

India's inputs on Country step-by-step guide on Asset recovery

1. Overview

India is committed towards global fight against corruption and considers that asset recovery is a fundamental principle of international anti-corruption regime. Asset recovery requests from foreign jurisdictions are accorded high priority by the Indian competent authorities and law enforcement agencies. A wide range of tools have been used by the Indian agencies for responding to foreign asset recovery requests .

2. Legal Framework for Asset Recovery

India primarily relies on Prevention of Money-Laundering Act, 2002 (PMLA) and the Code of Criminal Procedure, 1973 (Cr. PC) for effectively responding to asset recovery requests received from foreign jurisdictions. The Prevention of Corruption Act, 1988 (PC Act) criminalizes corruption and corruption related offences and has provisions regarding investigation and prosecution of such offences.

2.1 Prevention of Money Laundering Act, 2002

PMLA (<https://enforcementdirector.gov.in/pmla>) has comprehensive provisions for international cooperation for tracing, seizure or freezing, confiscation and return of proceeds of crime derived from a wide range of predicate offences. The Directorate of Enforcement (ED) is India's anti-money laundering law enforcement agency under PMLA. PMLA also has specific provisions for criminal confiscation of proceeds of crime, non-conviction based confiscation and return of confiscated assets to the requesting jurisdiction.

2.2 Prevention of Corruption Act, 1988

Corruption and corruption related offences are criminalised under the PC Act (https://www.indiacode.nic.in/handle/123456789/15587sam_handle_12345678_9/1362). The Central Bureau of Investigation (CBI) and State Police authorities undertake investigation and assist in the prosecution of such offences in accordance with provisions of the PC Act. Since corruption and corruption related offences under the PC Act have been listed as predicate offences in the schedule of PMLA, the proceeds of such offences can be largely and swiftly identified and restrained under the provisions of PMLA. Save as otherwise provided under the PMLA, money or property procured by means of an offence under the PC Act, can be attached and confiscated under Section 18A of the PC Act read with Criminal Law Amendment Ordinance, 1944.

2.3 Code of Criminal Procedure, 1973

Code of Criminal Procedure, 1973 (Cr.PC) (https://www.indiacode.nic.in/bitstream/123456789/15272/1/the_code_of_criminal_procedure%20C_1973.pdf) which is the main procedural law of India in criminal matters provides for identification, restraining and confiscation of assets through a Court mandated procedure.

3. Procedure for Asset Recovery in India

India encourages foreign countries to engage in informal international cooperation in asset recovery with Indian competent authorities and law enforcement agencies for identification and tracing of assets. These agencies and authorities can also be contacted for pre-MLA consultation for assistance in sending a formal MLA request and post-MLA consultation for clarification of doubts leading to expeditious execution of MLA requests. A formal MLA Request or Letter of Request is required for:

- Investigative assistance in collection and exchange of evidences in respect of proceeds of corruption and corruption related offences, located in India,
- Restrain of assets including provisional attachment, seizure or freezing of assets,
- Confiscation or forfeiture of assets including non-conviction based confiscation,
- Disposal/ Return of assets.

4. Informal cooperation for Asset Recovery

Article 48 of UNCAC requires that States parties to cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action and in conducting inquiries with respect to offences covered by the Convention concerning, inter-alia, the movement of proceeds of and instrumentalities used or intended for use in corruption and corruption related offences. Request for assistance in asset tracing, identification, guidance in drafting asset restrain requests can be sent to Indian agencies involved in asset recovery on the basis of Article 48 of UNCAC.

4.1. Tracing & Identification of assets

4.1.1 Scope of assistance

In order to seek assistance for recovery of stolen assets held within India, it is essential to first identify the assets acquired through proceeds of corruption and corruption related offences which may have been transferred to India. International requests for asset tracing and identification can be made to India for the following kinds of assistance:

- Location, ownership, valuation and beneficial ownership details of an asset as available in existing databases or which can be accessed through non-coercive and covert measures,
- Non-exhaustive details of assets held by a person or associates involved in criminal activity as available in existing databases or which can be accessed through non-coercive and covert measures;
- Company records.

Information on informal basis is shared with Requesting agencies subject to obligations imposed by the Requested agency or authority and fulfilment of requirements emanating from India's domestic law and international commitments.

4.1.2 Requirements for making an informal asset tracing and identification request

Requirements for sending an asset tracing and identification request are sometimes indicated in applicable bilateral Treaties or Agreements or Arrangements which should be adhered to while making such a request. Generally, asset tracing and identification requests from foreign jurisdiction should be accompanied by the following details:

- i. Brief description of criminal activity and legal proceedings instituted or proposed to be instituted in respect of person's or assets in Requesting country including legal provisions invoked;
- ii. Assets located in India believed to be acquired from proceeds of corruption or corruption related offence, or used for commission of such offence, and factual reasons for suspecting the same or,
- iii. Person's involved in criminal activity or with proceeds of corruption and description of their role in criminal activity of in relation to proceeds of crime, for the purpose of identification of assets which may be owned or held by such person's. In case it is believed/suspected that assets have been held by proxy persons on behalf of the accused or suspect, identifier details of such proxy persons (companies, businesses, trusts in the name of accused person/s or his/her family members or associates) should be provided, along with reasons for suspecting the same.

4.2 Pre-MLA Consultation:

As a next step and in order to swiftly and effectively restrain such proceeds located in India, it is also important to seek pre-MLA consultation before making a formal request. Since asset restraint and confiscation is largely executed under PMLA and Cr.PC, the Central Authority of India i.e. MHA, ED, CBI (NCB-India) through INTERPOL and other Indian agencies involved in asset recovery, can be consulted while drafting an MLA Request/Letter of Request (LR) seeking restrain/confiscation of assets for the purpose of guidance in respect of applicable legal provisions, evidentiary requirements and procedures. Pre-MLA consultation can also be used for sharing of information required to initiate parallel investigation in India.

4.3 Post-MLA Consultation:

Since asset restrain, confiscation and return is a multi-stage process and requires submission of evidences before various judicial fora in India, consultation with foreign requesting agencies is essential for better understanding of evidences required under domestic law of India. Thus, foreign requesting agencies are encouraged to proactively consult the Indian agency executing the asset recovery request through emails and video conferences. The details of the Indian agencies/ authorities involved in the asset recovery process in India have been provided in paragraph 4.5 of this document.

Subsequent to identification/confirmation of assets, a formal request for restraining the assets may be made to the Central Authority of India i.e. Ministry of Home Affairs which can be accompanied by a reference of the agency which has handled the informal request so that it gets routed to that agency, if appropriate, resulting in expeditious execution of the request.

4.4 International Asset Recovery and Informal Cooperation Networks:

India participates in a number of international asset recovery and law enforcement cooperation networks as per the following details:

- **FIU Egmont Group:** India is a member of the FIU- Egmont - Network through FIU - India which is responsible for FIU to FIU exchange, analysis and dissemination of information received from Reporting Entities (RES).
- **ARIN-AP:** India participates in ARIN/CARIN Network through ED for informal cooperation in the area of asset recovery which includes asset tracing, its identification and pre -MLA consultation for restraining assets located in India.
- **GlobE Network:** Indian agencies, ED and CBI are members of the Globe Network for direct contact and cooperation with foreign law enforcement agencies in investigation as well as recovery of assets in cases involving corruption and corruption related offences. .
- **INTERPOL:** India cooperates with foreign law enforcement agencies through the INTERPOL Network for assistance in investigation. CBI is designated as the National Control Bureau (NCB) - India for exchange of requests through INTERPOL.

Informal international cooperation in asset recovery can be undertaken through any of the above mentioned networks. ED also collaborates with UNODC - World Bank StaR Initiative for training, sharing of best practices and informal cooperation in recovery of assets.

4.5 Main Indian agencies for informal cooperation in Asset Recovery

- Directorate of Enforcement (ED)
- Central Bureau of Investigation (CBI)
- Financial Intelligence Unit (FIU) - India
- Ministry of Home Affairs (MHA)

The contact details of these agencies/authorities have been mentioned at the end of this document.

5. Formal International Cooperation for Asset Recovery

The Government of India has entered into 42 bilateral Mutual Legal Assistance Treaties (MLAT) or Agreements for international cooperation and assistance in criminal matters. The assistance under MLAT usually includes identification, restrain and confiscation of proceeds and instrumentalities used in commission of criminal offence. Thus, a formal request for recovery of assets can be made to India under MLAT.

Thus, a formal request for assistance in recovery and return of assets can be executed under the provisions of UNCAC. In all other cases, India also provides assistance to countries/jurisdictions on the basis of reciprocity.

5.1 Central Authority of India in Criminal Matters:

All the requests to India for the mutual legal assistance in criminal matters are made to the Central Authority of India. The Ministry of Home Affairs (MHA) is the Central Authority of India for dealing with requests for Mutual Legal Assistance (MLA) in criminal matters. After receiving the request, the Central Authority of India examines whether the request can be executed in India on the basis of

bilateral treaty or agreement or any International Convention. If the request has legal basis, the Central Authority may forward the asset recovery request to the Directorate of Enforcement or any other agency for execution of the request as per the provisions of PMLA, Cr.PC.

5.2. MLA Request to restrain assets through Attachment/ Seizure/ Freezing

An attachment, freezing or seizure order issued by a Court or authority outside India is not enforceable in India till a request of the foreign country for attachment, freezing or seizure of assets in India is made under MLAT/UNCAC or on reciprocal basis. A request for attachment, freezing or seizure of assets can also be made if the asset in question is involved in an offence of cross-border money laundering under Section 2 (1)(ra) of PMLA. The Director, Directorate of Enforcement, under PMLA or the competent Court in India under Cr. PC, can provisionally attach/ freeze/ seize an asset to provide assistance.

5.2.1 Procedure for international cooperation for provisional attachment, seizure, freezing under PMLA and Cr.PC

Comprehensive provisions for assistance for attachment, seizure or freezing of assets have been provided under PMLA which are briefly outlined as under:

- The Director shall, on receipt of a letter of request under section 58 or section 59 of PMLA, direct any authority under this Act to take all steps necessary for tracing and identifying such property. These steps may include any inquiry or investigation in respect of any person, place, property, assets, books of account or documents in any bank or public financial institution or any other relevant matter.
- Section 60(2) of the PMLA provides that where a letter of request is received by the Central Government from a court or an authority in a contracting State requesting attachment, seizure, freezing or confiscation of the property in India, derived or obtained, directly or indirectly, by any person from the commission of an offence under a corresponding law committed in that contracting State, the Central Government may forward such letter of request to the Director, Directorate of Enforcement, as it may think fit, for execution in accordance with the provisions of PMLA.
- The investigative tools to affect such a request are contained in Chapter III and Chapter V of PMLA which include provisions relating to attachment (Section 5), freezing or seizure (Section 17) adjudication, confiscation of property (Section 8).
- Chapter-VIIA of the Cr. PC containing sections 105A to 105L is a self-contained code for providing a wide range of assistance in tracing, identifying, attaching, seizing and forfeiture of property, if a request in this regard is received from a court or an authority in a foreign country/jurisdiction under a bilateral/multilateral treaty or on the basis of reciprocity.

Indian agencies responsible for asset recovery have been expeditiously taking up all incoming requests for assistance in asset recovery and have endeavoured to execute such requests on priority basis.

Restrain of Assets through Parallel Domestic Investigation in India

In response to an international request for restraint and recovery of assets which may be proceeds of crime, parallel money laundering (ML) investigation can be initiated in India under Section 2(1)(ra) of PMLA where a predicate offence is committed by a person outside India and proceeds of crime are transferred to India.

India has taken recourse to the above referred to provision as a sequel to a request by the Netherlands authorities for recovery of proceeds of crime of its resident, in India. The resident had committed the offence of money laundering in India and Netherlands and proceeds of crime were also invested in both the countries.

In response, ED initiated a domestic ML investigation and assets amounting to approximately Rs.325.7 million, in the form of immovable assets in India, were identified and provisionally attached under section 5 of PMLA. This attachment was confirmed by the Adjudicating Authority (PMLA) after giving opportunity to the affected parties to present their case. Subsequently, a Prosecution Complaint was also filed by ED against the individual and related entities before the Competent Court in India and currently, trial is underway.

5.3 Confiscation or forfeiture of assets

A formal MLA Request or LR can be sent to the Central Authority of India for confiscation of assets through execution of order of confiscation of asset by a foreign Court or authority.

5.3.1 Procedure for international cooperation for confiscation of assets under PMLA and Cr.PC

The order for confiscation of assets is passed by the Special Court under PMLA after conclusion of the trial for the offence of money laundering and all rights and title in the property vest absolutely in the Central Government free from all encumbrances. Section 8(5) of the PMLA provides that where on conclusion of a trial of an offence under the PMLA, the Special Court finds that the offence of money-laundering has been committed, it shall order that such property involved in the money-laundering or which has been used for commission of the offence of money-laundering shall stand confiscated to the Central Government. Section 105H of the Cr. PC also provides for forfeiture of property.

5.3.2 Direct Enforcement of foreign confiscation orders

Provisions of section 60(2A) of the PMLA provide for direct enforcement of foreign confiscation order issued by the competent foreign court or authority for confiscation of property involved in the offence of money-laundering or which has been used for commission of the offence of money-laundering.

5.3.3 Non-Conviction based Confiscation

The provisions of section 8(7) of the PMLA provides that in cases where the trial under the PMLA cannot be conducted by reason of death of the accused or the accused being declared a proclaimed offender or for any other reason or having commenced but could not be concluded the special court shall pass appropriate order regarding confiscation or release of the property involved in the offence of money laundering.

5.4 Disposal/Return of Assets

When any property in India is confiscated as result of execution of a request from a contracting state under the PMLA, section 60(7) of the PMLA provides that India may either return such property to the requesting state or compensate that state by disposal of such property on mutually agreed terms that would take into account deduction for reasonable expenses incurred in investigation, prosecution or judicial proceedings leading to the return or disposal of confiscated property. Indian agencies/ Central Authority may enter into an agreement or arrangement regarding final disposal of confiscated property as provided under section 60 (7) of PMLA.

Chapter VII-A of Cr.PC also provides legal mechanism for assistance in relation to attachment or forfeiture or seizure of property derived or obtained directly or indirectly from commissioning of criminal offence by the competent court.

The Ministry of Home Affairs is Central Authority of India for the request of mutual legal assistance for attachment, forfeiture, confiscation or return of such property under MLAT in criminal matters. The Central Authority after examining the request may forward the proposal for confiscation or return of asset to the Director, Directorate of Enforcement under PMLA or other law enforcement agencies for such action under Cr.PC.

5.5 Basic Requirements for making a Formal Asset Recovery Request:

Requesting countries are encouraged to seek pre-MLA consultation with the agencies involved in asset recovery process in India including the Directorate of Enforcement and the Central Authority of India i.e. the Ministry of Home Affairs particularly in important cases to ensure that the request meets the legal requirement so that assistance may be provided at an early date. The basic requirements for making a formal request to India are listed in the bilateral MLATS and the G20 Country Guide to Mutual Legal Assistance. In this context, guidelines for making legal request for asset recovery have been summarized:

- i. **Request should be proportionate to the alleged crime:** Requesting country must ensure that the request for assistance is proportionate to the level of crime being

investigated. The requesting state may like to consider the need for gathering the evidence in question keeping in view the cost involved in getting the evidence.

- ii. **The legal basis for seeking assistance in asset recovery should be indicated:** Requesting country must mention the Treaty, Convention (Bilateral Treaty/Agreements, Multilateral Treaty/Agreements or International Convention such as UNCAC, UNTOC, others) which has been relied upon to make such request. Where no such Bilateral Treaty/Agreements, Multilateral Treaty/Agreements or International Convention exists, request may be made on the basis of assurance of reciprocity. The assurance of reciprocity is to be provided by the Central Authority of the requesting country.
- iii. **The Authority/Agency of the requesting country conducting the investigation/prosecution should be clearly identified:** The authority which is conducting the investigation and prosecution (investigating agencies/ judicial authority) and requiring such assistance must be clearly notified in the request.
- iv. **Applicable legal provisions should be set out in the request:** The verbatim text of all relevant legal provisions under investigation and/or prosecution, including applicable penalties should be clearly mentioned in the request.
- v. **The nature of assistance sought should be clearly mentioned in the request:** Nature and details of assistance required should be clearly spelt out in the request along with other relevant details namely requirement of certification/ authentication of evidence so gathered.
- vi. **Request should be in accordance with treaty and domestic law of India:** Request should be made keeping in view the provisions of bilateral/ multi-lateral treaty and Indian Domestic Law.
- vii. **Details of requisite documents/ information:** The request should be sent as per following details:
 - a. Brief facts of the case under investigation or prosecution including summary of the evidences that support the investigation or prosecution must be mentioned.
 - b. In cases of request for seizure/confiscation of proceeds of crime, relevant details of property along with evidence to prove that the proceeds of crime have been derived through criminal activity should be mentioned in the request. The justification for restrain or seizure leading to confiscation should also be mentioned. In the cases of request for non-conviction based confiscation the legal basis and justification should be clearly recorded.
 - c. In cases of request for witness/ accused statement/testimony complete address and identifier of the person concerned should be mentioned along with enclosure of suggested questionnaire.
 - d. The request of documentary evidence should be accompanied with reason for availability of such documents in India along with relevance of evidence in the criminal investigation or prosecution proceedings in the requesting country.
 - e. The request for execution of search warrant should be accompanied with disclosure of correct address along with relevant details of premises. The

justification and relevance for the search in ongoing criminal investigation or prosecution proceeding in the requesting country should be disclosed.

- viii. **The requirement for confidentiality should be highlighted:** The request for assistance under treaty/ convention and its execution are subject to confidentiality clause of the treaty/ convention as well as of domestic law. The execution of request depending upon facts of the case may require disclosure of relevant information under domestic law. Accordingly, reason for maintaining confidentiality should be clearly justified in the request so that issue of confidentiality may be taken up with courts/ authorities. In the cases where disclosure of information is mandatory for execution of request, the requesting country shall be notified accordingly.
- ix. **The urgency in the execution of the request should be mentioned:** India endeavours to execute all international requests in a time bound manner. However, in cases where limitation date is involved in investigation or prosecution proceeding in the requesting country, a brief summary of such limitation or urgency should be clearly spelt out in the request along with relevant regulations.
- x. **Details of requesting law enforcement agencies/ authorities should be provided:** The request should contain the relevant details of law enforcement agencies/ authorities requiring such assistance so that necessary clarification, if any, may be obtained in order to facilitate early execution of the request.
- xi. **Mode and language of communication of the request:** The request for mutual legal assistance should be made in writing and in English language. The requisite supporting documents should be either in English language or should be accompanied with an English translation.
- xii. **Limitations on use of evidence should be provided:** The MLAT/ International Conventions provide for limitation on use of evidence provided in response to the request for mutual legal assistance. Accordingly, use of evidence shall be subject to the relevant clause of the treaty or as per reciprocal arrangement. Prior approval of the Central Authority of India shall be required in all the cases where use of document is requested for purposes other than those specified in the request.
- xiii. **Dual Criminality Requirements:** Assistance shall be provided without regard to whether the conduct that is the subject of the request would be punishable under legislation of both countries or not. However, if the request for assistance include any coercive action such as search & seizure, confiscation of proceeds of crime, the underlying conduct of the offence should also be an offence in India.
- xiv. **Refusal of request:** The request for assistance may be refused in accordance with the grounds of refusal mentioned in the bi-lateral agreement/treaty/UNCAC and corresponding principles as the case may be.

6. Other Useful References

Requesting countries are encouraged to refer to:

- Directorate of Enforcement website at:
<https://enforcementdirectorategov.in/> for additional guidance on making asset recovery requests to India.
- Central Bureau of Investigation website at:
<https://cbi.gov.in/>
- The Ministry of Home Affairs being the designated Central Authority of India for Mutual Legal Assistance in criminal matters has specified the procedure for Mutual Legal Assistance including incoming Letters of Request from foreign countries in its guidelines dated 04.12.2019. The same can be accessed at: https://www.mha.gov.in/sites/default/files/2022-08/ISII_ComprehensiveGuidelines16032020.pdf
