters are either pending for long time or are executed in piecemeal.
- There is ineffective case strategy and case management. Ambiguity in understanding the issue and queries raised time and again by the Member States further delays the execution. The delay offers opportunity to the suspected persons (beneficiary of proceeds of crime) to remove evidence and as such hinders the recovery of the assets generated through proceeds of crime.
- Inadequate laws and immunity enjoyed by the officials of a Member State is another impediment. Further, there are jurisdictional issues and statutes of limitations in entertaining requests for international cooperation.
- In criminal cases, there are challenges regarding admissibility of the evidence collected, and it is difficult to obtain conviction based on such evidence.
- Extradition of fugitives from foreign countries is delayed due to protracted proceedings.
- Recovery of laundered assets parked in foreign accounts, especially in tax haven countries, is significantly delayed.
- Different notices issued under the provisions of INTERPOL to trace out and nab the offenders are pending for a long time.

IV. COUNTERMEASURES AND POSSIBLE SOLUTIONS

Some of the countermeasures and possible solutions to the challenges in effective executions of request for international cooperation may be discussed as below:

- On the issue of lack of cooperation and case management, an effective case management system by developing case strategy, gathering of facts and establishing an agreement with foreign counterparts may be explored, as well as the possibility to undertake joint investigation with foreign authorities.
- To address legal issues and obstacles, it may be ensured whether adequate and effective legal frameworks are in place, both domestically and in relevant foreign jurisdictions. It may be ensured that confiscation of proceeds of crime is legally permissible, and issues of immunities enjoyed by officials may also be addressed.
- In “common law countries”, the required proof for conviction is “beyond a reasonable doubt” while for confiscation the required proof is “preponderance of probability”, whereas in “civil law countries” the standard of proof is the same for conviction as well as confiscation. Therefore, the “standard of proof” may be made uniform to enhance admissibility of evidence gathered through international cooperation.

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- Subject to domestic laws, Members States may sign bilateral agreements, mutual legal assistance treaties etc. which would be binding on the contracting parties and would facilitate speedy and effective cooperation in corruption-related matters including recovery of assets.
- The format of letters rogatory, Competent Authority in Member States etc. may be standardized to avoid any ambiguity and avoid repeated queries.
- Subject to domestic laws, if feasible, time frames may be fixed for speedy execution of the request.