



**GOVERNMENT OF INDIA**

**LAW COMMISSION OF INDIA**

**Report No.258**

**Prevention of  
Bribery of Foreign Public Officials and  
Officials of Public International  
Organisations—A Study and Proposed  
Amendments**

**August 2015**

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D.O. No.6(3)/286/2015-LC(LS)

27 August, 2015

**Dear Shri Sadananda Gowda ji,**

The Prevention of Bribery of Foreign Public Officials and Officials of Public International Organizations Bill, covering requirements of Article 6 of the United Nations Convention Against Corruption, was introduced in the 15<sup>th</sup> Lok Sabha and was referred to the Department Related Parliamentary Standing Committee on Personnel, Public Grievances, Law & Justice. On expiry of the term of the 15<sup>th</sup> Lok Sabha, the Bill lapsed and now, the Department of Personnel and Training proposes to introduce a fresh Bill. On the advice of the Prime Minister's Office, the proposed Bill has been referred to Law Commission of India in July this year, to submit its views / recommendations.

The Commission undertook extensive deliberations, discussions and in-depth study of the draft bill and the issues relating to it to give shape to its **Report No.258** titled "**Prevention of Bribery of Foreign Public Officials and Officials of Public International Organizations – A Study and Proposed Amendments**", which is enclosed herewith for consideration by the Government.

*With warm regards,*

*Yours sincerely,*

Sd/-

**[Ajit Prakash Shah]**

**Shri D.V. Sadananda Gowda**  
**Hon'ble Minister for Law and Justice**  
**Government of India**  
**Shastri Bhawan**  
**New Delhi**

## Report No.258

# Prevention of Bribery of Foreign Public Officials and Officials of Public International Organisations—A Study and Proposed Amendments

### Table of Contents

<b>Chapters</b>	<b>Title</b>	<b>Pages</b>
<b>I</b>	<b>INTRODUCTION</b>	<b>1-5</b>
<b>II</b>	<b>THE SCOPE AND APPLICATION OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION</b>	<b>6-17</b>
<b>III</b>	<b>BRIBERY LAWS IN OTHER JURISDICTIONS</b>	<b>18-39</b>
<b>A.</b>	<b>Australia</b>	<b>18-20</b>
<b>B.</b>	<b>Austria</b>	<b>20-22</b>
<b>C.</b>	<b>Canada</b>	<b>22-24</b>
<b>D.</b>	<b>El Salvador</b>	<b>24-26</b>
<b>E.</b>	<b>Malaysia</b>	<b>26-28</b>
<b>F.</b>	<b>Republic of Korea (South Korea)</b>	<b>29-30</b>
<b>G.</b>	<b>South Africa</b>	<b>30-32</b>
<b>H.</b>	<b>Switzerland</b>	<b>32-33</b>
<b>I.</b>	<b>United States</b>	<b>33-36</b>
<b>J.</b>	<b>United Kingdom</b>	<b>36-39</b>
<b>IV</b>	<b>CRITICAL ANALYSIS OF THE PREVENTION OF BRIBERY OF FOREIGN PUBLIC OFFICIALS AND OFFICIALS OF PUBLIC INTERNATIONAL ORGANISATIONS BILL, 2015</b>	<b>40-72</b>

	<b>Clause – by - Clause Analysis of the Prevention of Bribery of Foreign Public Officials and Officials of Public International Organisations Bill, 2015</b>	<b>42</b>
<b>A.</b>	<b>Preamble</b>	<b>42-43</b>
<b>B.</b>	<b>Clause 1</b>	<b>43-45</b>
<b>C.</b>	<b>Clause 2</b>	<b>45-49</b>
<b>D.</b>	<b>Clause 3</b>	<b>49-51</b>
<b>E.</b>	<b>Clause 4</b>	<b>51-58</b>
<b>F.</b>	<b>Clause 5</b>	<b>59</b>
<b>G.</b>	<b>Clause 6</b>	<b>59-60</b>
<b>H.</b>	<b>Clause 7</b>	<b>60-61</b>
<b>I.</b>	<b>Clause 8</b>	<b>61-62</b>
<b>J.</b>	<b>Clause 9</b>	<b>62-63</b>
<b>K.</b>	<b>Clause 10</b>	<b>63-65</b>
<b>L.</b>	<b>Clause 11</b>	<b>65-66</b>
<b>M.</b>	<b>Clause 12</b>	<b>66-67</b>
<b>N.</b>	<b>Clause 13</b>	<b>67</b>
<b>O.</b>	<b>Clause 14</b>	<b>67</b>
<b>P.</b>	<b>Clause 15</b>	<b>67</b>
<b>Q.</b>	<b>Clause 16</b>	<b>67</b>
<b>R.</b>	<b>Clause 17</b>	<b>68</b>
<b>S.</b>	<b>Clause 18</b>	<b>68-69</b>
<b>T.</b>	<b>Clause 19</b>	<b>69</b>
<b>U.</b>	<b>Clause 20</b>	<b>69-70</b>
<b>V.</b>	<b>Clause 21</b>	<b>70</b>
<b>W.</b>	<b>Clause 22</b>	<b>70</b>
<b>X.</b>	<b>Schedule</b>	<b>70-72</b>
	<b>Annexure</b>	<b>73-86</b>

## **CHAPTER I**

### **INTRODUCTION**

1.1 Corruption as an offence connotes the abuse of public office for private gain. Although actions that further corruption are condemned universally, nations have lacked consensus on the meaning and scope of corrupt conduct. To resolve this, the United Nations Convention Against Corruption, 2003 (“UNCAC”) was introduced to bring about clarity on the criminalisation of corrupt conduct that had a comparable impact for all nations. As of today, 176 countries have signed and ratified the UNCAC and pledged to incorporate its provisions into their domestic law. India is one such country.

1.2 Under Article 16 of the UNCAC, States Parties are required to penalise the offer and acceptance of an undue advantage to, and by, a foreign public official or an official of a public international organisation for acts and omissions that are contrary to his official duties. Currently India does not have domestic law in pursuance of Article 16. The Prevention of Corruption Act, 1988 (“PCA”) penalises the acceptance of bribes by domestic public officials, while the Prevention of Money Laundering Act, 2002 (“PMLA”) criminalises the illegal flow of money through the attachment and confiscation of property. Accordingly, a Group of Ministers felt it necessary to enact a law on foreign bribery in order to comply with requirements of Article 16 of the UNCAC. Pursuant to this, The Prevention of Bribery of Foreign Public Officials and Officials of Public International Organisations Bill, 2011 (“the 2011 Bill”) was introduced in the Lok Sabha on 25th March 2011. Under the 2011 Bill, the offer and acceptance of an undue advantage by a foreign public official or an official

of a public international organisation was specifically penalised. Thereafter on 1st April 2011, the Lok Sabha referred the Bill to the Department-Related Parliamentary Standing Committee on Personnel, Public Grievance, Law and Justice (“Standing Committee”) for its examination and report.

1.3 On 29th March 2012 the Standing Committee presented its fiftieth Report on the 2011 Bill.<sup>1</sup> The Report analysed the provisions of the 2011 Bill and made several recommendations for its improvement. Consequently, a proposal was moved for giving effect to the recommendations of the Standing Committee which was then approved by the Cabinet on 17th August, 2012. Owing to various reasons, however, the 2011 Bill could not be passed.

1.4 In the meantime, the Parliament also amended the PMLA in 2012 in order to make changes to the structure of its Schedule that contained predicated offences. This necessitated the need to amend the 2011 Bill since its provisions made references to the Schedule of the PMLA. Having taken note of this, the Cabinet gave its approval to a set of amendments to the 2011 Bill on 18th March 2013. Thereafter, a consolidated notice that discussed the recommendations of the Standing Committee and the amendments arising out of the amendment of the PMLA was sent to the Lok Sabha for its consideration on 4th April 2013. However due to various reasons, the 2011 Bill could not be taken up for consideration in subsequent sessions of the Parliament and eventually lapsed with the dissolution of the 15th Lok Sabha.

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<sup>1</sup> 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’, available at <<http://www.prindia.org/uploads/media/Bribery/SCR%20Prevention%20of%20Bribery%20Bill.pdf>>, last visited on 4th August, 2015.

1.5 A new proposal has now been made to re-introduce the 2011 Bill with certain suggested amendments and recommendations as the Prevention of Bribery of Foreign Public Officials and Officials of Public International Organisations Bill, 2015 (“the 2015 Bill”). During the examination of this proposal, a suggestion was received from the Minister of Law to consider including exceptions (defences) into the 2011 Bill in line with international experience. In this context it was noted that in the latest draft of the 2011 Bill there existed no exceptions to the offence of foreign bribery. The laws on foreign bribery in the UK and the USA however provided for such exceptions. Accordingly, it was proposed that similar exceptions/defences to the offence of foreign bribery must also be introduced under Clause 4 of the 2015 Bill. In this context, as per a letter dated 14th July 2015 from the Additional Secretary, the Minister for Law and Justice, Government of India, the Department of Personnel and Training now proposes to introduce the 2015 Bill in the next session of the Parliament to demonstrate India’s commitment towards the implementation of its obligations under the UNCAC. The following defences have been proposed to be included under clause 4 of the 2015 Bill - (a) “local law defence”, (b) “reasonable expenses directly related to the promotion, demonstration, or explanation of products or services or the execution or performance of a contract” and (c) “defence of adequate safeguards”.

1.6 The Ministry of Law and Justice has requested the 20th Law Commission of India (“the Commission”) to give its views and recommendations on the text of the 2015 Bill. Consequently, the Commission under the Chairmanship of Justice (Retd.) A.P. Shah has decided to undertake the present study titled **“Prevention of Bribery of Foreign Public Officials and**

**Officials of Public International Organisations—A Study and Proposed Amendments”** to review the provisions of the 2015 Bill and recommend appropriate amendments.

1.7 In the Report, the Commission proposes to undertake an analytical study of municipal, comparative and international law provisions pertaining to bribery of foreign public officials and officials of public international organisations. This is undertaken with a view to recommend amendments to the 2015 Bill thereby ensuring India’s compliance with Article 16 of the UNCAC. Accordingly this report is split into five Chapters. After the introduction (Chapter 1), Chapter 2 discusses the object and purpose of the UNCAC, specifically the drafting intent underlying Article 16. Other articles relevant to the offences contained under Article 16 are also analysed. Chapter 3 examines bribery legislations in other jurisdictions that are States Parties to the UNCAC. A cross-section of such countries is selected to demonstrate the various approaches taken to secure compliance. Chapter 4 contains a summary of the provisions of the 2015 Bill and a critical analysis of the same. Chapter 5 then makes recommendations on how the 2015 Bill ought to be amended in order to secure India’s compliance with Article 16 of UNCAC.

1.8 In order to prepare this Report, the Commission formed a sub-committee comprising the Chairman, Justice (Retd.) Ajit Prakash Shah, Mr. Sidharth Luthra (Senior Advocate), Mr. Siddharth Aggarwal (Advocate), Dr. Arghya Sengupta (Vidhi Centre for Legal Policy) and Ms Sumathi Chandrashekar (Consultant, Law Commission). Ms. Ritwika Sharma, Ms. Yashaswini Mittal (advocates) and Mr. Rahul Bajaj (law student) provided research assistance.

1.9           Thereafter, upon extensive deliberations, discussions and in-depth study, the Commission has given shape to the present Report.

## **CHAPTER II**

### **THE SCOPE AND APPLICATION OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION**

2.1 The heightened consciousness across nations of the growing and indiscriminate threat of corruption necessitated an international convention to tackle it.<sup>2</sup> Negotiations for such a convention started in the first quarter of 2002 and were conducted over the course of seven negotiating sessions, between January 21 2002 and October 1 2003.<sup>3</sup> The UNCAC was finally adopted by the General Assembly in its resolution 58/4 of 31st October 2003 and entered into force on 14th December 2005.<sup>4</sup> In subsequent years, 176 nations signed and ratified the UNCAC in order to tackle corruption within their territory on the basis of a set of uniform rules.<sup>5</sup>

2.2 According to Article 1 of the UNCAC, the main objectives of enacting an international treaty against corruption include the promotion and strengthening of measures to prevent and combat corruption, promotion and facilitation of international cooperation and technical assistance in the fight against corruption, and promotion of integrity, accountability and proper management of public affairs and public property. The key measures for tackling corruption as enumerated under the UNCAC include preventive

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<sup>2</sup> Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention Against Corruption, United Nations Office on Drugs And Crime (2010); see also 'Background of the United Nations Convention against Corruption', website of the United Nations Office on Drugs and Crime, available at <<https://www.unodc.org/unodc/en/treaties/CAC/>>, last visited on 4th August, 2015.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

measures, criminalisation of conduct, international cooperation, and asset recovery. The States Parties to the UNCAC have also established a mechanism to review its implementation through a peer review process that promotes international cooperation and the sharing of good practices.<sup>6</sup>

2.3 While there exist a wide array of opinions on what constitutes public corruption, the act of bribery is considered to be the most identified form of corruption that constitutes a penal offence in a large number of jurisdictions.<sup>7</sup> The offence of bribery or the use of undue influence have not been specifically defined in the text of the UNCAC and are left to individual formulations under the domestic laws of States Parties.<sup>8</sup> Nonetheless, the definitional clauses under Article 2 of the UNCAC serve as an important guide in interpreting Articles 15 and 16 of the Convention, which call upon States Parties to criminalise the offer and acceptance of bribery. The supply side of bribery concerns the act of offering a bribe (active bribery), while the demand side refers to the acceptance or solicitation of a bribe (passive bribery).<sup>9</sup> Under the UNCAC, the States Parties have an obligation to criminalise active and passive bribery of its national public officials under Article 15 and that of foreign public officials and officials of public

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<sup>6</sup> United Nations Office on Drugs and Crime, *Mechanism for the Review of Implementation of the United Nations Convention Against Corruption—Basic Documents* (2011).

<sup>7</sup> Ophelie Brunelle-Quraishi, 'Assessing The Relevancy And Efficacy Of The United Nations Convention Against Corruption: A Comparative Analysis', 2 *Notre Dame J. Int'l & Comp. L.* 101 (2011-2012); See also Michael Kubiciel, 'Core Criminal Law Provisions in the United Nations Convention Against Corruption', 9 *Int'l Crim. L. Rev.* 139 (2009).

<sup>8</sup> Division for Treaty Affairs United Nations Office on Drugs and Crime, *Legislative Guide for the implementation of the United Nations Convention Against Corruption* (Second revised edition, 2012) ("Legislative Guide on the UNCAC").

<sup>9</sup> Ophelie Brunelle-Quraishi (n 7).

international organisations under Article 16. Thus the definitions of a public official, a foreign public official and an official of a public international organisation under Article 2 of the UNCAC are relevant in construing the penal provisions under Article 16 of the UNCAC.

2.4 The UNCAC defines a public official as any person who either (i) holds a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority; (ii) performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party; or (iii) any other person as defined as a "public official" in the domestic law of a State Party.<sup>10</sup> A foreign public official is defined as any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and/or any person exercising a public function for a foreign country, including for a public agency or public enterprise, while an official of a public international organisation is defined as an international civil servant or any person who is authorised by such an organisation to act on behalf of that organisation.<sup>11</sup> States Parties can opt for broader or more inclusive definitions than the minimum required by Article 2.<sup>12</sup>

2.5 Article 15 of the UNCAC on 'Bribery of national public officials' states that:

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<sup>10</sup> Legislative Guide on the UNCAC (n 8).

<sup>11</sup> Legislative Guide on the UNCAC (n 8).

<sup>12</sup> Legislative Guide on the UNCAC (n 8).

*Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;*

*(b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.*

2.6 Therefore, as per the text of Article 15, States Parties are required to penalise active and passive bribery of their national public officials through legislative or other measures in order to comply with their obligations under the UNCAC. The distinction between the active and passive sides of the offence allows for the prosecution of corrupt conduct more effectively and is intended to introduce a stronger dissuasive effect.<sup>13</sup> The offences under Article 15 cover all instances of bribery that are either tangible or intangible, pecuniary or non-pecuniary.<sup>14</sup>

2.7 Article 16 on ‘Bribery of foreign public officials and officials of public international organisations’ states that:

*1. Each State Party shall adopt such legislative and other measures as may be necessary to*

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<sup>13</sup> Michael Kubiciel (n 7).

<sup>14</sup> Legislative Guide on the UNCAC (n 8).

*establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.*

*2. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.*

2.8 As evidenced by the text above, paragraph 1 of Article 16 mirrors clause (a) of Article 15, wherein States Parties are required to criminalise the active bribery of foreign public officials and officials of public international organisations.<sup>15</sup> However, contrary to Article 15, the scope of Article 16 only extends to those acts of bribery that take place during international business transactions, including in the context of international aid.<sup>16</sup> Further in distinction to the corresponding provision under Article 15, paragraph 2

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<sup>15</sup> Legislative Guide on the UNCAC (n 8); See also Travaux Préparatoires (n 2).

<sup>16</sup> *Ibid.*

of Article 16 only insists upon States Parties to *consider* criminalising the solicitation or acceptance of bribes by foreign public officials and officials of public international organisations.<sup>17</sup> As per the *travaux préparatoires* of the UNCAC, paragraph 2 under Article 16 was formulated in this manner not because any delegation condoned or was prepared to tolerate the solicitation or acceptance of bribes by foreign public officials or officials of public international organisations but was rather due to the fact that the conduct under paragraph 2 was already covered in essence under Article 15, which called upon States Parties to criminalise the solicitation and acceptance of bribes by their own officials.<sup>18</sup> As a result, the obligation to pass a law pursuant to paragraph 2 of Article 16 is not a mandatory requirement under the UNCAC but rather a directory provision that requires consideration by States Parties. However in the event a State Party chooses not to criminalise passive bribery under Paragraph 2, it is encouraged to consider providing assistance and cooperation with respect to the investigation and prosecution of the offence by another State Party that has criminalised it in accordance with the UNCAC.<sup>19</sup> In this regard, insofar as their laws permit, States Parties are encouraged to avoid allowing technicalities (e.g., lack of dual criminality<sup>20</sup>) get in the way of exchanging information with another State that is attempting to prosecute a corrupt official under its laws, which are compliant with the UNCAC.<sup>21</sup> It is pertinent to mention

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<sup>17</sup> Travaux Préparatoires (n 2).

<sup>18</sup> Travaux Préparatoires (n 2).

<sup>19</sup> Travaux Préparatoires (n 2).

<sup>20</sup> Under the principle of dual criminality, an accused can only be extradited if the alleged criminal conduct in question is considered criminal under the laws of both the surrendering and requesting States.

<sup>21</sup> Travaux Préparatoires (n 2).

that immunities enjoyed by foreign public officials and officials of public international organisations under international law are not affected by the provisions of Article 16.<sup>22</sup> In fact as indicated in the Legislative Guide to the UNCAC, public international organisations are encouraged to waive such immunities in appropriate cases.<sup>23</sup>

2.9 The understanding of Article 16 is incomplete without reference to certain other Articles of the UNCAC. Specifically, Article 42 of the UNCAC which requires States Parties to exercise jurisdiction over offences that are (a) committed in their territory; or (b) committed on board a vessel that is flying their flag or an aircraft that is registered under its laws at the time of the commission of the offence. Subject to Article 4, States Parties are also encouraged under Article 42 to consider establishing jurisdiction over offences that are (a) committed against its nationals; (b) committed by its national or by a stateless person who has his or her habitual residence in its territory; (c) established in accordance with Article 23 of this Convention (that deals with money laundering and proceeds of crime) and committed outside its territory but has implications within its territory; or (d) committed against itself, as a State. This provision therefore attempts to curb transnational corruption and plug key jurisdictional gaps that enable fugitives to find safe havens to evade the process of law.<sup>24</sup> However, as noted previously, paragraph 2 of Article 42 is specifically contingent upon the principles underlying Article 4 (Protection of sovereignty) of the UNCAC, which states that:

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<sup>22</sup> Travaux Préparatoires (n 2).

<sup>23</sup> Legislative Guide on the UNCAC (n 8).

<sup>24</sup> Legislative Guide on the UNCAC (n 8).

1. *States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.*
2. *Nothing in this Convention shall entitle a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.*

2.10. Therefore, while extending the application of domestic laws under Article 42 to international borders, States Parties need to keep in mind the aforementioned principles of territorial integrity and sovereign equality under Article 4. A violation of any of these principles would not only violate the UNCAC but also the UN Charter considering that both principles are based on Article 2 of the Charter.<sup>25</sup> Consequently, Articles 4 and 42 have to be read in conjunction while interpreting the scope of application of any law under paragraph 1 and 2 of Article 16 in order to ensure compliance with all provisions of the UNCAC.

2.11 Articles 26 (Liability of legal persons), 27 (Participation and attempt), 28 (Knowledge, intent and purpose as elements of an offence), 29 (Statute of limitations) and 30 (Prosecution, adjudication and sanctions) contain procedural and substantive elements of establishing and penalising an offence under the UNCAC.<sup>26</sup> Recourse to these provisions is also relevant

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<sup>25</sup> Legislative Guide on the UNCAC (n 8).

<sup>26</sup> Legislative Guide on the UNCAC (n 8).

in the interpretation for effective prosecution under Article 16. Specifically, Article 26 of the UNCAC codifies the liability for legal entities (for e.g. companies) that is consistent with the legal principles under the domestic law of States. The application of this liability is without prejudice to the criminal liability applicable to natural persons.<sup>27</sup> It extends to criminal, civil or administrative penalties.<sup>28</sup> Article 27 calls upon States Parties to criminalise not only the conduct but also the actions undertaken in furtherance of such conduct (i.e. aiding and abetting) under the UNCAC. Under Article 28 of the UNCAC, the elements of an offence, namely knowledge, intent and purpose must be established in a manner that takes into account inferences from the objective factual circumstances as well. Under Article 29, States Parties are also required to put in place long statutes of limitation for the offences established in accordance with the UNCAC. Finally, Article 30 in essence lays down the framework for prosecution, punishment and reintegration of convicted persons back into society. Some of the key issues covered include procedural safeguards, immunities and the extent of punishment.<sup>29</sup> Paragraph 9 of Article 30 is specifically relevant in this context as it permits States Parties to apply legal defences or other legal principles controlling the lawfulness of conduct as codified under their domestic law. Therefore, defences and exceptions to the offence of foreign bribery under domestic legislation flow from this provision.

2.12 The provisions under Chapter IV on International Cooperation also provide assistance to

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<sup>27</sup> Legislative Guide on the UNCAC (n 8).

<sup>28</sup> Legislative Guide on the UNCAC (n 8).

<sup>29</sup> Legislative Guide on the UNCAC (n 8).

States Parties in establishing contact with one another for the purpose of information exchange, mutual assistance and such other measures that endeavour to tackle trans-national bribery under Article 16 through collaborative efforts. In this context, Article 44 on Extradition is of particular significance since it discusses the scope, procedure and conditions that operationalise extradition under the UNCAC. In summary, the key provisions under Article 44 require States Parties to (1) establish extraditable offences in accordance with the UNCAC, provided the requirement of dual criminality is fulfilled; (2) consider granting extradition, where their domestic law permits, for offences under the Convention even without dual criminality; (3) consider applying Article 44 in respect several separate offences, where at least one of the offences is extraditable under Article 44 and some of those offences which are not extraditable by reason of their period of imprisonment but are related to offences established in accordance with the UNCAC; (4) not consider corruption offences under the UNCAC as political offences, in instances where such States Parties use the Convention as a basis for extradition; (5) conclude treaties on extradition with other States Parties, if the UNCAC does not constitute a legal basis for the purpose of extradition; (6) consider expediting extradition procedures and simplifying evidentiary requirements relating to corruption offences under the Convention; and (7) ensure fair treatment for persons facing extradition proceedings under article 44. In the context of a refusal of an extradition request under Article 44, States Parties are also required to (1) submit the case for domestic prosecution, ensure that the decision to prosecute and any subsequent proceedings are conducted with the required diligence and cooperate with the requesting State Party, if the extradition request is denied on the ground that the person is

a national; (2) consider enforcing sentences imposed under the domestic law of the requesting State, in instances where the extradition is denied for enforcement of sentences on grounds of nationality; and (3) consult, where appropriate, the requesting State Party in order to provide it with the opportunity to present information and views on the matter, prior to the refusal of an extradition request.

2.13 India signed the UNCAC in 2005 and subsequently ratified it 2011. However, at the time of ratification, India also declared, by way of a Notification, that “international cooperation for mutual legal assistance under Articles 45 and 46 of the Convention shall be afforded through applicable bilateral Agreements”, and in cases where a bilateral agreement does not cover the mutual legal assistance sought by the requesting State, it shall be provided under the Convention “on reciprocal basis”. By signing and ratifying the UNCAC, India has pledged to uphold its obligations under the Convention through the enactment of various laws on corruption.<sup>30</sup> In this regard, Article 253 of the Constitution of India<sup>31</sup> vests the Parliament of India with the requisite competence to enact laws in order to operationalise its obligations under the UNCAC. Further, Article 51, a directive principle, lists India’s obligation to promote international peace and endeavours to uphold its international obligations and commitments.

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<sup>30</sup> For more details on the list of signatories, please see <<https://treaties.un.org/doc/publication/mtdsg/volume%20ii/chapter%20xviii/xviii-14.en.pdf>>, last visited on 8th August, 2015.

<sup>31</sup> Article 51 of the Directive Principles on State Policy under Part IV of the Constitution of India; Article 253 under Part XI of the Constitution, contains a *non-obstante* clause that vests the Parliament with the power to make laws for implementing India’s international obligations.

2.14 Compliance with Article 16 and penalising bribery of foreign public officials and officials of public international organisations is the rationale for the present Bill. While giving shape to such a Bill, three key questions need to be considered: *first*, will the Bill only penalise offences contained in Article 16 (1) which is mandatory, or also offences contained in Article 16(2), which is directory? *Second*, to what extent will the Bill be extra-territorial in operation thereby necessitating co-operation with foreign countries? And *third*, what legal defences or other legal principles controlling the lawfulness of conduct should be codified under the Bill? In order to understand various approaches taken to answering these questions as well as to develop a comparative perspective in this regard, the relevant laws of 10 selected jurisdictions are analysed briefly in the next Chapter.

## **CHAPTER III**

### **BRIBERY LAWS IN OTHER JURISDICTIONS**

3.1 Several jurisdictions have enacted domestic legislations in pursuance of the UNCAC. The application of these legislations extends to national public officials, citizens, foreign citizens and in limited number of circumstances, to foreign public officials and officials of public international organisations. While a number of countries have enacted new comprehensive legislations covering corruption of national and foreign public officials as well as private corruption, others have incorporated these offences into existing laws. Most countries have not enacted law pursuant to paragraph 2 of Article 16 of the UNCAC, which is a directory provision. Bribery laws in 10 jurisdictions are discussed below for a better understanding of the scope of Article 16 of the UNCAC. Countries have been chosen in a manner that provides a representative sample — major common law jurisdictions, sub-continental nations, and other jurisdictions with notable approaches towards compliance with Article 16 for which authoritative country reports are available.

#### **A. Australia<sup>32</sup>**

3.2.1 The UNCAC was signed by Australia in 2003 and subsequently ratified in 2005. Australia has a federal system of governance with three layers of government: federal, state and local. The agencies involved in tackling corruption in Australia include the Australian Commission for Law Enforcement Integrity,

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<sup>32</sup> The information on Australia has been taken from the Executive summary on Australia, Note by the Secretariat, Third Session of the Implementation Review Group, Conference of the States Parties to the United Nations Convention Against Corruption, UN Doc. No. CAC/COSP/IRG/1/2/1 (2012); see also page on 'Foreign bribery', website of the Attorney-General's Department, Australian Government, available at <<http://www.ag.gov.au/CrimeAndCorruption/Foreignbribery/Pages/default.aspx>>, last visited on 8th August, 2015.

the Australian Crime Commission and the Commonwealth Ombudsman and the Australian Federal Police. In addition to these agencies, the Australian government also attempts to address corrupt conduct in an overarching manner.

3.2.2 For implementing its obligations under clause (a) of Article 15 of the UNCAC, section 141.1 of the Australian Criminal Code outlaws the bribery of a Commonwealth public official and covers a wide array of officials at the federal level and a wide range of conduct including the giving of benefits, obtaining gains or causing losses. In consonance with clause (b) of the Article 15, section 141.1 also criminalises the acceptance of an undue advantage by a public official in exchange for influence, either actual or perceived, on the exercise of his official's duties.

3.2.3 Division 70 of Chapter 4 of the Australian Criminal Code covers bribery of foreign public officials and officials of public international organisations in the context of Article 16. However, only active bribery of foreign public officials and officials of public international organisations as discussed under paragraph 1 of Article 16 of the UNCAC is penalised under Division 70. Passive bribery of such officials under paragraph 2 of Article 16 does not constitute a criminal offence under the Australian Criminal Code..

3.2.4 In the context of jurisdiction under Article 42 read in conjunction with Article 4 of the UNCAC, the Australian anti-bribery law broadly applies to all conduct within Australia, and to the conduct by Australian citizens, residents and companies overseas. While all payments are covered under the foreign bribery statute in Australia, facilitation payments made to expedite or to secure the performance of a routine governmental action by a foreign official, political party

or party official are exempt from penalisation. For identifying a transaction as a facilitation payment and not bribery, the Australian law requires the benefit received to be 'of a minor value' and to be offered 'for the sole or dominant purpose of expediting or securing performance of a routine government action of a minor nature'. The proceedings of the transaction are also required to be recorded. In addition to this, Australian law also exempts those gifts and advantages that are specifically permitted under the written law governing the foreign public official and the official of a public international organisation in question.

## **B. Austria<sup>33</sup>**

3.3.1 Austria signed the UNCAC in 2003 and ratified it in 2006. The legal framework against corruption in Austria mainly includes provisions from the Constitution, the Penal Code and the Criminal Procedure Code. Austrian law complies fully with all provisions of the UNCAC. The authorities involved include the Federal Ministry of Justice, the Federal Ministry of Interior and its Federal Bureau of Anti-Corruption, the Central Office for Prosecuting Economic Crimes and Corruption and the Criminal Police Office.

3.3.2 For the implementation of its obligations under clause (a) of Article 15, Austrian law penalises the offence of active bribery of national public officials through sections 307 (active bribery involving a breach of duties), 307a (granting of advantages), 307b (granting of advantages for the purpose of exercising influence) and 302 (abuse of official authority) of the Penal Code.

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<sup>33</sup> The information on Austria has been taken from the 'Country Review Report of Austria', Review by Israel and Vietnam for the review cycle 2010-2015, United Nations Office on Drugs and Crime. See also Executive summary on Austria, Note by the Secretariat, Fifth Session of the Implementation Review Group, Conference of the States Parties to the United Nations Convention Against Corruption, UN Doc. No. CAC/COSP/IRG/I/3/1/Add.11(2014).

Passive bribery of domestic public officials, which is covered under clause (b) of Article 15, is implicated under sections 304 (passive bribery involving a breach of duties), 305 (acceptance of advantages), 306 (acceptance of advantages for the purpose of exercising influence) and 302 (as discussed previously) of the Penal Code.

3.3.3 In the context of paragraph 1 of Article 16, Austria penalises the active bribery of foreign public officials and officials of public international organisations through the same provisions as the one used to implement its obligations under clause (a) of Article 15. In this regard, the offences under section 307 to 307b do not specifically differentiate between domestic or foreign public officials or officials of public international organisations thereby implying their application to both (which has been confirmed by Austria in its Country Review Report). Further the definition of a “public official” under section 74 of the Penal Code, specifically includes *any* person who as an organ or as an employee discharges tasks of legislation, administration or justice for another state or for an international organisation (paragraph 1(4a) of section 74). Section 302 of the Penal Code however is only applicable to national public officials and not to others. In relation to paragraph 2 of Article 16, the Austrian law does not differentiate between national and foreign public officials and officials of public international organisations in the context of the offence of passive bribery with the exception of section 302 that only applies to national officials. Sections 304, 305, 306 of Penal Code are relevant for the offence of passive bribery of foreign public officials and officials of public international organisations.

3.3.4 In respect of the implementation of Article 42 read in conjunction with Article 4 of the UNCAC, section 64 of the Austrian Penal Code allows for the exercise of national jurisdiction without the dual criminality requirement for criminal acts committed against an Austrian official abroad, and for criminal acts committed by an Austrian official abroad. For other offences, jurisdiction is established subject to dual criminality requirement, in the instance that the offender is an Austrian citizen or a foreigner, who was arrested in Austria and cannot be extradited to a foreign State for other reasons than the nature or other characteristics of the offence (section 65, Penal Code). Consequently, the Austrian legislation not only provides for the jurisdiction to prosecute when extradition is denied due to nationality but also covers situations of the denial of extradition for reasons unrelated to the nature of the offences.

### **C. Canada<sup>34</sup>**

3.4.1 Canada signed the UNCAC in 2004 and ratified it in 2007. The laws that implement the obligations of Canada under the UNCAC include Criminal Code, Corruption of Foreign Public Officials Act, Proceeds of Crime (Money Laundering) and Terrorist Financing Act, and the Mutual Legal Assistance in Criminal Matters Act. The body responsible for checking corrupt conduct is the Royal Canadian Mounted Police (“RCMP”).

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<sup>34</sup> The information on Canada has been taken from the Executive summary on Canada, Note by the Secretariat, Fifth Session of the Implementation Review Group, Conference of the States Parties to the United Nations Convention Against Corruption, UN Doc. No. CAC/COSP/IRG/I/3/1/Add.8 (2014); see also Report of Transparency International Canada Inc., ‘UNCAC Implementation Review: Civil Society Organization Report’ (2013), available at <[https://www.bennettjones.com/uploadedFiles/Publications/Articles/UNCAC\\_Review\\_TI-Canada.pdf](https://www.bennettjones.com/uploadedFiles/Publications/Articles/UNCAC_Review_TI-Canada.pdf)>, last visited on 8th August, 2015.

3.4.2 In the context of clauses (a) and (b) of Article 15, sections 119 (bribery of judicial officers), 120 (bribery of officers), 121 (frauds on the government), 122 (breach of trust by public officer), 123 (municipal corruption), 124 (selling or purchasing office), 125 (influencing or negotiating appointments or dealing in offices) and 426 (secret commissions) of the Canadian Criminal Code outlaw the offer and acceptance of bribery by Canadian officials. As noted in the Country Review Report on Canada, the legal framework on bribery under the Criminal Code is compliant with Canada's obligations under Article 15. In this regard, the definition of an official under section 118 is broad in scope, and includes all persons who perform public duties.

3.4.3 In the context of paragraph 1 of Article 16, Canada penalises active bribery of foreign public officials and officials of public international organisations under section 3 of the Corruption of Foreign Public Officials Act ("CFPOA"). In fact, under the provisions of CFPOA, it is also possible to prosecute an individual for conspiracy or attempt to commit bribery, along with aiding and abetting in the commission of bribery, an intention in common to commit bribery, and counselling others to commit bribery. Passive bribery of foreign public officials and officials of public international organisations as mentioned under paragraph 2 of Article 16 is not penalised under the CFPOA. However, the manipulation, falsification, or destruction of "books and records" to conceal or facilitate bribery constitutes an offence under the CFPOA (section 4).

3.4.4 In terms of jurisdiction and territoriality under Article 4 and 42 of the UNCAC, the CFPOA exercises jurisdiction over the offences that are

committed in whole or in part on the territory of Canada. In addition, CFPOA also covers the conduct of Canadian companies and individuals based on their nationality, regardless of where the alleged bribery took place. Prior to an amendment in 2013, the CFPOA required the existence of “a real and substantial link” between the offence and Canada in order to exercise jurisdiction beyond its territory. However, this requirement has now been removed. Sub-section 7(4) of the Criminal Code also extends jurisdiction to acts and omissions by public service employees under the Public Service Employment Act even though such acts and omissions may have been committed outside Canada. This is done only in the instance where the conduct in question is an offence in the place where it is committed and is also an indictable offence in Canada (principle of dual criminality). In terms of exceptions, prior to its amendment in 2013, the CFPOA provided for the defence of facilitation payments where payments made to expedite or secure the performance by a foreign public official or an official of a public international organisation of any act of a routine nature that forms a part of the official’s duties or functions were exempt from penalisation. With the amendments to 2013, this requirement has now been repealed.

#### **D. El Salvador<sup>35</sup>**

3.5.1 El Salvador signed the UNCAC in 2003 and ratified it in 2004. On ratification, international treaties become a part of the domestic law of El Salvador and are directly applicable. The anti-corruption institutions in the country include the Office of the Under-Secretary for Transparency and Prevention of Corruption which is

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<sup>35</sup> The information on El Salvador has been taken from the Executive summary on El Salvador, Note by the Secretariat, Fifth Session of the Implementation Review Group, Conference of the States Parties to the United Nations Convention Against Corruption, UN Doc. No. CAC/COSP/IRG/I/2/1/Add.22 (2013).

attached to the Office of the President of the Republic, the Office of the Attorney General that houses a unit that specialises in the combating of corruption, the Financial Investigation Unit, which is attached to the Office of the Attorney General, the Government Ethics Tribunal, the Court of Audit, the Office of the Superintendent of the Financial System, the Coordinating Commission for the Judiciary and lastly the Executive Technical Unit of the Judiciary.

3.5.2 The offence of active bribery of national public officials under clause (a) of Article 15 of the UNCAC is penalised under article 335 (on active bribery) and article 310 (on malfeasance) of the Criminal Code of El Salvador. Persons who serve in legislative or judicial entities are not included within the definition of a “public official” as set out under article 39 of the Criminal Code. These provisions also do not mention any advantage or benefit for third parties.

3.5.3 In the context of passive bribery of national public officials under clause (b) of Article 15 of the UNCAC, the Criminal Code criminalises the acceptance of a bribe in exchange for malfeasance (article 330), acceptance of a bribe in exchange for abuse of functions (article 331) and extortion (article 327). Advantages to third parties are again excluded from the purview of this offence.

3.5.4 Active bribery of foreign public officials and officials of public international organisations under paragraph 1 of Article 16 of the UNCAC are covered under article 335A of the Criminal Code that deals with transnational bribery. Till date there have been no prosecutions for transnational bribery in El Salvador. The offence of passive bribery under paragraph 2 of Article 16 of the UNCAC is not covered under any legislation in the country.

3.5.5 In the context of jurisdiction, El Salvador exercises its jurisdiction over most of the circumstances referred under Article 42 of the UNCAC. However there exists a lack of clarity on the exercise of its jurisdiction over (1) offences of corruption committed by one of its nationals abroad, (2) participation, preparation, attempt and other acts committed outside its territory in pursuance of money-laundering, (3) offences committed against a State Party to the UNCAC, and (4) offences committed by a foreign national who is present in its territory. The domestic laws of El Salvador also do not provide for a mechanism for consultation with the competent authorities of other States Parties as required under Article 42 of the UNCAC. The dual criminality is required for the purpose of extradition.

### **E. Malaysia<sup>36</sup>**

3.6.1 Malaysia signed the UNCAC in 2003 and subsequently ratified it in 2008. The anti-corruption bodies in Malaysia include the Malaysian Anti-Corruption Commission, the Attorney General's Chambers, the Royal Malaysia Police, the Royal Customs and Excise Department, the Financial Intelligence Unit of the Central Bank of Malaysia, the Ministry of Foreign Affairs, the Public Service Department and the Judiciary.

3.6.2 In respect of clause (a) of Article 15 of the UNCAC, Malaysia has adopted measures to penalise active bribery of its national public officials under sections 16 (b), 17 (b) and 21 of the Malaysian Anti-Corruption Commission Act ("MACCA"). Furthermore,

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<sup>36</sup> The information on Malaysia has been taken from the 'Country Review Report of Malaysia', Review by the Philippines and Kenya for the review cycle 2012-2013, United Nations Office on Drugs and Crime. See also Executive summary on Malaysia, Note by the Secretariat, Resumed fourth Session of the Implementation Review Group, Conference of the States Parties to the United Nations Convention Against Corruption, UN Doc. No. CAC/COSP/IRG/I/3/1/Add.1 (2013).

sections 214 and 161 to 165 of the Penal Code along with section 137 of the Customs Act are also relevant for the purpose of active bribery of national public officials. In this regard, if the conduct in question is punishable under MACCA and any other law, the offender will be charged only under MACCA. Further, the Country Review Reports on Malaysia also point out that all gifts received by national public officers must be reported in accordance with section 25(1) and (3) of MACCA. In the instance a gift is received and not reported, it is deemed to have been received corruptly.

3.6.3 Passive bribery under clause (b) of Article 15 of the UNCAC is covered under sections 16(a), 17(a) and 21 of MACCA. The various forms of passive bribery covered include soliciting, receiving, agreeing to receive, agreeing to accept, and attempting to obtain any gratification for oneself or another. The corresponding offences on passive bribery of national public officials are also covered under sections 161, 162, 163, 165 and 215 of the Penal Code. Section 161 of the Penal Code outlaws the taking of gratification, other than legal remuneration, in respect of an official act by a public servant and is also applicable to “someone expecting to be a public servant”.

3.6.4 Paragraph 1 and paragraph 2 of Article 16 on active and passive bribery of foreign public officials and officials of public international organisations are implemented under section 22 of MACCA. The offence of bribery of foreign public officials and officials of public international organisations was introduced in 2009 in order to ensure compliance with Article 16 of the UNCAC. MACCA contains definitions of “foreign public officials” and “officer of a public international organization” which reflect the corresponding definitions under Article 2 of the UNCAC. In Malaysia,

the legislature has also provided a compelling presumption under section 50 of MACCA in order to ease the prosecution of cases involving the aforementioned offences. The presumption comes into operation only when the essential ingredients of the offence have been established by the prosecution. Under this presumption, once it has been shown that gratification has been received by a national or foreign public official or an official of a public international organisation, it shall be presumed that it was corruptly received, unless the contrary is proved. It is pertinent to mention that in relation to paragraph 2 of Article 16, Malaysia has made a request for technical assistance under its Country Review Report submitted to the UNCAC for reconciling the provisions of MACCA with its obligations under the Diplomatic Privileges Act and the International Organizations Act.

3.6.5 In the context of jurisdiction under Articles 4 and 42 of the UNCAC, sections 2, 3 and 4 of the Penal Code, section 66 of MACCA and section 82 of Anti-Money Laundering and Anti-Terrorism Financing Act are of relevance. In the instance an offence is committed by a citizen or permanent resident outside Malaysia, jurisdiction may be exercised over the offence as if it were committed in the territory of Malaysia. Jurisdiction also extends to offences committed by any person against the property of any citizen or the Government of Malaysia. Principle of dual criminality is recognised in Malaysia and is applied in the context of extraditable offences.

## **F. Republic of Korea (South Korea)<sup>37</sup>**

3.7.1 The Republic of Korea signed the UNCAC in 2003 and ratified it in 2008. Articles 133, 129 and 130 of the Criminal Act of the Republic of Korea penalise both active and passive bribery of national public officials as required under clauses (a) and (b) of Article 15 of the UNCAC. The term “public official” as defined under Article 2 of the State Public Officials Act and Article 2 of the Local Public Officials Act covers a broad range of individuals including appointed and elected officials, members of the judiciary and prosecutors.

3.7.2 Korean law also criminalises active bribery of foreign public officials and officials of public international organisations as required under paragraph 1 of Article 16 of the UNCAC. Under the Act on Combating Bribery of Foreign Public Officials in International Business, Articles 2 and 3 cover all elements of active bribery as envisaged under paragraph 1 of Article 16 of the UNCAC. However, the offence of passive bribery under paragraph 2 of Article 16 of the UNCAC is not specifically outlawed. Nevertheless, the Republic of Korea can prosecute passive bribery of foreign public officials and officials of public international organisations under the Criminal Act through its provision on the “breach of trust”. Such officials can also be subject to prosecution for money-laundering operations.

3.7.3 In the context of Articles 4 and 42 of the UNCAC, Articles 2, 3, 4, 6 of the Criminal Act adequately discuss the instances where jurisdiction can be exercised including under the principle of

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<sup>37</sup> The information on the Republic of Korea has been taken from the Executive summary on South Korea, Note by the Secretariat, Fourth Session of the Implementation Review Group, Conference of the States Parties to the United Nations Convention Against Corruption, UN Doc. No. CAC/COSP/IRG/1/3/1/Add.7 (2013).

territoriality. In addition, the Republic of Korea also exercises jurisdiction over its nationals who commit crimes outside its territory, and over offences against itself and its nationals outside its borders.

3.7.4 In March 2015, the Republic of Korea promulgated a new Anti-Corruption Law. However on account of strong criticism on several counts, the law was challenged before the Constitutional Court and has therefore not been brought into force.<sup>38</sup>

### **G. South Africa<sup>39</sup>**

3.8.1 South Africa signed and ratified the UNCAC in 2004. The institutions that fight against corruption in South Africa include the Anti-Corruption Task Team, Directorate of Priority Crime Investigation, National Prosecution Authority, Specialised Commercial Crimes Unit, Special Investigation Unit, National Anti-Corruption Forum and the Public Protector.

3.8.2 Clauses (a) and (b) of Article 15 of the UNCAC are codified under section 3 of the Prevention and Combating of Corrupt Activities Act, 2004 (“PRECCA”), which criminalises the offence of corruption in general, namely, the offer (clause (b)) or acceptance (clause (a)) of gratification, directly or indirectly, to any person, whether for the benefit of that person or for another person, in order to act, personally or by influencing another person, in a manner that is unlawful or

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<sup>38</sup>Jeyup S. Kwaak, ‘South Korea Lawmakers Approve Anticorruption Law’, *The Wall Street Journal* (March 3, 2015), available at <<http://www.wsj.com/articles/south-korea-lawmakers-approve-anticorruption-law-1425387240>>, last visited on 8th August, 2015; see also South Korea: Controversial Anti-Corruption Law Promulgated, available at <[http://www.loc.gov/lawweb/servlet/lloc\\_news?disp3\\_l205404377\\_text](http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205404377_text)>, last visited on 8th August, 2015.

<sup>39</sup> The information on South Africa has been taken from the ‘Country Review Report of South Africa’, Review by Mali and Senegal for the review cycle 2010-2015, United Nations Office on Drugs and Crime; see also Executive summary on South Africa, Note by the Secretariat, Fourth Session of the Implementation Review Group, Conference of the States Parties to the United Nations Convention Against Corruption, UN Doc. No. CAC/COSP/IRG/I/2/1/Add.9 (2012).

amounts to an abuse of power or breach of trust. A “public officer” is defined under section 1 but does not specifically include legislators, judicial officers and prosecutors. Nevertheless, the actions of such officials are covered within the scope of the PRECCA under sections 7, 8 and 9.

3.8.3 In the context of paragraph 1 of Article 16 of the UNCAC, section 5 of PRECCA read in conjunction with section 3 criminalises the offence of active bribery of foreign public officials and officials of public international organisations. Passive bribery of such officials under paragraph 2 of Article 16 is not specifically penalised under PRECCA. However, through the general prohibition under section 3 of PRECCA which applies to “any person”, it is possible to penalise the acceptance of a bribe by a foreign public official or an official of a public international organisation.

3.8.4 In the context of jurisdiction, section 90 of the Magistrates’ Court Act, 1944 and section 35 of PRECCA allows for the exercise of jurisdiction over all criminal offences that are committed within the territory of South Africa. Under section 35(1) of PRECCA, jurisdiction is exercisable over all offences covered under the Act, regardless of the act constituting an offence at the place of its commission in the instance the alleged offender is a citizen, or is an ordinary resident or has been arrested in the territory of the South Africa. Under section 35(2), jurisdiction can also be exercised over offences that occur outside South Africa, notwithstanding the act constituting an offence in the place of its commission, if (a) such an act affects or is intended to affect a public body, a business or any other person in South Africa, (b) the alleged offender is found in the territory of South Africa, and (c) the offender is not extradited by South Africa. Citizens of

South Africa who commit crimes in foreign jurisdictions but are not extradited abroad can also be prosecuted under section 35(2) of PRECCA.

## **H. Switzerland<sup>40</sup>**

3.9.1 Switzerland signed the UNCAC in 2003 and ratified it in 2009. An Inter-departmental (inter-ministerial) Working Group against Corruption has been established in the country to prevent corruption, although the Group has no powers to engage in administrative enquiries or criminal investigations. The Attorney-General's Office is responsible for criminal investigations and prosecutions against the federal government. Issues surrounding mutual legal assistance are also addressed by the Attorney-General's Office. The Money-laundering Reporting Office plays a significant role in (1) collecting and analysing suspicious facts reported by financial intermediaries, and (2) in instances where the facts are well-founded, forwarding the necessary information to the criminal prosecution authorities of the Confederation.

3.9.2 In the context of the offences under Articles 15 and 16 of the UNCAC respectively, article 322 of the Swiss Criminal Code covers all the offences of active and passive bribery of national officials, foreign public officials and officials of public international organisations within its scope. The bribery provision also penalises the incitement of a national public official to perform an action *that is not contrary* to his or her duties. While indirect bribery is not specifically criminalised, the interpretation and application of the

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<sup>40</sup> The information on Switzerland has been taken from the 'Country Review Report of Switzerland, Review by Algeria and Finland for the review cycle 2010-2015, United Nations Office on Drugs and Crime; see also Executive summary on Switzerland, Note by the Secretariat, Reconvened Third Session of the Implementation Review Group, Conference of the States Parties to the United Nations Convention Against Corruption, UN Doc. No. CAC/COSP/IRG/I/2/1/Add.2 (2012).

national anti-corruption laws allows for the prosecution of bribery committed through intermediaries.

3.9.3 Swiss courts have established their jurisdiction in accordance with Article 42 of the UNCAC and recognise the principles of active and passive personality for the exercise of such jurisdiction. Under article 7(1) of the Swiss Criminal Code, felonies and misdemeanors committed outside Swiss territory by or against a person of Swiss nationality also come under Swiss criminal jurisdiction insofar as dual criminality is satisfied. Swiss courts also exercise jurisdiction in cases referred to in sub-paragraph (b) and sub-paragraph (d) of Article 42(2) of the UNCAC. Under exceptional circumstances, criminal jurisdiction can also be established in relation to crimes committed abroad where the alleged offender and the victim are both foreign nationals. These circumstances may relate to crimes that are condemned by the international community or cases where due to the application of the principle of non-refoulement, the extradition request cannot be operationalised.

## **I. United States<sup>41</sup>**

3.10.1 The United States of America (“US”) signed the UNCAC in 2003 and ratified it in 2006. The primary enforcement body for anti-corruption efforts in the US is the Department of Justice (“DOJ”), which checks the bribery of domestic public officials, foreign public officials and officials of public international organisations. The Federal Bureau of Investigations

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<sup>41</sup> The information on United States has been taken from the ‘Country Review Report of the United States of America’, Review by Sweden and the Former Yugoslav Republic of Macedonia for the review cycle 2010-2015, United Nations Office on Drugs and Crime; See also ‘A Resource Guide to the U.S. Foreign Corrupt Practices Act’, Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission (2012), available at <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf>, last visited on 8th August, 2015.

("FBI"), International Anticorruption Unit and the Securities and Exchange Commission ("SEC") assist the DOJ as necessary. The Federal Bribery Statute (18 US Code § 201) under the US Criminal Code and the Foreign Corrupt Practices Act ("FCPA") cover the relevant bribery offences.

3.10.2 In the context of clause (a) of Article 15 of the UNCAC, active bribery of national public officials is penalised under section 201(b)(1) of the Federal Bribery Statute under the US Code. All the elements of clause (a) of Article 15 are covered under the Federal Bribery Statute including "giving, offering or promising anything of value", "directly or indirectly with intention", "any other person or entity", and "to do or omit to do any act in violation of the lawful duty". Different States in the US have enacted their own laws prohibiting corrupt conduct as described under clause (a) of Article 15.

3.10.3 Passive bribery of national public officials as mentioned under clause (b) of Article 15 is penalised under various laws including 18 U.S.C. § 201(b)(2) & 18 U.S.C. § 201(c) (bribery of public officials and witnesses), 18 U.S.C. § 1346 (definition of "scheme or artifice to defraud" another of the intangible right to honest services), 18 U.S.C. § 1951 (interference with Commerce by Threats or Violence – the Hobs Act), 18 U.S.C. § 1952 (Interstate of Foreign Travel in Aid of Racketeering Enterprises) of the US Code. The requisite elements under clause (b) of Article 15 are adequately covered under these laws. Different States have again enacted their own laws to implement the offence under paragraph 2.

3.10.4 Active bribery of foreign public officials and officials of public international organisations under paragraph 1 of Article 16 of the UNCAC is penalised under the FCPA, Title 15, US Code. Additionally, US

federal law enforcement authorities, depending upon the facts and circumstances, can also resort to other federal laws to punish the conduct in question. These laws include Title 18 of United States Code, sections 371 (conspiracy to commit an offence against the United States), 1341 (mail fraud), 1343 (wire fraud), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), and 1956 (money laundering). Keeping a check on active bribery under the FCPA is a significant priority for the DOJ, the FBI and the US SEC. Prosecutions conducted so far under the FCPA involve both individuals and foreign and domestic companies. In the context of foreign nationals, the FCPA applies to a particular transaction only in instances where a portion of the transaction involving misconduct occurs within the territorial jurisdiction of the United States. The FCPA also applies to companies listed on the US stock exchange, as well as the officers, directors, employees, and agents of a listed company, regardless of their nationality.

3.10.5 In the context of paragraph 2 of Article 16 of the UNCAC, the FCPA does not explicitly penalise passive bribery of foreign public officials and officials of public international organisations. This is due to certain policy and jurisdictional concerns. Nevertheless, the US can and has prosecuted foreign officials for money laundering and employees of public international organisations for corruption pursuant to the wire fraud statute.

3.10.6 In the context of Articles 4 and 42 of the UNCAC, US law allows for the exercise of jurisdiction over all acts that violate US law and are committed within US territory. In the context of the offence of active bribery, the FCPA specifically allows for the exercise of jurisdiction over actions committed by US nationals and

businesses abroad. In addition, acts committed in furtherance of a bribe by foreign nationals and foreign businesses within the territory of the U.S. are also covered within the territorial jurisdiction of the US. Dual criminality is recognised and required for extraditing alleged offenders from the US. The defences applicable to a charge of bribery as mentioned under the Securities and Exchange Act of 1934 include (1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official; (2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, and was directly related to (A) the promotion, demonstration, or explanation of products or services; or (B) the execution or performance of a contract with a foreign government or agency thereof.

## **J. United Kingdom<sup>42</sup>**

3.11.1 The United Kingdom of Great Britain and Northern Ireland (“UK”) signed the UNCAC in 2003 and subsequently ratified it in 2006. As noted in its Country Review Report, UK demonstrates an exemplary system of curbing bribery and corruption. The institutional framework for checking corruption in the UK mainly consists of the international anti-corruption Champion that is housed in the Cabinet, the office of the Attorney General for England and Wales, the Crown Prosecution Service (“CPS”) and the Serious Fraud Office (“SFO”) and

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<sup>42</sup> The information on the United Kingdom has been taken from the ‘Country Review Report of the United Kingdom’, Review by Greece and Israel for the review cycle 2011-2012, United Nations Office on Drugs and Crime; See also ‘Self-Assessment for United Nations Convention Against Corruption - Chapters III and IV’, Justin Williams, Policy Adviser, Anti-Corruption, Department for International Development, United Nations Office on Drugs and Crime (2011).

the Serious and Organised Crime Division within the Crown Office.

3.11.2 Both active and passive bribery of national public officials as mentioned under clauses (a) and (b) of Article 15 of the UNCAC, are penalised under sections 1, 2, 3, 5 and 11 of the UK Bribery Act. The Act does not use the concept of a “public official” to describe the beneficiary of the undue and unlawful advantage, thereby dispensing with the need for a definition similar to the one under Article 2 (a) of the UNCAC. Consequently, the Act focuses instead on the “function or activity” to which the bribe relates. This “function or activity” holds relevance for the purpose of applying the Bribery Act to unlawful conduct that is performed outside the UK, thus covering all public servants (such as military or diplomatic staff) within its scope. The elements of the offences of active and passive bribery are discussed in great detail under the relevant provisions of the Bribery Act. They also cover instances where no gift or other benefit is actually given or received. The improper performance of an official function in anticipation or as a consequence of a bribe also constitutes an offence under the Bribery Act. Both tangible and intangible benefits are of relevance for the purpose of the corrupt conduct.

3.11.3 In the context of paragraph 1 of Article 16, the requisite elements of the offence of active bribery are covered under section 6 of the Bribery Act. The conduct implicated includes instances where no gift or other benefit is actually given or received. In contrast to the active and passive bribery of national public officials, section 6 also includes offerings to third parties that are made at the request of a foreign public official or an official of a public international organisation or with his “assent or acquiescence”. Socially adequate gifts and

offerings can be interpreted to not constitute bribery only in the instance where it is determined that they were not intended to influence their recipient. Sanctions for active and passive bribery of national public officials, foreign public officials and officials of public international organisations are the same under the Bribery Act. UK law also does not specifically require the bribery of foreign public officials to constitute an offence under the domestic law of the concerned foreign country.

3.11.4 In the context of paragraph 2 of Article 16 of the UNCAC, UK penalises the passive bribery of foreign public officials and officials of public international organisations under section 2 of the Bribery Act. Under section 2, the acceptance of bribe by *any* person including a foreign public official or an official of a public international organisation constitutes a criminal offence under the Bribery Act. Thus, while there is no specific offence of passive bribery by foreign public officials and officials of public international organisations, the general offence covering passive bribery is applicable to all such officials.

3.11.5 In relation to the jurisdictional clauses under the UNCAC, all acts of corruption committed within the territory of the UK are punishable under the UK criminal law. In addition, jurisdiction is also exercisable over offences committed on board UK ships. In the context of the offence of bribery in particular, section 12 of the Bribery Act also lists out the extended active nationality principle wherein all persons who have “a close connection with the United Kingdom”, including British citizens, individuals ordinarily resident in the UK, bodies incorporated under UK law (including UK subsidiaries of foreign companies) and Scottish partnerships are covered within the scope of application

of the provisions on bribery. The defences applicable to a charge of bribery include (1) the written law that are applicable in the country or territory concerned, (2) bona-fide expenditure including travel, which is related to promotional activities and (3) due diligence by companies that ensures that none of its employees, agents or any other associated persons are involved in the act of bribery.

3.11.6 In the light of the above discussion, it can be inferred that legislations in various jurisdictions that attempt to penalise active and passive bribery under Article 16 of the UNCAC, do so with caution in order to preserve harmonious diplomatic ties. The 10 countries surveyed have criminalised active bribery of foreign public officials and officials of public international organisations under paragraph 1 of 16 of the UNCAC. However, in the context of paragraph 2 of Article 16, only two countries (Malaysia and Switzerland) have a specific provision under its bribery law on paragraph 2 of Article 16. Of the remaining 8 countries, three (Australia, Canada, and El Salvador) do not penalise passive bribery of foreign public officials and officials of public international organisations under any circumstances, while five (Austria, South Africa, South Korea, UK and USA) have general provisions applicable to all persons which can be construed to cover passive bribery of foreign public officials and officials of public international organisations. Principles of nationality and territoriality under Article 42 read with Article 4 of the UNCAC are followed in all countries except El Salvador, where the overall application of these principles is not clear.

## CHAPTER IV

### **CRITICAL ANALYSIS OF THE PREVENTION OF BRIBERY OF FOREIGN PUBLIC OFFICIALS AND OFFICIALS OF PUBLIC INTERNATIONAL ORGANISATIONS BILL, 2015**

4.1 The Prevention of Bribery of Foreign Public Officials and Officials of Public International Organisations Bill, 2015 (“the 2015 Bill”) has been enacted in pursuance of Article 16 of the UNCAC which India signed on 9 December 2005 and ratified on 9 May 2011. The intention of the 2015 Bill is to serve as a composite legislation that contains provisions in pursuance of both Article 16(1) [active bribery] as well as Article 16(2) [passive bribery] of the UNCAC. By clause 1(2), it establishes applicability both on the basis of the territorial principle as well as the nationality principle. It has three key parts—

4.2 *First*, the offences established under the Bill; *second*, the processes for investigation and prosecution of such offences; *third*, the inter-relation of the Bill with other legislations and miscellaneous matters.

4.3 Clauses 3 and 4 of the Bill contain its main offences. Clause 3, enacted in pursuance of Article 16(2), broadly stated, makes bribe-taking by a foreign public official or official of a public international organisation punishable. Clause 4, enacted in pursuance of Article 16(1), makes giving of bribes to a foreign public official or official of a public international organisation punishable. However, an exception to the operation of clause 4 is carved out for commercial organisations if the expenses were reasonable and related to promotion, performance of a contract or the

organisation had adequate procedures to prevent persons from engaging in such conduct.

4.4 The key requirement to establish both offences is the existence of an undue advantage. In clause 3, the foreign public official or official of a public international organisation must obtain an undue advantage from what he accepts; analogously, in clause 4, the bribe-giver must give an undue advantage to a foreign public official or official of a public international organisation. Further, in clause 4, the bribe must be given to obtain an advantage relating to the conduct of international business. Attempts to take or give bribes as well as abetment of the commission of such offences are punishable under clause 5.

4.5 Clauses 6 to 12 deal with the processes that will be followed in prosecuting offences under the Bill. They are premised on the understanding that the Bill will have extra-territorial application and thus require agreements with foreign countries for enforcement. Accordingly, clause 6 empowers the Central Government to enter into such agreements for enforcement as well as exchange of information. Clause 7 deems offences under this Bill to be extraditable in all extradition treaties signed by India. Clauses 8 to 12 deal with processes pertaining to exchange of information and international co-operation pertaining to a particular case.

4.6 Clauses 13 to 19 and 22 provide for the inter-relation between the Bill and other legislations, including any consequent amendments that are provided in the Schedule to the Bill. Additionally, clause 16 provides for appellate and revisional powers of the High Court from decisions of the Special Judge who is the adjudicating authority under this 2015 Bill. Clauses

20 and 21 deal with the scope and procedure for delegated legislation under the 2015 Bill.

4.7 A clause-by-clause analysis of the 2015 Bill has been conducted hereafter. Each provision of the proposed 2015 Bill is also tested against relevant provisions of UNCAC, and wherever necessary, compared with similar laws in other jurisdictions.

## **5. Clause-by-Clause Analysis of the Prevention of Bribery of Foreign Public Officials and Officials of Public International Organisations Bill, 2015**

### ***A. Preamble***

*Analysis and comment:*

5.1.1 The Preamble of the 2015 Bill is unduly long, and repeats the text of Resolution 58/4 of 31<sup>st</sup> October, 2003 that was adopted by the UN General Assembly (to which the UNCAC was annexed). This repetition is not necessary. Instead, it will be sufficient to capture India's main obligations under the UNCAC in brief.

5.1.2 *Suggested draft:*

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*to prevent corruption in relation to bribery of foreign public officials and officials of public international organisations and for matters connected therewith or incidental thereto.*

WHEREAS India has signed the United Nations Convention Against Corruption on 9<sup>th</sup> December, 2005, and ratified the same on 9<sup>th</sup> May, 2011;

AND WHEREAS this Convention expresses concern about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardising sustainable development and the rule of law; and about cases of corruption that involve vast quantities of assets, which may constitute a substantial portion of the resources of States, and that threaten the political stability and sustainable development of those States;

AND WHEREAS in terms of Article 16 of this Convention, each State Party is required to adopt such legislative and other measures, as may be necessary to establish the bribery of foreign public officials and officials of public international organisations, as a criminal offence.

### ***B. Clause 1***

*Analysis and comment:*

5.2.1 Clauses 1(1) and 1(3) may be retained as they are.

5.2.2 However, there are concerns with clause 1(2). In particular, clause 1(2)(c), which attempts to extend the jurisdiction of this law to “persons on an aircraft or ship registered outside India but for the time being in or over India”, is extremely broad in its application, and may not be consistent with the principles of sovereignty envisaged by Article 4 (‘Protection of Sovereignty’) of the UNCAC. Article 4(1) of the UNCAC requires that States Parties to the UNCAC will carry out their obligations under the Convention “in a manner consistent with principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic

affairs of other States”. Article 4(2) further clarifies that under the UNCAC, a State Party cannot exercise jurisdiction or perform functions that are “reserved exclusively for the authorities of another State by its domestic law”. In light of these provisions, clause 1(2) must be redrafted to clarify the circumstances in which the conduct constituting an offence under this Act may fall under the jurisdiction of Indian law.

5.2.3 Further, clause 1(2)(d)(ii) contains two terms that are unclear and not defined, i.e., “place of business” and “ordinary residence in India”, which can lead to concerns during interpretation and applicability.

5.2.4 *Suggested draft:*

**1. Short title, extent and commencement.**

(1) This Act may be called the Prevention of Bribery of Foreign Public Officials and Officials of Public International Organisations Act, 2015.

(2) It extends to the whole of India, and applies –

(a) when the conduct constituting the offence under the Act occurs:

(i) wholly or partly in India; or

(ii) wholly or partly on board an aircraft or ship registered in India at the time of the commission of the offence;

(b) when the conduct constituting the offence under the Act occurs wholly outside India, and the offence is committed by:

(i) a person who is an Indian citizen;

(ii) a person who is a permanent resident of India; or

- (iii) a person that is a body corporate incorporated by or under the laws of India.

*Explanation 1:* For the purposes of clause (b), the expression “permanent resident” shall have the same meaning as assigned to it under the Income Tax Act, 1961 (43 of 1961).

*Explanation 2:* When the conduct constituting an offence occurs wholly outside India, no proceedings under this Act shall commence without the previous sanction of the Central Government.

(3) It shall come into force on such date as the Central Government may, by notification, appoint; and different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

### **C. Clause 2**

*Analysis and comment:*

5.3.1 The definition of an “agent” under clause 2(1)(a) now appears once in the redrafted Bill as recommended by the Commission (see comment on clause 4). Accordingly, this definition should be deleted from here and instead incorporated in the appropriate location.

5.3.2 Clause 2(1)(b) may be retained as it is.

5.3.3 Clause 2(1)(c) “contracting State”: This definition is unnecessary, and may be deleted. The term “contracting State” is used in multiple clauses of the 2015 Bill. If this term is retained, it will imply that any proceeding under this law will not be able to proceed until a reciprocal arrangement with the State in

question is entered into. Retaining this definition, thus, may entail undue procedural delays. Instead, it is recommended that the term be replaced by the term “concerned State” in the relevant clauses, which will be interpreted appropriately as required by the circumstances.

5.3.4 Clause 2(1)(d) “foreign country”: This definition seems deficient and incomplete. It proceeds to define a foreign country only on the basis of government, without having any reference whatsoever to territory. Guidance may be taken from other statutes, such as the Canadian Corruption of Foreign Public Officials Act 1998, to provide, firstly, that foreign country means “any country other than India”, and thereafter, include sub-divisions of government.

5.3.5 Clause 2(1)(e) “foreign public official”: This is a verbatim reproduction of the definition of the term in Article 2(b) of the UNCAC. However, the terms “public agency” and “public enterprise” are rather vague and not defined. The Department-related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, in its Fiftieth Report on the 2011 version of the 2013 Bill, presented to the Rajya Sabha on 29 March 2012, had raised similar concerns. The Standing Committee pointed out (in para 5.22A of its Report) that phrases like “public agency” and “public enterprise” are “vital definitional variables”. The absence of definitional clarity in these provisions could potentially lead to “confusion in interpretation and application”, and recommended that these phrases be defined further. The redrafted version of this definition will address these concerns of the Standing Committee as well.

5.3.6 There is also no need to include “official or agent of a public international organisation” in this definition, as that term is defined separately in clause 2(1)(g).

5.3.7 Clause 2(1)(f) and 2(1)(g) may be retained as they are.

5.3.8 Clause 2(1)(h) “public international organisation”: This definition is a reproduction of the Australian Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999. However, a shorter and more focused definition can be used, as based on the UK Bribery Act 2010.

5.3.9 Clause 2(1)(j) “undue advantage”: This definition *per se* is adequate. However, clauses 2(1)(j)(i) and (ii) attempt to incorporate the offence itself into the definition, which is inappropriate. Therefore, clauses 2(1)(j)(i) and (ii) should be deleted. Instead, an explanation may be added to clarify the concept of “legal remuneration” consistent with the meaning assigned to it under the Prevention of Corruption Act, 1988.

5.3.10 *Suggested draft:*

Clause 2(1)(a) should be deleted.

Clause 2(1)(c) should be deleted.

Clause 2(1)(d): “foreign country” means a country other than India, and includes:

(i) any political subdivision of that country;

(ii) the government, and any department or branch of government, of that country or of a political subdivision of that country; and

- (iii) any agency of that country or of a political subdivision of that country;

Clause 2(1)(e): “foreign public official” means:

- (i) a person who holds a legislative, executive, administrative or judicial position of a foreign country; or
- (ii) a person who performs public duties or public functions for a foreign country, including a person employed by a board, commission, corporation or other body or authority that is established to perform such duty or function on behalf of the foreign country, or is performing such duty or function;

*Explanation:* For the purpose of this definition:

- (A) “public duty” means a duty in the discharge of which the State, the public or the community at large has an interest; and
- (B) “public function” means an act or duty of a foreign public official in his capacity as such;

Clause 2(1)(h): “public international organisation” means an organisation whose members are any of the following:

- (i) countries or territories;
- (ii) governments of countries or territories;
- (iii) other public international organisations; or
- (iv) a mixture of any of the above.

Clause 2(1)(j): “undue advantage” means any gratification, benefit or advantage, property or interest in such property, reward, fee, valuable security or gift or any other valuable thing (other than legal remuneration), whether pecuniary or non-pecuniary, tangible or intangible.

*Explanation:* For the purpose of this definition, “legal remuneration” is not restricted to remuneration paid to a foreign public official or official of a public international organisation, but includes all remuneration which he is permitted to receive by the foreign country or the public international organisation which he serves.

### **D. Clause 3**

*Analysis and comment:*

5.4.1 This clause addresses the offence of passive bribery as provided under Article 16(2) of the UNCAC. It is relevant to recall the discussion in chapters 2 and 3 of this Report, where it is pointed out that Article 16(2) merely requires States Parties to the UNCAC to *consider* criminalising the solicitation or acceptance of bribes by foreign public officials and officials of public international organisations. In this regard, Article 16(2) is not a mandatory requirement but a directory provision. Of the countries surveyed by us, no other country, besides Malaysia and Switzerland, has passed a law pertaining to Article 16(2).

5.4.2 It is also relevant to consider the principles of sovereignty laid down in Article 4 of the UNCAC, under which a domestic law cannot be applicable outside the territory of the country where it is enacted. In this case, in light of the redrafted clause 1(2) recommended by the

Commission above, a foreign public official or an official of a public international organisation accused of passive bribery would be prosecuted in India under clause 3 only if the offence is committed wholly or partly in India. This would be further subject to the waiver of diplomatic immunities by the concerned foreign country or public international organisation. Even the relevant laws in Malaysia and Switzerland do not contain any specific provision to prosecute foreign public officials or officials of public international organisations when the offence has taken place outside their country.

5.4.3 Accordingly, the necessity of retaining clause 3 may be reconsidered. In the alternative, as suggested above, in light of the proposed redraft of clause 1(2), clause 3 will be applicable only to an act of passive bribery that has taken place wholly or partly in India, or on board an aircraft or ship registered in India at the time of the commission of the offence.

5.4.5 Further, clause 3 as presently drafted makes the offence of “attempt” to obtain undue advantage punishable with the same duration of imprisonment as the offence itself. However, the offence of “attempt” is now captured in a separate provision in the redrafted version of the 2015 Bill (see comment on clause 5), with a lesser duration of imprisonment. Therefore, the words “or attempts to obtain” may be deleted from here.

5.4.6 *Suggested draft:*

**3. Prohibition for accepting gratification by foreign public officials or officials of public international organisations.**

Whoever, being a foreign public official or official of public international organisation, intentionally

accepts or obtains or agrees to accept from any person, for himself or for any other person or entity, any undue advantage other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person or entity for rendering or attempting to render any service or disservice to any person or entity, shall be punishable with imprisonment which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

#### ***E. Clause 4***

##### *Analysis and comment:*

5.5.1 Clause 4(1) may be retained as it is. However, there are several concerns with the remainder of the provision.

5.5.2 In the first place, the proviso to clause 4(1) seeks to carve out defences/exceptions to an offence under clause 4(1). Therefore, it should not be in the form of a proviso, but should be a substantive provision in its own right.

5.5.3 The proviso is drafted to suggest that this defence/exception is only available to a commercial organisation and not to any person generally. That is not a desired position, and in fact, this defence/exception should apply to every “person”, the meaning of which term includes a commercial organisation.

5.5.4 Further, the proviso, in being attached to clause 4(1), also suggests that the defence/exception is

applicable only to an offence under clause 4, whereas it ought to be a general defence/exception for all offences under this law, including the abetment or attempt of any such offence.

5.5.5 Expressions such as “adequate procedures” used in the proviso to clause 4(1), and “guidelines” used in clause 4(2), appear to have been borrowed from the scheme recommended by the Commission in its 254th Report<sup>43</sup> on the Prevention of Corruption (Amendment) Bill, 2013 (“the 2013 Bill”). As per the proviso to clause 8 of the 2013 Bill, where an offence relating to bribing a public servant has been committed by a commercial organisation, such commercial organisation is punishable with a fine. Clause 9 of the 2013 Bill further provides that a commercial organisation may also be guilty and punishable with fine, if any person *associated* with the commercial organisation offers, promises or gives an undue advantage to a public servant. However, when such an associated person is guilty, the commercial organisation may not be liable if it can prove that it had in place adequate procedures designed to prevent persons associated with it from undertaking such conduct. Clause 10 of the 2013 Bill further provides that where an offence is proved to have been committed with the consent or connivance of any director, manager, secretary or other officer of the commercial organisation, such officer shall also be guilty of the offence, punishable with imprisonment and fine. Clause 9(5) of the 2013 Bill additionally requires the Central Government to prescribe guidelines about adequate procedures that can be adopted by commercial organisations in connection with preventing such bribery.

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<sup>43</sup> 254<sup>th</sup> Report, p. 35.

5.5.6 Merely transferring selected provisions from this scheme recommended by the Commission for the 2013 Bill will not be workable in this case in the 2015 Bill, unless the entire scheme of the 2013 Bill is fully incorporated in the present 2015 Bill. In fact, in the existing draft contained in clause 4 of the 2015 Bill, it would mean that a commercial organisation would be free from liability merely by showing that adequate procedures were put in place. This would not be in compliance with the requirements of Article 16 of the UNCAC.

5.5.7 The Commission, therefore, recommends that the entire scheme as recommended in its 254<sup>th</sup> Report in connection with the Prevention of Corruption (Amendment) Bill, 2013, should be incorporated into the 2015 Bill as well. This is provided as a new clause 8 of the redrafted Bill.

5.5.8 The explanation in proviso (b) to clause 4(1) clarifying the expression “undue advantage” is unclear and not properly worded. Instead, it is recommended that the explanation be redrafted as a defence/exception.

5.5.9 A comprehensive list of defences/exceptions under this law must also necessarily include a provision for “routine government function”, which will take into account payments made in the course of routine duties or functions of foreign public officials or officials of public international organisations for the purpose of issuing permits or licenses, processing official documents, and similar services. This defence/exception is available and acknowledged in most other jurisdictions, and a version of the same may be included here.

5.5.10 Accordingly, there should be a separate provision on defences/exceptions available against any offence listed in the law. This separate provision may be placed after all the offences are listed out. Based on the recommendations of the Commission regarding clause 5, this new provision on defences will appear as clause 7 of the redrafted Bill.

5.5.11 *Suggested draft:*

**4. Prohibition for giving gratification to foreign public official or officials of public international organisations.**

Whoever, in relation to the conduct of international business in order to obtain or retain business or to obtain any advantage relating thereto, intentionally, offers or promises to offer, gives or promises to give, directly or indirectly, any undue advantage, to any foreign public official or official of public international organisation, for himself or herself or for another person or entity, in order that such official, act or refrain from acting in the exercise of his or her official duties, shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

**7. Persons not guilty of offence in certain circumstances.**

(1) No person is guilty of an offence under this Act if the offer, promise or giving of any advantage, which was made to a foreign public official or official of a public international organisation, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of such foreign public official or official of a

public international organisation and was directly related to:

- (a) the promotion, demonstration, or explanation of products or services; or
- (b) the execution or performance of a contract with a foreign country or public international organisation.

(2) No person is guilty of an offence under this Act if the offer, promise or giving of any advantage is permitted under the laws of the foreign country or public international organization for which the foreign public official or official of a public international organisation performs duties or functions.

(3) No person is guilty of an offence under this Act if the offer, promise or giving of any advantage, is made to expedite or secure the performance by a foreign public official or official of a public international organisation of any act of a routine nature that is part of the duties or functions of the foreign public official or official of the public international organisation, such as:

- (a) the issuance of a permit, licence or other document to qualify a person to do business;
- (b) the processing of official documents, such as visas and work permits;
- (c) the provision of services normally offered to the public, such as mail pick-up and delivery, telecommunication services and power and water supply; and

(d) the provision of services normally provided as required, such as police protection, loading and unloading of cargo, the protection of perishable products or commodities from deterioration or the scheduling of inspections related to contract performance or transit of goods.

*Explanation:* For removal of doubts, it is clarified that a decision about whether to award new business; or to continue existing business with a particular person; or the terms of such new or existing business; shall not be regarded as any act of a routine nature for the purpose of sub-section (3).

### **8. Liability of commercial organisations for offences under this Act.**

(1) When an offence under this Act has been committed by a commercial organisation, such commercial organisation shall be punishable with fine.

(2) Where an offence under this Act is committed by a commercial organisation, and such offence is proved to have been committed with the consent or connivance of any director, manager, secretary or other officer of the commercial organisation, such director, manager, secretary or other officer shall be guilty of the offence and shall be liable to be proceeded against and punishable with imprisonment which shall not be less than the punishment prescribed for such offence under this Act.

(3) When an offence under this Act is committed by any person associated with the commercial organisation, the commercial organisation shall be

guilty of an offence and shall be punishable with fine:

*Provided* that it shall be a defence for the commercial organisation to prove that it had in place adequate procedures designed to prevent persons associated with it from undertaking such conduct.

(4) The Central Government may, with a view to enhancing compliance with this section by commercial organisations, prescribe such guidelines about adequate procedures as may be necessary, following a consultation process in which the views of all the interested stakeholders are obtained through public notice.

(5) For the purposes of this section:

(a) “commercial organisation” means:

- (i) a body which is incorporated in India and which carries on a business, whether in India or outside India;
- (ii) any other body which is incorporated outside India and which carries on a business, or a part of a business, in any part of India;
- (iii) a partnership firm or any association of persons formed in India and which carries on a business, whether in India or outside India; or
- (iv) any other partnership or association of persons which is formed outside India and which carries on a business, or part of a business, in any part of India;

(b) “business” includes a trade or profession or providing service including charitable service;

(c) a person is said to be associated with the commercial organisation if, disregarding any conduct constituting an offence under this Act, such person is a person who performs services for or on behalf of the commercial organisation.

*Explanation 1:* The capacity in which the person performs services for or on behalf of the commercial organisation shall not matter irrespective of whether such person is an employee or agent or subsidiary of such commercial organisation.

*Explanation 2:* For the purpose of this section, the term “agent” shall have the same meaning as assigned to it under section 182 of the Indian Contract Act, 1872 (9 of 1872).

*Explanation 3:* Whether or not the person is a person who performs services for or on behalf of the commercial organisation is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between such person and the commercial organisation.

*Explanation 4:* If the person is an employee of the commercial organisation, it shall be presumed unless the contrary is proved that such person is a person who performs services for or on behalf of the commercial organisation.

## **F. Clause 5**

*Analysis and comment:*

5.6.1 The language of this provision is confusing, as it combines the offences of “abatement” and “attempt”. Since the ingredients for these offences differ, it is recommended that this provision be split into two separate provisions, detailing each offence separately. Further, the penalty for the offence of attempt must be less than the penalty for the offence itself.

5.6.2 *Suggested draft:*

### **5. Abetment.**

Whoever abets the commission of an offence under section 3 or section 4 of this Act shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

### **6. Attempt.**

Whoever attempts to commit an offence under section 3 or section 4 of this Act shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to three years and shall also be liable to fine.

## **G. Clause 6**

*Analysis and comment:*

5.7.1 This provision has been inserted in context of India’s declaration regarding the applicability of Articles 45 and 46 of the UNCAC (see discussion in chapter 2 of this Report). At the time of ratification of the UNCAC,

India declared, by way of a Notification, that “international cooperation for mutual legal assistance under Articles 45 and 46 of the Convention shall be afforded through applicable bilateral Agreements”, and in cases where a bilateral agreement does not cover the mutual legal assistance sought by the requesting State, it shall be provided under the Convention “on reciprocal basis”. Clause 6(1) captures this situation. However, clause 6(2) is not required, and may be deleted. The provision will also be renumbered, in accordance with the revised draft.

5.7.2 *Suggested draft:*

**9. Agreements with foreign countries**

The Central Government may enter into an agreement with the Government of any country outside India for—

- (a) enforcing the provisions of this Act;
- (b) exchange of information for the prevention of any offence under this Act or under the corresponding law in force in that country or investigation of cases relating to any offence under this Act, and may, by notification, make such provisions as may be necessary for implementing the agreement (including mutual assistance).

**H. Clause 7**

*Analysis and comment:*

5.8.1 This provision attempts to unilaterally amend all extradition treaties that India has entered

into with other countries, to deem offences under this law as extraditable offences. This is in violation of Article 39 of the Vienna Convention of the Law on Treaties which provides that a treaty may be amended only by agreement between the parties to the treaty (and not by domestic legislation).

5.8.2 Further, Paragraphs (4), (5) and (7) of Article 44 of the UNCAC (“Extradition”) already deem all offences under the UNCAC to be offences that are extraditable. The Indian law makes the offences under the UNCAC punishable under domestic law, and in context of the same, this provision is redundant, and not required.

5.8.3 *Suggested draft:*

This provision should be deleted.

## **I. Clause 8**

*Analysis and comment:*

5.9.1 The Commission has recommended that the definition of the term “contracting State” be deleted from clause 2(1)(c) (see clause 2). For the purpose of this provision, therefore, the term “contracting State” should be replaced with “concerned State”, which will be interpreted appropriately as required by the circumstances. The provision will also be renumbered, in accordance with the revised draft.

5.9.2 *Suggested draft:*

### **10. Letter of request to a concerned State in certain cases.**

(1) Notwithstanding anything contained in this Act or the Code of Criminal Procedure, 1973 (2 of 1974), if, in the course of an investigation into an offence or other proceedings under this Act, an application is made to a Special Judge by the Investigating Officer or any officer superior in rank to the Investigating Officer that any evidence is

required in connection with investigation into an offence or proceedings under this Act and he is of the opinion that such evidence may be available in any place in a concerned State, and the Special Judge, on being satisfied that such evidence is required in connection with the investigation into an offence or proceedings under this Act, may issue a letter of request to a court or an authority in the concerned State competent to deal with such request to—

(i) examine facts and circumstances of the case,

(ii) take such steps as the Special Judge may specify in such letter of request, and

(iii) forward all the evidence so taken or collected to the Special Judge issuing such letter of request.

(2) The letter of request shall be transmitted in such manner as the Central Government may specify in this behalf.

(3) Every statement recorded or document or thing received under sub-section (1) shall be deemed to be the evidence collected during the course of investigation.

## **J. Clause 9**

*Analysis and comment:*

5.10.1 The Commission has recommended that the definition of the term “contracting State” be deleted from clause 2(1)(c) (see clause 2). For the purpose of this provision, therefore, the term “contracting State” should be replaced with “concerned State”, which will be interpreted appropriately as required by the circumstances. The provision will also be renumbered, in accordance with the revised draft.

5.10.2 *Suggested draft:*

## **11. Assistance to a concerned State in certain cases.**

Where a letter of request is received by the Central Government from a court or an authority in a concerned State requesting for investigation into an offence or proceedings under this Act and forwarding to such court or authority any evidence connected therewith, the Central Government may forward such letter of request to the Special Judge or to any authority under the Act, as it thinks fit, for execution of such request in accordance with the provisions of this Act or, as the case may be, any other law for the time being in force.

### **K. Clause 10**

*Analysis and comment:*

5.11.1 The Commission has recommended that the definition of the term “contracting State” be deleted from clause 2(1)(c) (see clause 2 above). For the purpose of this provision, therefore, the term “contracting State” should be replaced with “concerned State”, which will be interpreted appropriately as required by the circumstances. The provision will also be renumbered, in accordance with the revised draft.

5.11.2 *Suggested draft:*

### **12. Reciprocal arrangements for processes and assistance for transfer of accused persons.**

(1) Where a Special Judge, in relation to an offence punishable under section 3 or section 4, desires —

- (a) a summons to an accused person; or
- (b) a warrant for the arrest of an accused person; or
- (c) a summons to any person requiring him to attend and produce a document or other thing or to produce it; or
- (d) a search warrant,

issued by it shall be served or executed at any place in any concerned State, it shall send such summons or warrant in duplicate in such form, to such court, Judge or Magistrate through such authorities, as the Central Government may, by notification, specify in this behalf and that court, Judge or Magistrate, as the case may be, shall cause the same to be executed.

(2) Where a Special Judge, in relation to an offence punishable under section 4 has received for service or execution—

(a) a summons to an accused person; or

(b) a warrant for the arrest of an accused person; or

(c) a summons to any person requiring him to attend and produce a document or other thing, or to produce it; or

(d) a search warrant,

issued by a court, Judge or Magistrate in a concerned State, it shall, cause the same to be served or executed as if it were a summons or warrant received by it from another court in the said territories for service or execution within its local jurisdiction; and where—

(i) a warrant of arrest has been executed, the person arrested shall be dealt with in accordance with the procedure specified under the Code of Criminal Procedure, 1973 (2 of 1974);

(ii) a search warrant has been executed, the things found in this search shall, so far as possible, be dealt with in accordance with the procedure specified under the Code of Criminal Procedure, 1973 (2 of 1974):

Provided that in a case where a summon or search warrant received from a concerned State has been executed, the documents or

other things produced or things found in the search shall be forwarded to the court issuing the summon or search warrant through such authority as the Central Government may, by notification, specify in this behalf.

(3) Where a person transferred to a concerned State pursuant to sub-section (2) is a prisoner in India, the Special Judge or the Central Government may impose such conditions as that court or Government deems fit.

(4) Where the person transferred to India pursuant to sub-section (1) is a prisoner in a concerned State, the Special Judge in India shall ensure that the conditions subject to which the prisoner is transferred to India are complied with and such prisoner shall be kept in such custody subject to such conditions as the Central Government may direct in writing.

#### **L. Clause 11**

*Analysis and comment:*

5.12.1 The Commission has recommended that the definition of the term “contracting State” be deleted from clause 2(1)(c) (see clause 2). For the purpose of this provision, therefore, the term “contracting State” should be replaced with “concerned State”, which will be interpreted appropriately as required by the circumstances. The provision will also be renumbered, in accordance with the revised draft.

5.12.2 *Suggested draft:*

#### **13. Procedure in respect of letter of request.**

Every letter of request, summons or warrant, received by the Central Government from, and every letter of request, summons or warrant, to be transmitted to a concerned State under this Chapter shall be transmitted to a concerned State

or, as the case may be, sent to the concerned court in India in such form and in such manner as the Central Government may, by notification, specify in this behalf.

### **M.Clause 12**

*Analysis and comment:*

5.13.1 The Commission has recommended that the definition of the term “contracting State” be deleted from clause 2(1)(c) (see clause 2 above). For the purpose of this provision, therefore, the term “contracting State” should be replaced with “concerned State”, which will be interpreted appropriately as required by the circumstances. The provision will also be renumbered, in accordance with the revised draft.

5.13.2 *Suggested draft:*

### **13. Attachment, seizure and confiscation, etc. of property in a concerned State or India.**

(1) Where the property is suspected to be in a concerned State, the Special Judge, on an application by an officer authorised by the Central Government, may issue a letter of request to a court or an authority in the concerned State for execution of attachment or confiscation of the property in the concerned State.

(2) Where a letter of request is received by the Central Government from a court or an authority in a concerned State requesting attachment or confiscation of the property in India, derived or obtained, directly or indirectly, by any person from the commission of an offence under section 3 or section 4 committed in that concerned State, the Central Government may forward such letter of request to the Special Judge for execution in accordance with the provisions of this Act.

(3) The Special Judge shall, on receipt of a letter of request under sub-section (2), direct any authority to take all steps necessary for tracing and identifying such property.

(4) The steps referred to in sub-section (3) may include any inquiry, investigation or survey in respect of any person, place, property, assets, documents, books of account in any bank or public financial institutions or any other relevant matters.

(5) Any inquiry, investigation or survey referred to in sub-section (4) shall be carried out by an authority mentioned in sub-section (3) in accordance with such directions issued in accordance with the provisions of this Act.

#### **N. Clause 13**

*Analysis and comment:*

5.14 This provision may be retained as it is. The provision will also be renumbered, in accordance with the revised draft.

#### **O. Clause 14**

*Analysis and comment:*

5.15 This provision may be retained as it is. The provision will also be renumbered, in accordance with the revised draft.

#### **P. Clause 15**

*Analysis and comment:*

5.16 This provision may be retained as it is. The provision will also be renumbered, in accordance with the revised draft.

#### **Q. Clause 16**

*Analysis and comment:*

5.17 This provision may be retained as it is. The provision will also be renumbered, in accordance with the revised draft.

### **R. Clause 17**

*Analysis and comment:*

5.18.1 The latter part of this provision, which states that “nothing contained herein shall exempt any foreign public official or official of public international organisation from any proceeding which might, apart from this Act, be instituted against him”, is unnecessary, and may be deleted. The provision will also be renumbered, in accordance with the revised draft.

5.18.2 *Suggested draft:*

#### **19. Act to be in addition to any other law.**

The provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being in force.

### **S. Clause 18**

*Analysis and comment:*

5.19.1 This provision will apply only if the conduct constituting the offence takes place wholly or partly in India, and in this regard, its presence is guided by the necessity of clause 3 of the 2015 Bill. If clause 3 is deleted (see clause 3), this provision may also be deleted. In any event in light of the recommendation of the Commission to delete the definition of the term “contracting State” from clause 2(1)(c) (see clause 2), the term “contracting State” should be replaced with “concerned State”, which will be interpreted appropriately as required by the circumstances. The provision will also be renumbered, in accordance with the revised draft.

5.19.2 *Suggested draft:*

If retained the suggested draft would be as follows:

**20. Proceedings under this Act to be taken in consultation with concerned State against foreign public official to whom privileges and immunities under any law or Convention or treaty apply.**

In case any foreign public official or official of public international organisation is alleged to have committed an offence under this Act to whom certain privileges and immunities applies under the United Nations (Privileges and Immunities) Act, 1947 or the International Finance Corporation (Status, Immunities and Privileges) Act, 1958, or the International Development Association (Status, Immunities and Privileges) Act, 1960, or the Diplomatic Relations (Vienna Convention) Act, 1972, or under any other law for the time being in force or under any Convention or treaty, the Central Government shall, in consultation with the concerned State or public international organisation, as the case may be, take adequate measures for proceeding under this Act against such public official.

**T. Clause 19**

*Analysis and comment:*

5.20 This provision may be retained as it is. The provision will also be renumbered, in accordance with the revised draft.

**U. Clause 20**

*Analysis and comment:*

5.21.1 This provision will be retained as it is, except that the reference to clause 4(2) will be corrected to refer to the (new) clause 8(4). The provision will also be renumbered, in accordance with the revised draft

5.21.2 *Suggested draft:*

**22. Power to make rules.**

(1) The Central Government may, by notification, make rules for carrying out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:

(a) framing of guidelines to enhance compliance with the provisions of section 8 by the commercial organizations under subsection (4) of section 8;

(b) any other matter which is to be, or may be, prescribed, or in respect of which provision is to be, or may be, made by rules.

**V. Clause 21**

*Analysis and comment:*

5.22 This provision may be retained as it is. The provision will also be renumbered, in accordance with the revised draft.

**W.Clause 22**

*Analysis and comment:*

5.23 This provision may be retained as it is. The provision will also be renumbered, in accordance with the revised draft.

**X. Schedule**

*Analysis and comment:*

5.24.1 The reference to the relevant provision dealing with the amendment of certain enactments should be corrected to refer to the correct provision as renumbered and provided in the recommended draft of the Commission.

5.24.2 Part II of the Schedule dealing with the Amendment of the Schedule of the Prevention of Money-Laundering Act, 2002 (15 of 2003), will change in accordance with the revised scheme for offences, separating the offence for abetment and attempt, as recommended by the Commission.

5.24.3 *Suggested draft:*

THE SCHEDULE  
(See Section 24)  
AMENDMENT OF CERTAIN ENACTMENTS  
PART I  
THE PREVENTION OF CORRUPTION ACT, 1988  
(49 of 1988)

**Amendment to Section 3**

In section 3, in sub-section (1), in clause (a), for the words “any offence punishable under this Act”, the words and figures “any offence punishable under this Act or the Prevention of Bribery of Foreign Public Officials and Officials of Public International Organisations Act, 2015” shall be substituted.

PART II  
THE PREVENTION OF MONEY LAUNDERING ACT, 2002  
(15 of 2003)

**Amendment of Schedule**

In the Schedule, in Part A, after paragraph 8, the following paragraph shall be inserted, namely:-

“Paragraph **8A**”

The Prevention of Bribery of Foreign Public Officials and Officials of Public International Organisations Act, 2015.

<b>Section</b>	<b>Description of Offences</b>
3	Prohibition for accepting gratification by a Foreign Public Official or an Official of a Public International Organisation
4	Prohibition for giving gratification to a Foreign Public Official or an Official of a Public International Organisation
5	Abetment
6	Attempt

**Sd/-**  
**[Justice A.P. Shah]**  
**Chairman**

**Sd/-**  
**[Justice S.N. Kapoor]**  
**Member**

**Sd/-**  
**[Prof. (Dr.) Mool Chand Sharma]**  
**Member**

**Sd/-**  
**[Justice Usha Mehra]**  
**Member**

**Sd/-**  
**[P.K. Malhotra]**  
**Member (Ex-officio)**

**Sd/-**  
**[Dr. Sanjay Singh]**  
**Member (Ex-officio)**

**[Dr. G. Narayana Raju]**  
**Member-Secretary**

**Annexure**

**REVISED DRAFT OF THE PREVENTION OF BRIBERY OF FOREIGN PUBLIC  
OFFICIALS AND OFFICIALS OF PUBLIC INTERNATIONAL ORGANISATIONS  
BILL, 2015**

Having regard to the discussion and amendments proposed to the 2015 Bill, the Commission suggests the following revised draft of the Prevention of Bribery of Foreign Public Officials and Officials of Public International Organisations Bill, 2015.

**THE PREVENTION OF BRIBERY OF FOREIGN PUBLIC  
OFFICIALS AND OFFICIALS OF PUBLIC INTERNATIONAL  
ORGANISATIONS BILL, 2015**

A

BILL

*to prevent corruption in relation to bribery of foreign public officials and officials of public international organisations and for matters connected therewith or incidental thereto.*

WHEREAS India has signed the United Nations Convention Against Corruption on 9<sup>th</sup> December, 2005 and ratified the same on 9<sup>th</sup> May, 2011;

AND WHEREAS this Convention expresses concern about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardising sustainable development and the rule of law; and about cases of corruption that involve vast quantities of assets, which may constitute a substantial portion of the resources of States, and that threaten the political stability and sustainable development of those States;

AND WHEREAS in terms of Article 16 of this Convention, each State Party is required to adopt such legislative and other measures, as may be necessary to establish the bribery of foreign public officials and officials of public international organisations, as a criminal offence.

BE it enacted by Parliament in the Sixty-sixth Year of the  
Republic of India as follows:-

## **CHAPTER I**

### **PRELIMINARY**

#### **1. Short title, extent and commencement.**

(1) This Act may be called the Prevention of Bribery of Foreign Public Officials and Officials of Public International Organisations Act, 2015.

(2) It extends to the whole of India, and applies –

(a) when the conduct constituting the offence under the Act occurs:

(i) wholly or partly in India; or

(ii) wholly or partly on board an aircraft or ship registered in India at the time of the commission of the offence;

(b) when the conduct constituting the offence under the Act occurs wholly outside India, and the offence is committed by:

(i) a person who is an Indian citizen;

(ii) a person who is a permanent resident of India; or

(iii) a person that is a body corporate incorporated by or under the laws of India.

*Explanation 1:* For the purposes of clause (b), the expression “permanent resident” shall have the same meaning as assigned to it under the Income Tax Act, 1961 (43 of 1961).

*Explanation 2:* When the conduct constituting an offence occurs wholly outside India, no proceedings under this Act shall commence without the previous sanction of the Central Government.

(3) It shall come into force on such date as the Central Government may, by notification, appoint; and different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

#### **2. Definitions.**

(1) In this Act, unless the context otherwise requires, -

(a) “Convention” means the United Nations Convention Against Corruption adopted by the Resolutions 58/4 of

31st October, 2003 of the General Assembly of the United Nations;

(b) “foreign country” means a country other than India, and includes:

(i) any political subdivision of that country;

(ii) the government, and any department or branch of the government, of that country or of a political subdivision of that country; and

(iii) any agency of that country or of a political subdivision of that country;

(c) “foreign public official” means:

(i) a person who holds a legislative, executive, administrative or judicial position of a foreign country; or

(ii) a person who performs public duties or public functions for a foreign country, including a person employed by a board, commission, corporation or other body or authority that is established to perform such duty or function on behalf of the foreign country, or is performing such duty or function;

*Explanation:* For the purpose of this definition:

(A) “public duty” means a duty in the discharge of which the State, the public or the community at large has an interest; and

(B) “public function” means an act or duty of a foreign public official in his capacity as such;

(d) “notification” means a notification published in the Official Gazette;

(e) “official of a public international organisation” means an international civil servant or any person who is authorised by such an organisation to act on behalf of that organisation;

(f) “public international organisation” means an organisation whose members are any of the following:

- (i) countries or territories;
  - (ii) governments of countries or territories;
  - (iii) other public international organisations; or
  - (iv) a mixture of any of the above;
- (g) “Special Judge” means the Special Judge appointed under section 3 of the Prevention of Corruption Act, 1988 (49 of 1988);
- (h) “undue advantage” means any gratification, benefit or advantage, property or interest in such property, reward, fee, valuable security or gift or any other valuable thing (other than legal remuneration), whether pecuniary or non-pecuniary, tangible or intangible;

*Explanation:* For the purpose of this definition, “legal remuneration” is not restricted to remuneration paid to a foreign public official or official of a public international organisation, but includes all remuneration which he is permitted to receive by the foreign country or the public international organisation which he serves.

(2) The words and expressions used under this Act but not defined and defined under the Prevention of Corruption Act, 1988 (49 of 1988) shall have the meanings respectively assigned to them under that Act.

## **CHAPTER II**

### **OFFENCES AND PENALTIES OF BRIBERY OF FOREIGN OFFICIALS AND OFFICIALS OF PUBLIC INTERNATIONAL ORGANISATIONS**

#### **3. Prohibition for accepting gratification by foreign public officials or officials of public international organisations.**

Whoever, being a foreign public official or official of public international organisation, intentionally accepts or obtains or agrees to accept from any person, directly or indirectly, for himself or for any other person or entity, any undue advantage other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person or entity for rendering or attempting to render any service or disservice to any person or entity, shall be punishable with imprisonment which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

#### **4. Prohibition for giving gratification to foreign public official or officials of public international organisations.**

Whoever, in relation to the conduct of international business in order to obtain or retain business or to obtain any advantage relating thereto, intentionally, offers or promises to offer, gives or promises to give, directly or indirectly, any undue advantage, to any foreign public official or official of public international organisation, for himself or herself or for another person or entity, in order that such official, act or refrain from acting in the exercise of his or her official duties, shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

#### **5. Abetment.**

Whoever abets the commission of an offence under section 3 or section 4 of this Act shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

#### **6. Attempt.**

Whoever attempts to commit an offence under section 3 or section 4 of this Act shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to three years and shall also be liable to fine.

#### **7. Persons not guilty of offence in certain circumstances.**

(1) No person is guilty of an offence under this Act if the offer, promise or giving of any advantage, which was made to a foreign public official or official of a public international organisation, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of such foreign public official or official of a public international organisation and was directly related to:

- (a) the promotion, demonstration, or explanation of products or services; or
- (b) the execution or performance of a contract with a foreign country or public international organisation.

(2) No person is guilty of an offence under this Act if the offer, promise or giving of any advantage is permitted under the laws of the foreign country or public international organization for which the foreign public official or official of a public international organisation performs duties or functions.

(3) No person is guilty of an offence under this Act if the offer, promise or giving of any advantage, is made to expedite or secure the performance by a foreign public official or official of a public international organisation of any act of a routine nature that is part of the duties or functions of the foreign public official or official of the public international organisation, such as:

- (a) the issuance of a permit, licence or other document to qualify a person to do business;
- (b) the processing of official documents, such as visas and work permits;
- (c) the provision of services normally offered to the public, such as mail pick-up and delivery, telecommunication services and power and water supply; and
- (d) the provision of services normally provided as required, such as police protection, loading and unloading of cargo, the protection of perishable products or commodities from deterioration or the scheduling of inspections related to contract performance or transit of goods.

*Explanation:* For removal of doubts, it is clarified that a decision about whether to award new business; or to continue existing business with a particular person; or the terms of such new or existing business; shall not be regarded as any act of a routine nature for the purpose of sub-section (3).

### **8. Liability of commercial organisations for offences under this Act.**

(1) When an offence under this Act has been committed by a commercial organisation, such commercial organisation shall be punishable with fine.

(2) Where an offence under this Act is committed by a commercial organisation, and such offence is proved to have been committed with the consent or connivance of any director, manager, secretary or other officer of the commercial organisation, such director, manager, secretary or other officer shall be guilty of the offence and shall be liable to be proceeded against and punishable with imprisonment which shall not be less than the punishment prescribed for such offence under this Act.

(3) When an offence under this Act is committed by any person associated with the commercial organisation, the commercial

organisation shall be guilty of an offence and shall be punishable with fine:

*Provided* that it shall be a defence for the commercial organisation to prove that it had in place adequate procedures designed to prevent persons associated with it from undertaking such conduct.

(4) The Central Government may, with a view to enhancing compliance with this section by commercial organisations, prescribe such guidelines about adequate procedures as may be necessary, following a consultation process in which the views of all the interested stakeholders are obtained through public notice.

(5) For the purposes of this section:

(a) “commercial organisation” means:

- (i) a body which is incorporated in India and which carries on a business, whether in India or outside India;
- (ii) any other body which is incorporated outside India and which carries on a business, or a part of a business, in any part of India;
- (iii) a partnership firm or any association of persons formed in India and which carries on a business, whether in India or outside India;  
or
- (iv) any other partnership or association of persons which is formed outside India and which carries on a business, or part of a business, in any part of India;

(b) “business” includes a trade or profession or providing service including charitable service;

(c) a person is said to be associated with the commercial organisation if, disregarding any conduct constituting an offence under this Act, such person is a person who performs services for or on behalf of the commercial organisation.

*Explanation 1:* The capacity in which the person performs services for or on behalf of the commercial organisation shall not matter irrespective of whether such person is an employee or agent or subsidiary of such commercial organisation.

*Explanation 2:* For the purpose of this section, the term “agent” shall have the same meaning as assigned to it under section 182 of the Indian Contract Act, 1872 (9 of 1872).

*Explanation 3:* Whether or not the person is a person who performs services for or on behalf of the commercial organisation is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between such person and the commercial organisation.

*Explanation 4:* If the person is an employee of the commercial organisation, it shall be presumed unless the contrary is proved that such person is a person who performs services for or on behalf of the commercial organisation.

### **9. Agreements with foreign countries.**

The Central Government may enter into an agreement with the Government of any country outside India for—

- (a) enforcing the provisions of this Act;
- (b) exchange of information for the prevention of any offence under this Act or under the corresponding law in force in that country or investigation of cases relating to any offence under this Act, and may, by notification, make such provisions as may be necessary for implementing the agreement (including mutual assistance).

### **10. Letter of request to a concerned State in certain cases.**

(1) Notwithstanding anything contained in this Act or the Code of Criminal Procedure, 1973 (2 of 1974), if, in the course of an investigation into an offence or other proceedings under this Act, an application is made to a Special Judge by the Investigating Officer or any officer superior in rank to the Investigating Officer that any evidence is required in connection with investigation into an offence or proceedings under this Act and he is of the opinion that such evidence may be available in any place in a concerned State, and the Special Judge, on being satisfied that such evidence is required in connection with the investigation into an offence or proceedings under this Act, may issue a letter of request to a court or an authority in the concerned State competent to deal with such request to—

- (i) examine facts and circumstances of the case,
- (ii) take such steps as the Special Judge may specify in such letter of request, and
- (iii) forward all the evidence so taken or collected to the Special Judge issuing such letter of request.

(2) The letter of request shall be transmitted in such manner as the Central Government may specify in this behalf.

(3) Every statement recorded or document or thing received under sub-section (1) shall be deemed to be the evidence collected during the course of investigation.

**11. Assistance to a concerned State in certain cases.**

Where a letter of request is received by the Central Government from a court or an authority in a concerned State requesting for investigation into an offence or proceedings under this Act and forwarding to such court or authority any evidence connected therewith, the Central Government may forward such letter of request to the Special Judge or to any authority under the Act, as it thinks fit, for execution of such request in accordance with the provisions of this Act or, as the case may be, any other law for the time being in force.

**12. Reciprocal arrangements for processes and assistance for transfer of accused persons.**

(1) Where a Special Judge, in relation to an offence punishable under section 3 or section 4, desires —

- (a) a summons to an accused person; or
- (b) a warrant for the arrest of an accused person; or
- (c) a summons to any person requiring him to attend and produce a document or other thing or to produce it; or
- (d) a search warrant,

issued by it shall be served or executed at any place in any concerned State, it shall send such summons or warrant in duplicate in such form, to such court, Judge or Magistrate through such authorities, as the Central Government may, by notification, specify in this behalf and that court, Judge or Magistrate, as the case may be, shall cause the same to be executed.

(2) Where a Special Judge, in relation to an offence punishable under section 4 has received for service or execution—

- (a) a summons to an accused person; or
- (b) a warrant for the arrest of an accused person; or
- (c) a summons to any person requiring him to attend and produce a document or other thing, or to produce it; or
- (d) a search warrant,

issued by a court, Judge or Magistrate in a concerned State, it shall, cause the same to be served or executed as if it were a summons or warrant received by it from another court in the said territories for service or execution within its local jurisdiction; and where—

(i) a warrant of arrest has been executed, the person arrested shall be dealt with in accordance with the procedure specified under the Code of Criminal Procedure, 1973 (2 of 1974);

(ii) a search warrant has been executed, the things found in this search shall, so far as possible, be dealt with in accordance with the procedure specified under the Code of Criminal Procedure, 1973 (2 of 1974):

Provided that in a case where a summon or search warrant received from a concerned State has been executed, the documents or other things produced or things found in the search shall be forwarded to the court issuing the summon or search warrant through such authority as the Central Government may, by notification, specify in this behalf.

(3) Where a person transferred to a concerned State pursuant to sub-section (2) is a prisoner in India, the Special Judge or the Central Government may impose such conditions as that court or Government deems fit.

(4) Where the person transferred to India pursuant to sub-section (1) is a prisoner in a concerned State, the Special Judge in India shall ensure that the conditions subject to which the prisoner is transferred to India are complied with and such prisoner shall be kept in such custody subject to such conditions as the Central Government may direct in writing.

**13. Procedure in respect of letter of request.**

Every letter of request, summons or warrant, received by the Central Government from, and every letter of request, summons or warrant, to be transmitted to a concerned State under this Chapter shall be transmitted to a concerned State or, as the case may be, sent to the concerned court in India in such form and in such manner as the Central Government may, by notification, specify in this behalf.

**14. Attachment, seizure and confiscation, etc. of property in a concerned State or India.**

(1) Where the property is suspected to be in a concerned State, the Special Judge, on an application by an officer authorised by the Central Government, may issue a letter of request to a court or an authority in the concerned State for execution of attachment or confiscation of the property in the concerned State.

(2) Where a letter of request is received by the Central Government from a court or an authority in a concerned State requesting attachment or confiscation of the property in India, derived or obtained, directly or indirectly, by any person from the

commission of an offence under section 3 or section 4 committed in that concerned State, the Central Government may forward such letter of request to the Special Judge for execution in accordance with the provisions of this Act.

(3) The Special Judge shall, on receipt of a letter of request under sub-section (2), direct any authority to take all steps necessary for tracing and identifying such property.

(4) The steps referred to in sub-section (3) may include any inquiry, investigation or survey in respect of any person, place, property, assets, documents, books of account in any bank or public financial institutions or any other relevant matters.

(5) Any inquiry, investigation or survey referred to in sub-section (4) shall be carried out by an authority mentioned in sub-section (3) in accordance with such directions issued in accordance with the provisions of this Act.

**15. Provisions of Criminal Law Amendment Ordinance, 1994 to apply to attachment under this Act.**

Save as otherwise provided under this Act, or the Prevention of Money-laundering Act, 2002 (15 of 2003) the provisions of the Criminal Law Amendment Ordinance 1944 (Ord. 38 of 1944), as amended by section 29 of the Prevention of Corruption Act, 1988 (49 of 1988), shall, as far as may be, apply to the attachment, administration of attached property and execution of order of attachment or confiscation of the property under this Act.

**16. Certain provisions of Act 49 of 1988 to apply**

Save as otherwise provided under this Act, the provisions of the Prevention of Corruption Act, 1988 and the rules made thereunder, (including those relating to appointment of Special Judges under Chapter II and investigation into the cases and inspection of bankers books under Chapter IV of that Act), shall, so far as may be, apply in relation to the offence under this Act as they apply in relation to the offence under the Prevention of Corruption Act, 1988.

**17. Military, Naval and Air Force or other laws not to be affected.**

(1) Nothing in this Act shall affect the jurisdiction exercisable by, or the procedure applicable to, any court or other authority under the Army Act, 1950 (45 of 1950), the Air force Act, 1950 (46 of 1950), the Navy Act, 1957 (62 of 1957), the Border Security Force Act, 1968 (47 of 1968), the Coast Guard Act, 1978 (30 of 1978) and the National Security Guard Act, 1986 (47 of 1986).

(2) For the removal of doubts, it is hereby declared that for the purposes of any such law as is referred to in sub-section (1), the

court of a Special Judge shall be deemed to be a court of ordinary criminal justice.

**18. Appeal and Revision.**

Subject to the provisions of this Act, the High Court may exercise, so far as they may be applicable, all the powers of appeal and revision conferred by the Code of Criminal Procedure, 1973 (2 of 1974) on a High Court as if the court of the Special Judge were a Court of Session trying cases within the local limits of the High Court.

**19. Act to be in addition to any other law.**

The provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being in force.

**20. Proceedings under this Act to be taken in consultation with concerned State against foreign public official to whom privileges and immunities under any law or Convention or treaty apply**

In case any foreign public official or official of public international organisation is alleged to have committed an offence under this Act to whom certain privileges and immunities applies under the United Nations (Privileges and Immunities) Act, 1947 or the International Finance Corporation (Status, Immunities and Privileges) Act, 1958, or the International Development Association (Status, Immunities and Privileges) Act, 1960, or the Diplomatic Relations (Vienna Convention) Act, 1972, or under any other law for the time being in force or under any Convention or treaty, the Central Government shall, in consultation with the concerned State or public international organisation, as the case may be, take adequate measures for proceeding under this Act against such public official.

**22. Code of Criminal Procedure, 1973 to apply subject to certain modifications**

Save as otherwise provided under this Act, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), as amended by section 22 of the Prevention of Corruption Act, 1988 (49 of 1988) shall have effect in their application in relation to any proceeding in relation to an offence punishable under this Act.

**22. Power to make rules.**

(1) The Central Government may, by notification, make rules for carrying out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:

- (a) framing of guidelines to enhance compliance with the provisions of section 8 by the commercial organizations under sub-section (4) of section 8;
- (b) any other matter which is to be, or may be, prescribed, or in respect of which provision is to be, or may be, made by rules.

**23. Rules and notification to be laid before Parliament.**

Every rule made by the Central Government, or notification issued under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule, or notification or both Houses agree that the rule or notification should not be made or issued, the rule, or notification shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or notification.

**24. Amendment of certain enactments.**

The enactments specified in the Schedule to this Act shall be amended in the manner specified therein and such amendments shall take effect on the date of commencement of this Act.

THE SCHEDULE

(See Section 24)

AMENDMENT OF CERTAIN ENACTMENTS

PART I

THE PREVENTION OF CORRUPTION ACT, 1988

(49 of 1988)

**Amendment to Section 3**

In section 3, in sub-section (1), in clause (a), for the words “any offence punishable under this Act”, the words and figures “any offence punishable under this Act or the Prevention of Bribery of Foreign Public Officials and Officials of Public International Organisations Act, 2015” shall be substituted.

PART II

THE PREVENTION OF MONEY LAUNDERING ACT, 2002  
(15 of 2003)

**Amendment of Schedule**

In the Schedule, in Part A, after paragraph 8, the following paragraph shall be inserted, namely:-

“Paragraph **8A**”

The Prevention of Bribery of Foreign Public Officials and Officials of Public International Organisations Act, 2015.

<b>Section</b>	<b>Description of Offences</b>
3	Prohibition for accepting gratification by a Foreign Public Official or an Official of a Public International Organisation
4	Prohibition for giving gratification to a Foreign Public Official or an Official of a Public International Organisation
5	Abetment
6	Attempt