

Interaction regarding
UNITED NATIONS CONVENTION
AGAINST CORRUPTION (UNCAC)

Conducted by:

Department of Personnel & Training (DoPT)
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Towards Effective Implementation of Provisions of the United Nation's Convention against Corruption (UNCAC)

Issue 1: Corruption & the Private Sector

Articles 21, 22, 32, 33, 34 & 35 (in Chapter III of UNCAC) along with Article 12
(in Chapter II)

Our Recommendations:

- **Corruption-free Licensing (related to Art. 12(2)(d) of UNCAC):** The government should immediately move away from a regime of opaque, non-competitive, highly discretionary policy of allocating or issuing licenses for scarce natural resources such as land, water, sand, coal, iron and mineral ores and electromagnetic spectrum at both national and state levels to a policy regime that is based on fair, transparent and competitive procedures so that there is no scope for collusion and corruption between public officials and private firms/individuals.
- **Taxing Windfall profits:** a windfall profit tax should be imposed on all firms that secured a license or mining lease or other natural resource, and made huge profit without value addition. This will ensure that excess profits made out of a vital public resource are retained with the Exchequer, and are not appropriated by private interests. Mere private monopoly of public assets shouldn't be a source of unusual profits, even if there is no corruption in the transfer of asset. Such a windfall profit tax was imposed in the UK in 1997, in respect of North Sea Oil, and the monopolies in electricity, telecom, airports, gas, water, and railway sectors.
- **Tainted Contracts (related to Art. 34 of UNCAC):** a law should be enacted by the Parliament making all contracts involving corruption, or a loss to the Exchequer, void *ab initio* and unenforceable. This will remove all incentives for corporate firms to bribe any public official to get a favour. A company that loses the bribe amount as well as the business or benefit or favour received through corruption is unlikely to resort to bribery. Only then can we demand corporate integrity and create a level playing field.

- **Service Guarantees and Charters:** There must be mandatory and universal service guarantees from the government and independent regulatory authorities to private firms in the form of well-defined, empowered and effective Charters (on the lines of Citizen's Charters and service guarantees for individual citizens). These Charters for business firms could cover all routine and straightforward business matters like registrations, tax-related issues, procedural approvals, licenses, regulatory clearances, etc. to ensure their delivery in a time-bound and corruption-free manner based on clearly defined, transparent and simple procedures. Mandatory compensation in case of delays, etc. should be integral to these service guarantees and charters.
- **Protecting whistle-blowers (related to Art. 32 and 33 of UNCAC):** The government must put in place institutional mechanisms (Vigilance Commission or a similar body) to monitor and ensure that private firms and their personnel who choose to expose instances of abuse of office, collusion and corruption by public officials are not harassed and penalized for doing so. There is compelling empirical evidence that whistle-blowing private entities face victimization resulting in severely and adversely affecting their market share, procurements, payments, likely contracts in future, etc. The proposed institutional mechanism should monitor any attempts to victimize whistle-blowing private firms so that they are given the necessary protection; thereby, the overall climate for doing business in the country too is improved.
- Already, the existing non-conducive business environment coupled with unfavourable policy framework and with pervasive corruption common to both, has resulted in significant capital outflows from India, as private firms look to opportunities abroad rather than within the country.
- **Employing former public officials (related to Art. 12(2)(e) of UNCAC):** any restrictions regarding private employment of former public officials should be based on rational and reasonable grounds. If necessary, the present "cooling off" period (1 year) for retired higher-level public servants could be revisited. Employment of a former public official by a private firm to executive positions that directly relate to the functions held or supervised by that public official during his tenure could be restricted or barred to prevent influence peddling, etc. However, appointments to positions that are non-executive in nature such as independent directors, corporate mentors and advisors could be exempted so that healthy and desirable interaction between the private sector and former public officials is not adversely affected.
- **Penalizing False Claims (related to Art. 35 of UNCAC):** a law similar to the False Claims Act in the US should be enacted in India. This law allows imposition of a civil penalty five times the loss sustained by the Exchequer in any public procurement or transfer of natural resource. If a product is overpriced relative to the best customer of the company, or the asset is underpriced while transferring from State to a Corporate, or there is compromise in quality or environmental damage, or the Exchequer has lost money through fraud, bribery or wrongdoing, then any citizen can file a claim, and a court after hearing is empowered to impose five times the loss as penalty. The whistle-blowing citizen too gets a

share of the penalty as incentive. Under the False Claims Act in the US, more than \$24 billion has been reportedly recovered from firms in 23 years (in the 1987-2011 period), in 10,650 cases.

- **Non-Governmental agencies:** NGOs which receive substantial public funding should also be covered under the Prevention of Corruption Act. Norms should be laid down that any institution or body that has received more than 50% of its annual operating costs, or a sum equal to or greater than Rs.1crores during any of the preceding 3years should be deemed to have obtained 'Substantial funding' for that period and that purpose of such funding. As NGOs are not considered to be governmental agencies, offences would conceivably not include bribe-taking but would be connected more with bribe-giving (to public officials/entities) or misappropriation of funds, misuse of resources or financial irregularities.

Issue 2: Immunity to Bribe Givers & Expanding and Strengthening Scope of Corruption Offences

Related to Article 15 (in Chapter III of UNCAC)

Our Recommendations:

- **Immunity to bribe givers:** When corruption is rampant, we need reliable evidence to act decisively against public servants. Most corruption in India is extortionary where a citizen or corporate is fleeced by an unscrupulous official simply to do what was originally due to them or what they are entitled to. In such a scenario, it is important to give immunity to bribe givers who are victims of extortion in order to be able to prosecute corrupt officials. Even in countries like the US, plea bargaining is a very common occurrence where by a culprit gets immunity by cooperating with the officials.
- **Defining corruption offences:** The scope of corruption offences should be expanded to also include:
 - Gross perversion of the constitution and democratic institutions amounting to willful violation of oath of office
 - Abuse of authority unduly favoring or harming someone
 - Obstruction of justice
 - Squandering public money
- **Offence of Collusive Bribery:** Section 7 of the Prevention of Corruption Act (1988) needs to be amended to provide for a special offence of 'collusive bribery'. An offence could be classified as 'collusive bribery' if the outcome or intended outcome of the transaction leads to a loss to the state, public or public interest. The punishments for all such cases of collusive bribery should be double that of other cases of bribery.

- **Burden of proof on the accused in such cases:** In all such cases if it is established that the interest of the state or public has suffered because of an act of a public servant, then the court shall presume that the public servant and the beneficiary of the decision committed an offence of ‘collusive bribery’.

Issue 3: Ill-gotten Wealth - Seizure and Confiscation

Related to Articles 20, 23, 24, 31 (in Chapter III of UNCAC)

Our recommendations:

- The **Corrupt Public Servants (Forfeiture of Property) Bill** as recommended by the 166th Law Commission and reiterated by the 2nd Administrative Reforms Commission (ARC) should be enacted without any further delay. In particular, the provisions for attachment, forfeiture and confiscation of corrupt proceedings should ensure that:
 - Wealth/assets of corrupt public servants, not just the proceedings transacted in the corruption offences are covered.
 - The assets/wealth of persons related to or associated with the corrupt public servant and benefitting from his offences too are covered.
 - Hurdles to seizure and confiscation of ill-gotten wealth in the form of ill-defined “prior approval” provisions from the Central and State Government are not placed.
 - Any income of public servants that is not declared or intimated as being from lawful sources are made illegal.
- Immediate implementation of the **Benami Transactions (Prohibition) Act, 1988** is necessary.

Issue 4: Liability for corruption offences

Related to Article 26 (in Chapter III of UNCAC)

Our recommendations:

- **Stricter punishments:** The punishments for all cases of collusive bribery (ref. *Issue 2*, above) should be double that of other cases of bribery.

- **Mandatory Sentencing:** A definite, long-term prison sentence is required to address serious offence, particularly those committed by higher officials, whether elected or appointed. Hence, it is recommended that conviction should entail a mandatory prison sentence of 5 years. All over the world, stiff prison sentences and confiscation of assets are employed in such offences. In cases (i) involving large financial sums for serious economic offences, particularly those involving higher officials, (ii) of collusive corruption, and (iii) of breach of fiduciary responsibility and betrayal of public trust resulting in grave loss to the public exchequer, the minimum prison sentence should be 15 years. For instance, in the USA, former Illinois Governor Rod Blagojevich in federal corruption conviction was sentenced to 14 years and Doctors Arun Sharma and Kiran Sharma were sentenced to 15 years in a massive health care fraud, and their properties were confiscated.

Issue 5: Investigations & Prosecution – Specialized Authorities

Related to Article 30 and 36 (in Chapter III of UNCAC)

Our recommendations:

Sanction for Prosecution:

- Prior sanction should not be necessary for prosecuting a public servant who has been trapped red-handed or in cases of possessing assets disproportionate to the known sources of income.
- The Prevention of Corruption Act should be amended to ensure that sanctioning authorities are not summoned and instead the documents can be obtained and produced before the courts by the appropriate authority.
- The Presiding Officer of a House of Legislature should be designated as the sanctioning authority for MPs and MLAs respectively.
- The requirement of prior sanction for prosecution now applicable to serving public servants should also apply to retired public servants for acts performed while in service.
- In all cases where the Government of India is empowered to grant sanction for prosecution, this power should be delegated to an Empowered Committee comprising the Central Vigilance Commissioner and the Departmental Secretary to Government. In case of a difference of opinion between the two, the matter could be resolved by placing it before the full Central Vigilance Commission. In case, sanction is required against a Secretary to Government, then the Empowered Committee would comprise of Cabinet Secretary and the Central Vigilance Commissioner. Similar arrangements may also be made at the State level. In all cases the order granting sanction for prosecution or otherwise shall be issued within

two months. In case of refusal, the reasons for refusal should be placed before the respective legislature annually.

Independent, Competent and Empowered Prosecuting Authority:

- In India only about 6% of non-confessional cases end up in convictions. Therefore, there is a strong need for an independent, effective Prosecuting Authority that supervises the entire process of prosecution arising out of impartial investigations and evidence-gathering that stand up to scrutiny in a court of law. Therefore, an independent and effective Prosecuting Authority should be established, modeled on the District Attorney (DA) system of the United States, with a sitting Judge of district rank brought on deputation. The territorial jurisdiction of this DA need not be limited to an administrative district alone. By definition, a sitting District Judge serving on deputation as the DA cannot be influenced by extraneous factors or pressures.
- The names for the panel of prosecuting lawyers in this independent prosecutorial system are to be prepared by the Attorney General in consultation with the independent, empowered Lokpal. In the States, the Vigilance Commissions/ Lokayuktas can be empowered to supervise prosecution in corruption cases.

Investigations:

- Permission to take up investigations under the present statutory arrangement should be given by the Central Vigilance Commissioner in consultation with the concerned Secretary. In case of investigation against a Secretary to Government, the permission should be given by a Committee comprising the Cabinet Secretary and the Central Vigilance Commissioner.
- This would require an amendment to the Delhi Special Police Establishment Act. In the interim the powers of the Union Government may be delegated to the Central Vigilance Commissioner, to be exercised in the manner stated above. A time limit of 30 days may be prescribed for processing this permission.
- Appropriate provision must be made in the case of states.

Issue 6: Strengthening Investigative Techniques & Capacity Building

Related to Article 50 (in Chapter IV of UNCAC)

Our recommendations:

- Currently, there are only about 6,000 personnel in the CBI with nation-wide jurisdiction. Of these, only about 2,000 are investigators. The number of corruption cases registered by CBI is of the order of 1,000 every year. Obviously, these are miniscule numbers in the face of a massive national problem of corruption.

- India urgently needs to have a plan and action program to expand CBI almost ten-fold over the next ten years if the agency has to respond to the growing challenge and serve the country effectively. This should be coupled with adequate infrastructure for surveillance, forensic laboratories, communications and mobility.
- Similarly, in the States ACBs need to be strengthened by adding to their capacity with budgetary commitments and adequate resources.
- Special emphasis must be given to serious corruption offences involving high levels of sophistication or complexity (cyber crime, serious fraud, etc.) by strengthening dedicated cells/offices within investigative agencies with properly trained professionals and personnel, especially at the State level.

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