



**PARLIAMENT OF INDIA
RAJYA SABHA**

50

**DEPARTMENT RELATED PARLIAMENTARY STANDING COMMITTEE
ON PERSONNEL, PUBLIC GRIEVANCES, LAW AND JUSTICE**

FIFTIETH REPORT

ON

**THE PREVENTION OF BRIBERY OF FOREIGN PUBLIC OFFICIALS
AND OFFICIALS OF PUBLIC INTERNATIONAL
ORGANISATIONS BILL, 2011**

**(PRESENTED TO THE RAJYA SABHA ON 29TH MARCH, 2012)
(LAID ON THE TABLE OF THE LOK SABHA ON 29TH MARCH, 2012)**

**RAJYA SABHA SECRETARIAT
NEW DELHI
MARCH, 2012 / CHAITRA, 1933 (SAKA)**

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* To be appended at printing stage.

COMPOSITION OF THE COMMITTEE
(Constituted on 31st August, 2011)

1. Dr. Abhishek Manu Singhvi — *Chairman*

RAJYA SABHA

2. Shri Shantaram Laxman Naik
3. Dr. Bhalchandra Mungekar
4. Shri Balavant *alias* Bal Apte
5. Shri Ram Jethmalani
6. Shri Sukhendu Sekhar Roy
7. Shri Ram Vilas Paswan
8. Shri O.T. Lepcha[@]
9. Shri Parimal Nathwani
10. Shri Amar Singh

LOK SABHA

11. Shri Kirti Azad
12. Shri N.S.V. Chitthan
13. Smt. Deepa Dasmunsi
14. Shri D.B. Chandre Gowda
15. Shri Shailendra Kumar
16. Smt. Chandresh Kumari
17. Shri Prasanta Kumar Majumdar
18. Shri Arjun Ram Meghwal
19. Shri Pinaki Misra
20. Kumari Meenakshi Natarajan
21. Shri Harin Pathak
22. Shri Lalu Prasad
23. Adv. A. Sampath
24. Shri S. Semmalai
25. Shri Vijay Bahadur Singh
26. Dr. Prabha Kishor Taviad
27. Shri Manish Tewari[#]
28. Adv. P.T. Thomas (Idukki)
29. Shri Arun Subhash Chandra Yadav
30. Shri Madhusudan Yadav
31. Vacant^{*}

SECRETARIAT

Shri Deepak Goyal, Joint Secretary
Shri K.P. Singh, Director
Shri K.N. Earendra Kumar, Joint Director
Smt. Niangkhanem Guite, Assistant Director
Smt. Catherine John L., Committee Officer

[@] Retired from Rajya Sabha w.e.f. 23rd February, 2012.

[#] Ceased to be Member of the Committee due to change in nomination to be Member of the Standing Committee on Defence w.e.f. 2nd March, 2012

^{*} Existing since the constitution of the Committee on 31st August, 2011.

INTRODUCTION

I, the Chairman of the Department Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, having been authorised by the Committee on its behalf, do hereby present the Fiftieth Report on The Prevention of Bribery of Foreign Public Officials and Officials of Public International Organisations Bill, 2011. The Bill seeks to prevent corruption relating to bribery of foreign public officials and officials of public international organisations and for matters connected therewith or incidental thereto.

2. In pursuance of the rules relating to the Department Related Parliamentary Standing Committee, the Hon'ble Chairman, Rajya Sabha referred* the Bill, as introduced in the Lok Sabha on the 25th March, 2011 and pending therein, to this Committee on the 1st April, 2011 for examination and report.

3. Keeping in view the importance of the Bill, the Committee decided to issue a press communiqué to solicit views/suggestions from desirous individuals/ organisations on the provisions of the Bill. Accordingly, a press communiqué was issued in national and local newspapers and dailies, in response to which memoranda containing suggestions were received, from various organizations / individuals / experts, by the Committee.

4. The Committee heard the presentation of the Secretary, Department of Personnel and Training, Ministry of Personnel, Public Grievances and Pensions on the provisions of the Bill in its meeting held on 15th June, 2011. The representatives of DoPT made one more presentation before the Committee on the 12th March, 2012 to clarify certain provisions of the Bill. The Committee also heard the views of stakeholders/ NGOs in its meetings held on 10th and 24th January, 2012.

5. While considering the Bill, the Committee took note of the following documents/information placed before it :-

- (i) Background note on the Bill submitted by the Department of Personnel and Training, Ministry of Personnel, Public Grievances and Pensions;
- (ii) Views/suggestions contained in the memoranda received from various organisations/institutions/individuals/experts on the provisions of the

* Rajya Sabha Parliamentary Bulletin Part-II (No(No.48398) dated 1st April, 2011.

Bill and the comments of the Department of Personnel and Training thereon;

- (iii) Views expressed during the oral evidence tendered before the Committee by the stakeholders such as office bearers of CII, PHD Chamber of Commerce, FICCI and ASSOCHAM; and Central Vigilance Commissioner, Director, CBI; Director of Enforcement; and other non-official witnesses viz. Shri Ravinder Kumar and Shri Radhey Shyam Agarwal in its meetings held on the 10th and 24th January, 2012; and
- (iv) Other research material/ documents related to the Bill.

6. The Committee adopted the Report in its meeting held on the 26th March, 2012.

7. For the facility of reference and convenience, the observations and recommendations of the Committee have been printed in bold letters in the body of the Report.

New Delhi;
26th March, 2012

Dr. Abhishek Manu Singhvi
Chairman,
Committee on Personnel,
Public Grievances, Law and Justice

REPORT

The Prevention of Bribery of Foreign Public Officials and Officials of Public International Organisations Bill, 2011 was introduced* in the Lok Sabha on the 25th March, 2011. It was referred* by the Hon'ble Chairman, Rajya Sabha to the Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice on the 1st April, 2011 for examination and report.

2. The Bill (Annexure-A) seeks to prevent corruption relating to bribery of foreign public officials and officials of public international organisations and for matters connected therewith or incidental thereto.

3. The Statement of Objects and Reasons, appended to the Bill reads as under:-

“Bribery of public officials to obtain advantages in international business raises serious moral and political concerns, undermines good governance and sustainable economic development, and distorts competition. Corruption in awarding business contracts has social, political, environmental and economic costs which no country can afford. Serious consequences result when public officials

* Published in Gazette of India (Extraordinary) Part-II Section 2 dated 25th March, 2011.

♣ Rajya Sabha Parliamentary Bulletin Part-II (No.48398) dated 1st April, 2011..

take bribes in awarding contracts to foreign businesses for public services such as roads, water, electricity etc. resulting in inappropriate decisions and undermining plans for development.

2. *The United Nations Convention against Corruption annexed to the Resolution 58/4 of 31st October, 2003 was adopted by the General Assembly of the United Nations and opened it for signature at the High-level Political Signing Conference held in Merida, Mexico, from 9th to 11th December, 2003. India has signed the Convention on 9th December, 2005. The ratification of Convention would require criminalising the act of foreign bribery and it would strengthen India's existing anti-corruption laws that demonstrate India's commitment to good governance and give more credibility in its fight against bribery and corruption.*

3. *India already has in place a framework for combating corruption under certain laws, namely, the Prevention of Corruption Act, 1988 and the Prevention of Money-laundering Act, 2002 which covers a number of areas that need international standards for the criminalisation of bribery. Article 16 of the Convention requires that each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, the giving or taking of undue advantage to or by a foreign public official or an official of a public international organisation, directly or indirectly, for the official himself or*

herself or another person or entity when committed intentionally. However, the bribery of foreign public officials in international business transactions is not covered under the above said Acts. Therefore, a need has been felt to bring a legislation to give effect to the aforesaid Convention.

4. The Prevention of Bribery of Foreign Public Officials and Officials of Public International Organisations Bill, 2011 seeks to prevent corruption relating to bribery of foreign public officials and officials of public international organisations and for matters connected therewith or incidental thereto. The proposed legislation, inter alia, —

- (a) prohibits accepting gratification by foreign public official or official of public international organisation and making such act punishable with imprisonment for a term which shall not be less than six months but which may extend to seven years and shall also be liable to fine;*
- (b) prohibits giving gratification to foreign public official or official of public international organisation and making such act punishable with imprisonment for a term which shall not be less than six months but which may extend to seven years and shall also be liable to fine;*
- (c) makes abetment and attempts of the acts specified at (a) and (b) above also punishable with imprisonment for a term which shall not be less than six months but which may extend to seven years and shall also be liable to fine;*

- (d) *confers power upon the Central Government to enter into agreements with foreign countries enforcing the provisions of proposed legislation;*
- (e) *makes provision declaring the offences under the proposed legislation as extraditable offences;*
- (f) *makes provision for rendering assistance to a contracting State in certain cases to give effect to provisions of the proposed legislation;*
- (g) *makes provision for reciprocal arrangements for processes and assistance for transfer of accused persons;*
- (h) *makes provision for attachment, seizure and confiscation, etc., of property in a contracting State or India.*

5. *It is also proposed that proceedings under the proposed legislation shall be taken in consultation with the contracting State against foreign public official to whom privileges and immunities under any law or Convention or treaty are accorded.*

6. *The Bill seeks to achieve the above objectives."*

4. The Committee heard the presentation of the Secretary, Department of Personnel and Training of the Ministry of Personnel, Public Grievances and Pensions on the Bill on the 15th June, 2011.

5. In order to have a broader view on the Bill, the Committee decided to invite views/suggestions from desirous individuals/organisations on the

Bill. Accordingly, a press release was issued inviting views/suggestions which was published in major English and Hindi dailies and newspapers all over India on the 12th April, 2011.

5.1. The Committee considered eight memoranda from out of the ones received from the individuals/organisations to the Department of Personnel and Training for their comments thereon. A list of such memoranda is placed at Annexure- B.

5.2. The major points raised in these memoranda are summarized as follows:

- (i) The word 'agent' as mentioned in clause 2(1) (c) has not been defined. A New clause defining “agent” may be introduced in clause 2 (1) of the Bill defining “agent” to mean any authorized representative who acts on behalf of his or her principal and includes a Director, Officer, employee or other person authorized to act on behalf of his or her principal, and the term “agency” to mean correspondingly.
- (ii) In Clause 2(1)(c) of the Bill, the term “public function” is not defined clearly. It needs to be clearly stated that according to which law, whether Indian law or the law of his Nationality or the law of the Country/ State for which he is discharging

functions, his function will be classified as a “public function”.

(iii) The term “foreign public official” should be defined as follows: “Foreign public official” means and includes:-

- (a) Any person holding a legislative, administrative or judicial office of a foreign country;
- (b) Any person performing public function for a foreign state or country, including any person employed by a Board, Commission, Corporation or other body or authority that performs a function of a foreign state; or
- (c) An official or agent of a public international organization;

(iv) The term “foreign country” may be defined as follows and added: ‘Foreign Country’ means any country other than India and includes:

- (a) Any foreign territory;
- (b) All levels of sub-divisions of government of any such country or territory; or

- (c) Any agency of any such country or territory or of a political sub-division of any such country or territory;
- (v) There is lack of clarity in the definition of the term “undue advantage” given in clause 2(1) (h). The substance of this clause appears to be addressing and elaborating upon the passive foreign bribery offence under clause 3. The reference to “undue advantage” does not seem to correlate with the rest. The definition be revised on the following points:

- a) The definition under paragraph (h) states that “bribery means an act of a foreign public official”.

This leaves out the notion of an “omission” as required by Article 16(1) of the UNCAC and Article 1 of the OECD Anti-Bribery Convention.

- b) Undue advantage should not be restricted to pecuniary advantages only it should also include non-pecuniary favor as well. The items in subparagraphs (i), (ii) and (iii), require that the foreign public official "obtain" the "valuable thing or pecuniary advantage". This might appear to exclude

cases where the bribe has not been obtained or received by the foreign public officials.

(vi) In clause 10(3) of the Bill, it is not clear on what aspects and matters, the Special Judge or Court or Central Government may impose conditions regarding transfer of persons.

(vii) In clause 18 of the Bill, after the word “shall”, the following words may be inserted “within a prescribed time limit”. This would obligate the Central Government to make consultation within a time frame.

5.3. The major highlights of the comments furnished by the Department of Personnel and Training are given below :-

(i) The definition of the words “foreign public official” and “official of public international organisation” in its existing form is very wide in the sense that foreign public official includes “ any person exercising a public function for a foreign country” and the definition of the word “official of a public international organisation’ includes ‘any person who is

authorized by such an organisation to act on behalf of that organisation”.

- (ii) The phrase “person performing a public function for a foreign state or country including a public agency or public enterprise” presently used in the definition of “foreign public official” as such has a wider connotation and will also cover the person employed by “ Board, Commission or Corporation”.
- (iii) In terms of the interpretative notes to Article 2 in the Tavaux of Preparatories on the UNCAC, the term “foreign country” includes all levels and subdivisions of Government, from national to local and this should cover the category mentioned in sub clause (iii) of the proposed definition (Refer para 5.2 (iv) *ibid*). The existing definition of foreign country is on the above lines.
- (iv) The definition of the term ‘undue advantage’ in clause 2(1)(h) has been taken from Section 13 of Prevention of Corruption Act 1988 and can, therefore, be considered

adequate to meet the requirements stated in the legislative guide.

- (v) The substantive provisions under clause 3 covers both the act or forbearing to act, and the definition of 'undue advantage' under 2(h) has to be read harmoniously with the substantive provision of clause 3.
- (vi) There appears to be a gap in the existing formulation of clause 4 and Government is open to suggestion of a formulation for amendment.
- (vii) In regard to the quantum of punishment the formulation in the bill is on the lines of punishment prescribed for various offences under the Prevention of Corruption Act 1988. Section 13(2) of the PCA provides for a maximum punishment of 7 years and fine (amount not specified) for criminal misconduct. The punishment proposed in the proposed bill of 7 years and fine, is in line with the punishment provided under that act and therefore may not be disturbed.
- (viii) Investigation/prosecution of offences under this bill to a substantially large extent would be dependent on effectiveness of international co-operation secured in the

area of Mutual Legal Assistance Agreements (MLAA). Moreover, the cases involving foreign bribery can be very complicated requiring extensive investigation and analysis of data. Therefore, prescription of time limits can create difficulties at the ground level. However, the MLAA can be drafted to commit the parties to the agreement to a time schedule."

5.4. The Committee also heard the views of office bearers of CII, PHD Chamber of Commerce, FICCI and ASSOCHAM; and Central Vigilance Commissioner, Director, CBI; Director of Enforcement; and other non-official witnesses viz. Shri Ravinder Kumar and Shri Radhey Shyam Agarwal in its meetings held on the 10th and 24th January, 2012.

5.4A On the explicit request of Secretary, DoPT, the Ministry was given an opportunity to provide further clarifications on the provisions of the Bill at its meeting held on the 12th March, 2012.

5.5. The Committee adopted the Report in its meeting held on the 26th March, 2012.

MAJOR ISSUES EXAMINED BY THE COMMITTEE

Undue advantage

5.6. Sub clause-(h) of the Clause 2 of the Bill provides an elaborate definition of the term "undue advantage." However, the intangible and

non-pecuniary advantages are apparently left out while defining the expression 'undue advantage.' The Members of the Committee and witnesses that appeared before the Committee raised serious concerns *vis a vis* the definition assigned to the expression 'undue advantage' in the Bill and asserted that the intangible and non-pecuniary advantages be included under the said expression.

5.7. A Member of the Committee expressed her views as:-

एक और बात, जो बहुत इम्पोर्टेंट है, वह यह है कि सैक्शन 2(1)(h) में इनकी जो अनड्यू एडवांटेज है, "undue advantage" that is to say bribery means an act of a foreign public official or official of public international organisation". इसमें इन्होंने पेक्युनरी एडवांटेज को लिखा है, लेकिन नॉन पेक्युनरी के बारे में नहीं लिखा है, इन्होंने कहीं पर भी यह नहीं कहा है, इनको टेंजिबल और नॉन टेंजिबल, दोनों चीजों को कवर करना चाहिए। मुझे लगता है कि इनको इन दोनों चीजों पर पुनर्विचार करना चाहिए।

5.8. Organization like the CBI, Organisation for Economic-Cooperation Development (OECD) and some other witnesses also stated in their comments furnished to the Committee that the definition given to the term "undue advantage" need to be modified to cover the bribes of both pecuniary as well as non-pecuniary nature. For instance, the CBI in its

note furnished to the Committee suggested that the words “valuable thing or pecuniary advantage” in clauses 2(h)(i), 2(h)(ii) and 2(h) (iii) need to be replaced by the words “valuable thing or advantage.” Likewise, the CBI stated in its note that an explanation regarding valuable thing or advantage need to be added below Clause 2(h) (iv) to ensure that the words “valuable thing or advantage” are not restricted to pecuniary things or advantages, or such things or advantage estimable in terms of money only.

5.9. OECD in its comments furnished to the Committee also highlighted that there is some lack of clarity concerning the definition afforded to the term “undue advantage” under Clause 2. According to their comments the provision, in substance, appears to be addressing and elaborating upon the passive foreign bribery offence under Clause 3. However, the reference to “undue advantage” does not appear to correlate with the rest of the text.

5.10. The Ministry in the their in written comments submitted as follows:

".....The term 'undue advantage' used in the main body of clause 3 criminalising the act of bribery on the demand side has been defined under clause 2(1)(h) as an act of obtaining any valuable thing or pecuniary advantage. The connective "or" used in the definition has to be construed as including advantage which may be pecuniary or any valuable thing. Sub clause (iv) of clause 2(1)(h) has a very wide coverage and undue advantage, whether pecuniary or not, would stand covered. The definition of the term 'undue advantage' in clause 2(1)(h) has been taken from Section 13 of Prevention of Corruption Act 1988 and can therefore be considered adequate to meet the requirements stated in the legislative guide....."

5.11. The Committee takes note of various suggestions by CBI & OECD and opines that exclusion of intangible and non-pecuniary advantages from the scope of expression "undue advantage" would unnecessarily and unjustifiably narrow down the scope & coverage of the proposed law. The Committee opines that clause 2(1)(h) does not comprehensively define the term "undue advantage" and further opines that it ought to have covered both pecuniary and non pecuniary advantages. The Ministry's reference to Section 13 of PC Act is not tenable. An enormous range of non pecuniary advantages

would be unnecessarily excluded by use of the narrow definition and yet they would clearly involve bribery.

5.12. The Committee is of the considered view that if the Bill is to effectively check the offences relating to bribery of foreign officials in the international business transactions, the expression 'undue advantage,' which explains what an act of bribery may also comprise, needs to be comprehensively defined, embracing both intangible and non-pecuniary advantages within its ambit so as to avoid any narrow or limited interpretation. The Committee, accordingly, recommends that the Government may review the definition of the term 'undue advantage' in the light of the aforesaid conclusions.

Exemption to Certain Business Activities

5.13. Some witnesses suggested that the bill should provide for the provisions to exempt some obvious business courtesy gifts and services such as offering limited and reasonable refreshments, entertainment, gifts etc.

5.14. The Committee notes the suggestions of the witnesses on this count. The Committee, accordingly, recommends that the Government should consider incorporating in the Bill a clear *de*

***minimis* clause or exemption to exclude certain defined business or courtesy gifts and services including, but not limited to, offering limited and reasonable refreshments, dinners/lunches, entertainment, token gifts and the like. Such exemptions may be carefully calibrated either in terms of monetary value or subject matter or both.**

Foreign Public Officials and Officials of Public International Organisation.

5.15. While deliberating upon a Bill that seeks to criminalize the bribery of public officials in international business transactions, the Committee considered it imperative to delineate the scope of the term public officials. The present Bill provides for two categories of such officials namely 'foreign public officials' and 'officials of public international organizations'. In view of the importance attached to the said expressions, the Committee deeply deliberated upon what should encompass the expression 'Foreign public officials' and officials of public international organizations.'

5.16. Clause 2(1)(c) of the Bill defines the 'foreign public officials' as any person holding a legislative, executive, administrative or judicial

office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise and any official or agent of a public international organisation. It was pointed out by some members of the Committee that in this definition, the terminologies like 'public functions' and 'agents' need further elaboration. Likewise, some witnesses emphasized the need to explicitly clarify the expression 'officials of public international organizations.'

5.17. A Member of the Committee put her views as :-

....पब्लिक फंक्शन को ठीक ढंग से डिफाइन नहीं किया गया, इसलिए इससे यह समझ में नहीं आता कि किस लॉ के अनुसार वह पब्लिक फंक्शन है, *whether Indian law or the law of his nationality or the law of the country or State for which he is discharging that function.*

.....पूरे बिल में पहली बार "एजेंट" शब्द का इस्तेमाल तो किया है, लेकिन उसको कहीं पर भी परिभाषित नहीं किया गया, यह भी एक बात है, दूसरी बात यह है कि मैं इनसे निवेदन करना चाहूंगी कि वे एजेंट को परिभाषित कर ही दें तो अच्छा है, क्योंकि डिप्लोमेटिक filed में ज्यादातर काम एजेंट के माध्यम से भी होते हैं, उसको इसके परव्यू में लें और उसको परिभाषित करें तो अच्छा होगा, क्योंकि डिप्लोमेट तो वैसे ही बहुत सारी इम्युनिटी में होते हैं, वह उनके माध्यम से शायद ही होगा।.....

5.18. In its written comments the DoPT submitted that :-

".....The definition of the words "foreign public official" and "official of public international organisation" in its existing form is very wide in the sense that foreign public official includes "any person exercising a public function for a foreign country" and the definition of the word "official of a public international organisation" includes 'any person who is authorized by such an organisation to act on behalf of that organization'.

The Bill seeks to criminalise bribery of foreign public officials and is a standalone legislation. The term "foreign public official" as defined would point to the fact that the "public function" is to be seen and interpreted with reference to functions performed with reference to that foreign country or state. The term 'public function' had many variations of definition discussed during negotiations of the Convention with reference to both Article 15 which deals with criminalization of domestic bribery and Article 16 which deals with foreign bribery and ultimately this term was not defined in Article 2 of UNCAC.

5.19. With regard to expression 'Public International Organisations' there was a suggestion through written memoranda that 'Public International Organisation' may be defined as—

- (a) an organisation—
 - (i) of which two or more countries are members; or
 - (ii) that is constituted by persons representing two or more countries;
- (b) an organisation established by, or a group of organisations constituted by—
 - (i) organisations of which two or more countries are members; or
 - (ii) organisations that are constituted by the representatives of two or more countries; or
- (c) an organisation that is—
 - (i) an organ of, or office within, an organisation described in paragraph (a) or (b);
 - (ii) a commission, council or other body established by an organisation or organ referred to in subparagraph (i); or
 - (iii) a committee or a subcommittee of a committee of an organisation referred to in paragraph (a) or (b) or of an organ, council or body referred to in subparagraph (i) or (ii).

5.20. CBI in its note submitted to the Committee also suggested that the term Public International Organisations is not properly defined. It was suggested in their note that the term may be defined as *an organization having business transactions involving two or more countries or organizations engaged in trade, commerce, industries, business or other commercial activities of any kind carried on for gain or profit.*

5.21. The Ministry in its written comments submitted to the Committee appeared to be quite agreeable. It stated as under.

".....The word "public international organisation" has been used with reference to crimilaising act of giving and taking undue advantage to/by an official of 'public international organisation'. The term 'Public International Organisation' can be considered to be defined as in the proposed formulation. The Department is open to suggestions....."

5.22. The Committee had taken up these definitions with Secretary, Department of Personnel and Training during her presentation before the Committee. The Secretary, at that time, had assured the Committee that the Department was open to consider the suggestions given by the Committee and would take up the matter with the Law Ministry, who have done the drafting, to see whether any additions were required to be made.

5.22A. The Committee finds two crucial phrases in clause 2(1)(c) and 2(1)(d) referring in turn to phrases like 'public functions', 'public agency', 'public enterprise' and 'agent'. These phrases are the vital definitional variables in these provisions. However, the Committee finds that these phrases have not been separately defined in clause 2 of the proposed Bill. Absence of such definitional clarity would lead to some confusion in interpretation and application. Consequently, the Committee opines and recommends that these 4 phrases and/or

**other important concepts/phrases be defined in the definition clauses
2 of the Bill.**

JURISDICTION OVER NON-CITIZENS OF INDIA

5.23. Sub clause (d) of clause 1(2) applies to the to a person, who—

- (i) is not a citizen of India;
- (ii) operates an aircraft or ship; and
- (iii) has his principal place of business or permanent residence in India.

5.24. Some Members of the Committee and witnesses were of the view that the above-mentioned clause which is seemingly intended to define jurisdictional reach of the Bill over non-citizens of India appears to be confusing to an extent, thereby leading to a somewhat narrow interpretation. According to the existing provision only a specific category of non-citizens in India fall within the jurisdictional extent of the Bill whereas as remaining non-citizens in India who have their principal place of business or permanent residence in India, but do not operate an aircraft or ship, remain entirely excluded.

5.25. CBI and OECD in their notes submitted to the Committee shared similar apprehensions. CBI stated in its note that as per the existing clause, other non-citizens who are actively doing other business etc. in India or having dealing with Indian companies including

Government/Semi government or non-governmental organizations may not be covered by the Bill. CBI was of the view that clause 1(2) (d) may be re-formulated as under:-

to a person, who is not a citizen of India and

- (i) Operates an aircraft or a ship; or
- (ii) has his, or his employer's, place of business or residence in
India.

5.26. Representative of PHD Chambers of Commerce while deposing before the Committee also highlighted this aspect as under:

".....If you come to the definition of "persons", clause 1, extends to citizens and non citizens. You see clause 1(d), it says "to a person who ", then you say, "(i) is not a citizen of India; (ii) operates an aircraft or ship; and " but in the last clause which is "(iii) has his principal place of business or permanent residence in India". A diplomat or a person from IMF etc., may not have his permanent residence in India. But then he will be able to escape from the mischief. Suppose, somebody comes on a tourist visa or somebody from Nepal comes, would you like to reconsider this word "permanent"? The very fact that he is in India or has a reasonable nexus with India need not be good enough?....."

5.27. In its written comments submitted to Committee, the DoPT appears to have agreed for bringing greater clarity by suitably amending the sub

clause 1(2)(d). Representatives of DoPT, while deposing before the Committee, were of the view that sub-clause (ii) may be removed from the existing provision so as to avoid ambiguous interpretations.

5.28 The Committee is in agreement over the concerns raised with respect to Clause 1(2) (d). The Committee, accordingly, recommends that the Department should suitably modify clause 1(2) (d) regarding jurisdiction *vis a vis* non-citizens in India, so as to prevent creation of an escape route for offenders. It is recommended that clause 1(2) (d) may be re-formulated as under:-

"to a person,

- (i) who is not a citizen of India; and**
- (ii) has his principal place of business or permanent residence in India".**

TIME FRAME FOR INVESTIGATIONS

5.29. Whether the Bill should provide for a time-frame for investigation or not was another important issue which drew the attention of the Committee during the deliberations on the Bill. Some Members of the Committee and witnesses that appeared before the Committee were of the view that a reasonable and meaningful timeframe should be prescribed in the Bill to ensure the timely completion of investigations. The Members

raised this issue with the Secretary, DoPT during her presentation on the Bill before the Committee.

5.30. A Member put forward his views in following words :-

There is no difficulty in fixing the timeframe because I have seen the legislation where a timeframe is fixed. There, it is always made open that in case of necessity, on a reasonable cause, the time can be extended. By fixing the time limit, you will expedite the investigation, but an option can be given to the court or the competent authority that on some reasonable cause, this time can be extended

5.31. The Secretary explained the situation in his reply to the Committee as under :-

".....there are two things. One is 'absolutely desirable' and one is 'possible'. If we look at the status of investigation of offences within the country, very often, there are cases which are complicated and which take a long time for completion of investigation. CBI officials are sitting here and they could confirm the problems that come during investigation even domestically. When investigations are undertaken abroad, it would be much more difficult getting information and getting clearances....."

5.32. The representative of CBI offered his views on the issue as:-

".....the completion of investigation depends on so many things, for example, the nature of the case, the voluminous nature of the case, the legal complications involved, the number of witnesses to be examined, the number of documents to be

scrutinised and the number of expert opinions that are supposed to be taken. Then, there is the process of letter rogatory. It takes years. So, it would not be possible to fix a time limit, and it varies from case to case....."

5.33. The Committee acknowledges the explanation offered by the Secretary and the representative of CBI. The Committee, however, impresses upon the Government to appreciate the need for completion of investigation in a definite time frame. Investigations cannot be indefinite, thereby defeating the very purpose of expeditious closure. The Committee, accordingly, calls for a specific time limit to be prescribed for the initial decision and also to provide for an extension, if necessary, for reasons to be recorded in writing and with a further in-built time limit for the extension. The Government should also evolve a mechanism to ensure the timely completion of investigations so as to have the desired deterrent effect over wrong doers and provide an efficacious system of punishment. This is equally important for Indian citizens as for foreign public officials. The Committee is of the view that the Bill itself should prescribe a time-frame to complete the investigation so as to fix the accountability of investigative agencies. Such an arrangement may however, have inbuilt flexibility, keeping in view the complexities of the transnational process of investigation. Accordingly, the

Committee recommends that provisions may be made for granting reasonable extension of time by a separate designated Competent Authority in deserving situations.

Necessity of the Legislation

5.34. There was a complete unanimity in the Committee that the Bill proposes an effective legislative architecture to criminalize the bribery of public officials in international business transactions.

5.35. The Committee feels that undoubtedly amendments in domestic laws are also needed to effectively deal with the offences of bribery of foreign public officials in international business, thereby ensuring India's compliance with the UNCAC in both letter and spirit.

5.36. The Committee agrees with the objectives of the Bill. The Committee is of the opinion that the legislative proposal contained in the Bill is reflective of India's commitment towards the charter of UNCAC. The Committee feels that legislative measures proposed in the Bill will further expand the reach of India's anti-corruption regime by embracing hitherto untouched areas of bribery of foreign public officials and officials of public international organisations.

5.37. The Committee also notes that the Bill provides equal treatment to both the bribe giver and the bribe taker. This two-pronged strategy, in the considered view of the Committee, would prove to be a strong blow against corruption in the area of international business. Further, the Bill is also meritorious in addressing a wide spectrum of associated issues like mutual legal assistance, international cooperation in investigations, extradition of offenders and confiscation of properties/assets of the offenders.

Need for Standalone Legislation

5.38. Deliberations of the Committee have brought forth two divergent view points with regard to the *modus operandi* to give effect to the mandatory provisions of the UNCAC in India. Some witnesses who appeared before the Committee were of the view that an entirely new law for this purpose is likely raise unexpected and unnecessary ambiguities leading to the legal complexities and contradictory interpretations. Those holding this viewpoint preferred amendments in the respective domestic laws dealing with the corruption, mainly, the Prevention of Corruption Act, 1988 (POCA) to ensure India's compliance with the UNCAC. The contrary views point, however, was that a Standalone Bill approach should be followed, given the legal complexities involved in the process of amendments of the POCA and the fact that the jurisdiction of POCA is

mainly confined to offences involving bribery in domestic sphere and not foreign bribery offences. Moreover, it was strongly urged that to amend POCA would not only be time consuming and cumbersome but would also be a complex patchwork amendment exercise given the large expanse of POCA and its focus on several other issues.

5.39. The representation of CBI while deposing before the Committee expressed his concern in these words :-

".....rather than going in for the formulation of an altogether new piece of legislation, the desired purpose will perhaps be served in a better manner if suitable amendments are carried out in the existing anti-corruption law, that is, the Prevention of Corruption Act. There are several reasons to justify this approach. The first and the foremost is that the Prevention of Corruption Act has withstood the test of time in courts. There is a plethora of judgements and case laws expounding the substantive and procedural provisions of the Act. It is very likely that the provisions of the proposed Bill may run into an unintended conflict with the provisions of the Prevention of Corruption Act....."

5.40. The Central vigilance Commissioner in his comments furnished before the Committee drew the attention of the Committee towards a likely overlapping of the present Bill with the Prevention of Corruption Act, 1988.

".....In compliance with Art 16 (1) of UNCAC, the Bill explicitly recognizes the offering or giving of "undue advantage" as an

offence. However, the PC Act 1988 does not explicitly recognize offering of “undue advantage” as an offence. The offence of offering of or giving gratification is supposed to be addressed indirectly as “abetment” to the primary offence of accepting of gratification under Section 12 of the PC Act. This legal ambiguity which remains unaddressed is prone to create problems in tackling domestic corruption. Section 4 and 5 of the proposed Bill make a clear distinction between giving of gratification and abetment and therefore, both the terms have different implications. The absence of explicit provisions to recognise the offering of gratification as an offence has been a lacuna in the PC Act which has been highlighted frequently. Further, while the Bill proposes a maximum punishment of seven years, the PC Act 1988 prescribes a maximum punishment of only five years. Therefore, due to the differences between the provisions of the Bill and the PC Act, Indian persons or entity would be treated differently for bribing a foreign public official and for bribing a domestic public official.....”

5.41. However, while replying to the queries of Members, CVC welcomed the present Bill and opined that he would prefer standalone legislation for the purpose. He, however, was not against the alternative view supporting a comprehensive Prevention of Corruption Act having incorporated therein the provisions to deal with the offences of foreign bribery. He expressed his views as

".....If the Prevention of Corruption Act has to be amended, then not only this issue, but the entire range of issues will need to be discussed. What we feel is that this is a necessary step. If you can manage to get the Prevention of Corruption Act amended, well and good. Otherwise, do not delay the process, because this is a necessary thing that we require to fight corruption. What we are interested in is that this debate should not get delayed. That is the only argument....."

5.42. Representative of the DoPT, while replying to the queries of Members on the issue, clarified his Department's perspective as under:

".....But the Prevention of Corruption Act is a comprehensive legislation. There are already several pending issues which need to be amended. There have been attempts in the past to amend those. In 2008, this Bill was introduced and passed in the Lok Sabha, but in the Rajya Sabha it met with some obstacle. There are several issues which are pending. The Government is trying to sort these out. That was the view taken by the Government while going in for a stand-alone legislation rather than again going back to the earlier position....."

5.43 Representatives of the DoPT, while providing further clarifications to the Committee on the 12th March, 2012 on the need for a standalone Bill to criminalize the offences of the foreign bribery, supported for the standalone approach over the amendments in POCA. The main reasons highlighted by them were:-

- Tackling foreign bribery offence requires heavy reliance on international co-operation in areas of mutual legal assistance, tracing of proceeds of crime, seizure, freezing and confiscation of assets, extradition, etc.
- Conceptually, the scope of bribery offence under UNCAC covers promising, offering or giving an undue advantage (on the supply side). PC Act does not have express provisions on the supply side of bribery (except through the abetment offence).
- The scope of the offence under UNCAC is wider. The amendment route would create a dichotomous situation where offering bribe to a foreign public official would be an offence but the offering of the same to an Indian public official would not be.
- In case the PC Act Amendment route is adopted, it would necessitate changes in the PC Act for enhancing the focus and scope of the entire Act, thus throwing the present PC Act wide open. That may necessitate a comprehensive unified legislation as has been recently done by United Kingdom. Such an exercise can, more appropriately, be taken up only after the culmination of review process under UNCAC and also other Anti-Corruption legislative initiatives.

- Previous efforts to bring amendments in PC Act have not been successful and evoked controversies, apart from being extremely time consuming.

5.44. The Committee notes that the objective of the present Bill, viz, to seek fulfilment India's commitments under the UNCAC is undoubtedly of great importance. In this context, the Committee takes note of the two divergent approaches, which have emerged in the course of its deliberations, as summarised above. Having examined the two views, the Committee is of the considered opinion that for a proper implementation of the provisions of the Bill, it would be more prudent to opt for a standalone Bill approach rather than amending the Prevention of Corruption Act, 1988 (POCA).

5.45 The Committee accordingly endorses the Bill and recommends that the Government should expeditiously pass the Bill in its existing format of a standalone legislation.

5.46 While endorsing the Bill, the Committee also takes note of the fact that there is a variation in the quantum of punishment in the POCA and the Bill in hand. While the POCA prescribes an imprisonment of minimum 6 months and maximum upto 5 years, the Bill in hand prescribes for a punishment of minimum 6 months imprisonment extending upto a maximum of 7 years. The Committee does not find any justification in this significant variation in the quantum of punishment in the two legislations. The Committee opines that the Government may review this differentiation in the

quantum of punishment. Such a review is all the more desirable keeping in view the provisions of clause 14 of the Bill which provides that POCA shall apply in relation to offences under the said Bill.

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RECOMMENDATIONS/OBSERVATIONS OF THE COMMITTEE AT A GLANCE

Definition of Undue advantage

- 1. The Committee takes note of various suggestions by CBI & OECD and opines that exclusion of intangible and non-pecuniary advantages from the scope of expression “undue advantage” would unnecessarily and unjustifiably narrow down the scope & coverage of the proposed law. The Committee opines that clause 2(1)(h) does not comprehensively define the term “undue advantage” and further opines that it ought to have covered both pecuniary and non pecuniary advantages. The Ministry's reference to Section 13 of PC Act is not tenable. An enormous range of non pecuniary advantages would be unnecessarily excluded by use of the narrow definition and yet they would clearly involve bribery. [Para 5.11]**
- 2. The Committee is of the considered view that if the Bill is to effectively check the offences relating to bribery of foreign officials in**

the international business transactions, the expression 'undue advantage,' which explains what an act of bribery may also comprise, needs to be comprehensively defined, embracing both intangible and non-pecuniary advantages within its ambit so as to avoid any narrow or limited interpretation. The Committee, accordingly, recommends that the Government may review the definition of the term 'undue advantage' in the light of the aforesaid conclusions. [Para 5.12]

Exemption regarding Certain Activities

3. The Committee notes the suggestions of the witnesses on this count. The Committee, accordingly, recommends that the Government should consider incorporating in the Bill a clear *de minimis* clause or exemption to exclude certain defined business or courtesy gifts and services including, but not limited to, offering limited and reasonable refreshments, dinners/lunches, entertainment, token gifts and the like. Such exemptions may be carefully calibrated either in terms of monetary value or subject matter or both. [Para 5.14]

Foreign Public Officials and Officials of Public International Organisation.

3.A The Committee finds two crucial phrases in clause 2(1)(c) and 2(1)(d) referring in turn to phrases like 'public functions', 'public agency', 'public enterprise' and 'agent'. These phrases are the vital definitional variables in these provisions. However, the Committee finds that these phrases have not been separately defined in clause 2 of the proposed Bill. Absence of such definitional clarity would lead to some confusion in interpretation and application. Consequently, the Committee opines and recommends that these 4 phrases and/or other important concepts/phrases be defined in the definition clauses 2 of the Bill. [Para 5.22A]

JURISDICTION OVER NON-CITIZENS OF INDIA

4. The Committee is in agreement over the concerns raised with respect to Clause 1(2) (d). The Committee, accordingly, recommends that the Department should suitably modify clause 1(2) (d) regarding jurisdiction *vis a vis* non-citizens in India, so as to prevent creation of an escape route for offenders. It is recommended that clause 1(2) (d) may be re-formulated as under:-

"to a person,

(ii) who is not a citizen of India; and

- (ii) has his principal place of business or permanent residence in India". [Para 5.28]

TIME FRAME FOR INVESTIGATIONS

5. The Committee acknowledges the explanation offered by the Secretary and the representative of CBI. The Committee, however, impresses upon the Government to appreciate the need for completion of investigation in a definite time frame. Investigations cannot be indefinite, thereby defeating the very purpose of expeditious closure. The Committee, accordingly, calls for a specific time limit to be prescribed for the initial decision and also to provide for an extension, if necessary, for reasons to be recorded in writing and with a further in-built time limit for the extension. The Government should also evolve a mechanism to ensure the timely completion of investigations so as to have the desired deterrent effect over wrong doers and provide an efficacious system of punishment. This is equally important for Indian citizens as for foreign public officials. The Committee is of the view that the Bill itself should prescribe a time-frame to complete the investigation so as to fix the accountability of investigative agencies. Such an arrangement may however, have inbuilt flexibility, keeping in view the complexities of the transnational process of investigation. Accordingly, the Committee recommends that provisions may be made for granting

reasonable extension of time by a separate designated Competent Authority in deserving situations. [Para 5.33]

Necessity of the Legislation

6. The Committee feels that undoubtedly amendments in domestic laws are also needed to effectively deal with the offences of bribery of foreign public officials in international business, thereby ensuring India's compliance with the UNCAC in both letter and spirit.

[Para 5.35]

7. The Committee agrees with the objectives of the Bill. The Committee is of the opinion that the legislative proposal contained in the Bill is reflective of India's commitment towards the charter of UNCAC. The Committee feels that legislative measures proposed in the Bill will further expand the reach of India's anti-corruption regime by embracing hitherto untouched areas of bribery of foreign public officials and officials of public international organisations.

[Para 5.36]

8. The Committee also notes that the Bill provides equal treatment to both the bribe giver and the bribe taker. This two-pronged strategy, in the considered view of the Committee, would prove to be a strong blow against corruption in the area of

international business. Further, the Bill is also meritorious in addressing a wide spectrum of associated issues like mutual legal assistance, international cooperation in investigations, extradition of offenders and confiscation of properties/assets of the offenders.

[Para 5.37]

Need for Standalone Legislation

9. The Committee notes that the objective of the present Bill, *viz*, to seek fulfilment India's commitments under the UNCAC is undoubtedly of great importance. In this context, the Committee takes note of the two divergent approaches, which have emerged in the course of its deliberations, as summarised above. Having examined the two views, the Committee is of the considered opinion that for a proper implementation of the provisions of the Bill, it would be more prudent to opt for a standalone Bill approach rather than amending the Prevention of Corruption Act, 1988 (POCA).

[Para 5.44]

10. The Committee accordingly endorses the Bill and recommends that the Government should expeditiously pass the Bill in its existing format of a standalone legislation. [Para 5. 45]

11. While endorsing the Bill, the Committee also takes note of the fact that there is a variation in the quantum of punishment in the POCA and the Bill in hand. While the POCA prescribes an

imprisonment of minimum 6 months and maximum upto 5 years, the Bill in hand prescribes for a punishment of minimum 6 months imprisonment extending upto a maximum of 7 years. The Committee does not find any justification in this significant variation in the quantum of punishment in the two legislations. The Committee opines that the Government may review this differentiation in the quantum of punishment. Such a review is all the more desirable keeping in view the provisions of clause 14 of the Bill which provides that POCA shall apply in relation to offences under the said Bill.

[Para 5.46]

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