UNITED NATIONS

ECONOMIC AND SOCIAL COUNCIL

Distr.
GENERAL

E/5838
11 June 1976

ORIGINAL: ENGLISH

Sixty-first session
Agenda item 13

TRANSNATIONAL CORPORATIONS

Measures against corrupt practices of transnational and other corporations, their intermediaries and others involved

Report of the Secretary-General

SUMMARY

This report is issued in accordance with General Assembly resolution 3514 (XXX) of 15 December 1975 relating to the corrupt practices of transnational and other corporations, their intermediaries and others involved.

The introduction refers to the resolution and a note verbale transmitted by the Secretary-General to Governments requesting information and outlines the scope of the report. Section I surveys the range of possible measures to combat corrupt practices at the private, national and international levels. Section II contains an analysis of the investigations made by Governments and the main proposals suggested for dealing with the problems of corrupt practices which require clarification and action if they are to be effectively combated.

CONTENTS

INTRODUCTION

1. The General Assembly on 15 December 1975 adopted resolution 3514 (XXX) entitled "Measures against corrupt practices of transnational and other corporations, their intermediaries and others involved", in which it condemned all corrupt practices, including bribery, by transnational and other corporations, their intermediaries and others involved, in violation of the laws and regulations of the host countries, and reaffirmed the right of any State to adopt legislation and to investigate and take appropriate legal action, in accordance with its national laws and regulations, against incidents of such corrupt practices. It also called upon both home and host Governments to take, within their respective national jurisdictions, all the necessary measures that they deem appropriate, including legislative measures, to prevent such corrupt practices, and to exchange information bilaterally and, as appropriate, multilaterally, particularly through the United Nations Centre on Transnational Corporations. Home Governments were called upon to co-operate with host Governments to prevent such corrupt practices, including bribery, and to prosecute, within their national jurisdictions, those who engage in such acts. Furthermore, the General Assembly requested the Economic and Social Council to direct the Commission on Transnational Corporations to include in its programme of work the question of corrupt practices of transnational corporations and to make recommendations on ways and means whereby such corrupt practices could be effectively prevented.

2. Lastly, the General Assembly in the resolution requested the Secretary-General to report to the Assembly at the thirty-first session, through the Economic and Social Council, on the implementation of the resolution. This report is in compliance with that request.

3. The Secretary-General on 2 March 1976 transmitted a note verbale to Governments requesting relevant information on the subject of corrupt practices generally and in particular on the following matters:

(a) The extent to which corrupt practices as referred to in General Assembly resolution 3514 (XXX) have been encountered in the country and the measures taken by the Government;

(b) The findings of relevant studies or investigations carried out by the Government and available statistics;

(c) The relevant existing laws, penal code and special legislation;

(d) The existing range of sanctions;

(e) The difficulties faced in obtaining information available in other countries.

4. The note verbale also requested any suggestions that Governments might have for dealing with corrupt practices as well as proposals for facilitating co-operation and the exchange of information between host and home countries.

5. The preparation of this report was delayed in order to obtain the maximum possible number of responses from Governments. As of 30 May 1976 the following 18 Governments had replied to the note verbale of the Secretary-General: Argentina, Barbados, Colombia, Denmark, Dominican Republic, Finland, France, Germany (Federal Republic of), Iceland, Iran, Japan, Mexico, Norway, Singapore, Sweden, the Union of Soviet Socialist Republics and the United States of America. 1/

6. This report is based mainly on the responses made by Governments to the Secretary-General's note verbale. Section I discusses the measures and regulations taken at the international, national and private levels to deal with the issue of corrupt practices. Section II describes the investigations of corrupt practices and the measures taken by Governments and summarizes the proposals that Governments have made for dealing with the issue of corrupt practices.

I. REGULATIONS CONCERNING CORRUPT PRACTICES

7. Various types of measures can be found at the international, national and private levels for the prevention of corrupt practices. Although these are of varying scope and effectiveness, each may play a significant role in regulating and preventing corrupt practices.

A. At the international level

8. International law has not yet developed in the area of corrupt practices either through custom or treaties. A number of intergovernmental organizations have recently considered, or are considering, the problem of corrupt practices, especially with reference to transnational corporations.

9. Before the thirtieth session of the General Assembly, the issue of corrupt practices arose at the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. The Congress examined various forms of crime, national and transnational, with a view to finding appropriate means of prevention. One of those crimes was corruption. 2/

10. At its second session the Commission on Transnational Corporations decided to include in its programme of work the question of corrupt practices of transnational corporations. It also took note in that programme of work of the proposal for an international agreement submitted by the United States of America. The Commission decided to forward the proposal to the Economic and Social Council,

---

1/ The full texts of the government replies are available for consultation in the Secretariat of the United Nations.

2/ See "Changes in forms and dimensions in criminality - transnational and national" (A/CONF.56/3), paper prepared for the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1-12 September 1975.

recommending that the Council consider the matter of corrupt practices on a priority basis and take appropriate action at its sixty-first session.

11. The Permanent Council of the Organization of American States on 10 July 1975 adopted a resolution in which it referred to "news stories (which) have recently come to public light concerning actions constituting manifestly immoral conduct, as well as interference on the part of some transnational enterprises in the domestic affairs of some countries" and resolved to request the member States to co-operate in the exchange of information for the purpose of achieving effective control of the activities of transnational enterprises. 3/ The Permanent Council further resolved:

> "I. To condemn in the most emphatic terms any act of bribery, illegal payment or offer of payment by any transnational enterprise; any demand or acceptance of improper payments, as well as any act contrary to ethics and legal procedures; and
>
> "II. To urge the Governments of the member States, in so far as necessary, to clarify their national laws with regard to the aforementioned improper or illegal acts." 4/

The Guidelines for Multinational Enterprises, under consideration in the Organisation for Economic Co-operation and Development (OECD), contain provisions against giving or receiving bribes. These provide that enterprises under the jurisdiction of OECD member States should not render - and they should not be solicited or expected to render - any bribe or other improper benefit, direct or indirect, to any public servant or holder of public office; and, unless legally permissible, they should not make contributions to candidates for public office or to political parties or other political organizations; finally, they should abstain from any improper involvement in local political activities.

12. The United States Senate on 12 November 1975 called upon the United States Government to seek an international code of conduct covering "bribery, indirect payments, kickbacks, unethical political contributions and other such similar disreputable activities", as part of the current General Agreement on Tariffs and Trade multilateral trade negotiations. 5/

B. At the national level

13. Although a number of countries are currently considering the adoption of criminal legislation dealing with corrupt practices committed abroad by their companies, there appears to be little or no existing legislation dealing specifically with the problem.

3/ CP/Res.154 (167/75).

4/ Ibid.

5/ United States of America, Ninety-fourth Congress, first session, Senate resolution 265.

14. The criminal codes of various countries, however, deal with corruption generally. In addition, other kinds of legislation relating to taxation, anti-trust and securities, for instance, often contain provisions which deal collaterally with the problem of corrupt practices.

1. Penal legislation

15. In their replies many Governments stated that they had no legislation dealing specifically with the corrupt practices of transnational corporations but that their penal codes contained provisions relating to corruption in general. Four aspects of these codes deserve particular attention.

(a) The concept of corruption

16. The concept of corruption appears to have different shades of meaning depending on the specific socio-cultural and historical contexts. Even within a particular society at a particular period of time, the concept may have a different meaning, in the context of law, political science, religion, sociology or business. Although an analysis or definition of corrupt practices is outside the scope of this report it is useful to indicate, in a preliminary manner, certain common features that generally characterize the concept of corruption. In essence, a corrupt practice is a special type of process or technique for influencing decision making. What distinguishes it from other influencing processes or techniques is the method by which the influence is effected. Every society accepts and legitimizes certain methods in the pursuit of individual interests and condemns others, ethically or legally. Duress, fraud and corruption belong to that latter category. In the international context the primary concern is focused on three types of corrupt practices: those involving improper participation by foreign interests in the political process, payments to public officials either directly or through middlemen, in order to obtain favourable decisions, and "facilitative" payments to achieve speedy action, which is not necessarily illegal. The dividing line between these categories of corrupt practices are not rigid ones and are often blurred. However, on the one hand, practices involving improper participation by foreign interests in the political process are of such seriousness, when they occur, that they deserve to be treated on their own merit and not in connexion with "corrupt practices including bribery". On the other hand, practices involving "facilitative" payments are not treated in this report, both because of the relatively insignificant amounts of the payments and of the relative ease with which they can be eliminated through routine administrative housekeeping. 6/

17. In many common law countries, the essence of the concept as it appears in the various criminal codes is that a public officer has directly or indirectly agreed or permitted his conduct as a public officer to be influenced by the gift,

---

6/ This is not to say that facilitative payments are harmless. Although they appear to be harmless where only one person is involved, they give rise to unjustified preferences where there are many competitors. For instance, the clerk

(Foot-note continued on following page)

promise or prospect of any valuable consideration to be received by him. 7/ It is immaterial whether the "valuable consideration" preceded or followed the improper act by the public official. For instance, if, after a person has done any act as a public officer, he secretly accepts or agrees to accept valuable considerations on account of that act, he is presumed to have been guilty of corruption. The codes also stipulate that it is immaterial whether the act to be done by a public officer in consideration of the improper inducement is in any manner criminal or otherwise wrongful.

18. The law of Barbados refers to several phenomena as corruption. Article 3, paragraph 1, of the Prevention of Corruption Act punishes any person who, by himself or in conjunction with any person, corruptly solicits or receives or agrees to receive, for himself or for any other person, any gift, loan, fee, reward or advantage whatsoever as an inducement to, or reward for or otherwise on account of any member, officer or servant of the Crown or of a public body doing or forbearing to do anything in respect of any matter or transaction, actual or proposed, in which the Crown or such public body is concerned. Also, under the Election Offences and Controversies Act, section 6 provides that a person is guilty of a corrupt practice who is guilty of bribery, of "treating", of undue influence, of committing, aiding, abetting, counselling or procuring the commission of the offence of personation as variously defined in subsections 2 and 3, section 7, 8 and 9, respectively. Lastly, section 47 of the Representation of the People Act prohibits contributions towards promoting or procuring the election of a condidate at an election by any person other than the candidate, his election agent and other persons authorized in writing by the election agent. According to subsection 6, a person who incurs, or aids, abets, counsels or procures any other person to incur, any expenses in contravention of this provision is guilty of a corrupt practice.

19. In French law, a conceptual distinction is made between "passive corruption",

---

6/ (continued):

passes one out of one hundred competing files. Moreover, far from speeding up procedures, their over-all effect may be the very opposite. As the Santhanam Committee noted

> "Certain sections of the staff concerned are reported to have got into the habit of not doing anything in the matter till they are suitably persuaded. It was stated by a Secretary that even after an order had been passed, the fact of the passing of such an order is communicated to the persons concerned and the order itself is kept back till the unfortunate applicant has paid appropriate gratification to the subordinate concerned. Besides being a most objectionable corrupt practice, this custom of speed money has become one of the most serious causes of delay and inefficiency." (Report of the Committee on Prevention of Corruption, published by the Government of India, Ministry of Home Affairs, New Delhi, 1964.)

7/ See, for instance, S 240, Ghana Criminal Code, Act. 29.

which refers to the acts of the recipient and "active corruption" which refers to the acts of the donor. Both these forms of corruption are, however, distinguished from the offences of "concussion", "ingérence" and "trafic d'influence" which are dealt with under separate provisions of the penal code.

(b) Persons capable of committing corruption

20. There are considerable differences in the various laws relating to the persons capable of being corrupted. By far the strongest emphasis is placed on the corruption of public officials. In some common law jurisdictions public officers alone can be corrupted within the meaning of the penal codes. The identity of persons in this category is basically the same as that spelt out in article 139 of the Iranian Penal Code, namely, "any civil servant, any agent of the Government or the judiciary or the administrative order, as well as any official or agent of deliberative or municiapl institutions". Mexican law includes within the category of public officials for the purposes of corruption the officers of enterprises in which the State participates as a shareholder or as an associate (articles 217 and 218, Penal Code of Mexico, 1964). In the laws of many States it is immaterial whether the offence is committed within or outside the scope of the officials' public duties. (See, for instance, article 317 of the Brazilian Penal Code, 1969.)

21. There is thus an increasing tendency to create a wide range of possible perpetrators of corrupt practices. In the Federal Republic of Germany (article 359, Penal Code) the law includes permanent and temporary officials with or without oath of office. French law also provides that the widest possible interpretation be given to the term "fonctionnaire public" to encompass, for example, anyone holding an elective or appointive office within the administration, judiciary, armed forces or connected services, or being an agent or employee of a public administration or of any organization under government control, or a citizen with public service employment, even if unsalaried (article 177, No. 1, French Penal Code; Dalloz Code Pénal, annotations to article 177, Nos. 1-5).

22. The corresponding law in the German Democratic Republic refers to a person who exercises powers related to the State or to the management of the economy or to a person who abuses powers expressly vested in him (article 247, Penal Code). Swedish law includes a person who takes a bribe even before the assumption of a public office provided the assumption of office was imminent and the bribe related to such public office (chap. 20, sects. 1 and 2, Penal Code). A similar position exists in the penal codes of the United Kingdom, Australia, Canada, New Zealand and virtually all anglophonic African and Asian countries.

23. In some countries corruption may be committed not only when public officials are involved but also as between employees of a private enterprise. For instance, article 177 of the French Penal Code provides:

"Any clerk, employer or agent, whatever his form of remuneration, who either directly or through others, and without knowledge or consent of his

employer, either solicits or accepts offers or promises, or solicits or receives gifts, considerations, commissions, discounts or premiums, in order to perform or abstain from performing any act within the scope of his employment, shall be punished by jailing from one to three years and by fine ...".

A fortiori, a public official commits corruption even if the act was beyond the scope of the employment of the person bribed, but was facilitated by his duties or position.

24. In the Federal Republic of Germany the "Law against unfair competition" provides imprisonment up to one year or a fine up to DM 5,000 for a person who

"in the course of commercial business and for the purpose of competition offers or promises gifts or other advantages to an employee or agent of a commercial undertaking in order to obtain, through the corrupt conduct of the employee or agent, an advantage for himself or a third party in the supply of goods or professional services."

However, the prosecution of the offence depends on a request being made by, inter alia, manufacturers who produce or deal with products or services of similar or related nature, and associations promoting industrial interests.

25. A Swedish law dealing with the same subject-matter provides for up to one year imprisonment or fining and for the obligation to indemnify the damage caused. 8/ Similarly, in Norway, section 6 of the Marketing Control Act is directed against anyone in the conduct of business offering or giving any gift or similar benefit to someone employed by or acting on behalf of another person. 9/ This provision applies only to the perpetrator of an act of bribery, not against the person who is thereby led to violate the law. The case of the giver is dealt with under the penal code.

(c) Elements of the offence

26. Public officers may be corrupted by any means. Thus, some codes use the generic term "any valuable consideration". Such valuable consideration may comprise, as article 177 of the French Penal Code illustrates, "gifts, considerations, commissions, discounts or premiums". More extensively still, article 178 provides that

"Any person who solicits or accepts offers or promises, or solicits or receives gifts or considerations, so as to obtain or attempt to obtain any decorations, ribbons or any other favourable consideration on the part of public authorities, contracts, enterprises or other privileges deriving from

---

8/ Paras. 6 and 7 of the "Act containing the rules for the prevention of unfair competition of May 29, 1931, as amended 22 May 1942".

9/ Act No. 47 of 16 June 1972.

agreements concluded with public authorities or in administration, and, by so doing, abuses his actual or presumed influence, shall be punished by jailing for no less than one or more than five years and by /fine/."

Under Iranian law transfer of any amount of money or any possession may constitute a bribe. A further description of the elements of corruption is given in article 147 which states

"For the purpose of article 1 of the law concerning bribery and article 141 of the Penal Code, if a property is directly or indirectly transferred to a government employee free of charge or at a grossly lower price than the normal price or at a fictitiously normal price while actually representing a grossly lower price, or if a property is purchased directly or indirectly from such government employee at grossly above the normal price or at a factitiously normal price but in reality representing a grossly higher price, he shall be considered as recipient of a bribe and the buyers as persons giving a bribe."

27. Generally speaking, the various penal codes make no distinction between the legality or illegality of the act in respect of which the public official accepts the bribe in consideration for doing. Consequently, a small payment to an office clerk to communicate a decision which the department has made but not yet publicized is as much corruption as if he had accepted the payment in consideration for revealing confidential information or procured a favourable decision from the department. However, varying factors will alter the severity with which the offence is dealt with. If the bribe were offered in consideration for the commission of a crime, the penalty for that crime will be attached in addition to that provided for corruption to the donor or recipient as the case may be.

28. The penal codes of most States, including the provisions relating to corruption, do not explicitly state whether or not they extend over activities engaged in abroad by their nationals. Swedish law, however, states expressly that a Swedish citizen guilty of corruption abroad in principle is liable to prosecution in Sweden and, to the extent that the act is criminal, also in the country where it was committed. Also, the relevant provisions of the Norwegian Penal Code are made applicable to any corrupt practice committed abroad either in respect of Norwegian enterprises or a Norwegian authority or by persons who are Norwegian nationals or domiciled in Norway if the corrupt practice in question is directed against a Norwegian authority, or by foreigners in violation of the relevant laws of the country in which the acts occurred.

(d) Sanctions

29. The punishment for corruption varies from country to country. It usually consists of imprisonment and/or a fine, and its gravity is influenced by factors such as whether (1) the act for which the bribe was paid was actually performed; (2) the act was within the scope of official duties; (3) the act constituted a violation of such duties (or a non-performance · retardation of an official act

which should have been performed) or a crime per se; or (4) the bribe was paid after an act falling within official duties. Some legal systems confer heavier punishments if certain specified circumstances obtain.

30. For instance, in Italy a fine and up to three years' imprisonment may be imposed if the act is within the scope of the official's duties; in the Federal Republic of Germany and Switzerland, a fine or imprisonment up to two years; in the Netherlands, a fine of up to 300 florins or imprisonment up to three months. If the act constitutes a violation of official duties, Italian law prescribes imprisonment from two to five years. This may be increased, if the corruption results in the award of public office, pensions, honours etc. or if contracts are concluded in which the administration of which the public official is part is interested. In Brazil, the punishment is increased by one third for corrupt practices that also constitute violations of official duties. If the official is not himself an active seeker of the bribe but has merely given in to the demand or influence of others, the punishment is imprisonment of three months to one year or a fine (article 317, sects. 1 and 2, Penal Code of Brazil). In Colombia, the penalty may go from one to eight years' imprisonment and a fine either where a violation of official duties is involved or where the act concerns the conclusion of public contracts, bidding, sales of public property. In addition to the foregoing penalties, the official may be suspended or dismissed from office.

31. Generally speaking, penal codes punish with equal sanctions both the giver and the taker of bribes. In the United Kingdom, Canada, Australia and other countries of the common law tradition, the acts of giving and taking are misdemeanours for which equal penalties are prescribed. In some countries, however, the fact that the giver is a public official provides a rationale for the imposition of a heavier penalty.

32. Under article 143 of the Iranian Penal Code, however, the person offering the bribe will be "exempted from the penalty if it is proven that he committed the infraction only to safeguard his legitimate rights". The giver will also be exempted from the penalty "if he communicates his infraction to competent authorities and gives proof thereof".

33. In addition to fine or imprisonment, the constitutions of some countries deprive persons guilty of corruption of access to public office. Also laws relating to membership in certain professional classes (for example, lawyers, accountants) deny membership to persons who have been convicted of crimes involving fraud, corruption, dishonesty or any kind of moral turpitude.

(e) Procedures for proving corruption

34. In almost all countries the institutions involved in bringing the legal process to bear in respect of corrupt practices consists of the police departments which investigate allegations of crime, justice departments which prosecute the case and the judicial tribunals which declare the guilt or innocence of the accused and in the former event impose the appropriate penalty. In view of the secrecy involved in acts of corruption, the mutuality that often exists between

giver and taker, and the personalities of the public officials concerned the normal operation of the legal process is often confronted with insuperable problems, the most significant of which is the non-availability of adequate information about the offence. This is compounded by the fact that in the event of a trial the rules of evidence - which ordinarily operate well with respect to some crimes - tend to exclude as hearsay or uncorroborated evidence the type of evidence which is more easily available in corruption cases. The result often is the discharge of the accused in apparently compelling cases. This in turn tends to weaken the morale of the responsible law enforcement officers and to eviscerate their enthusiasm in pursuing other cases. To address this problem some countries have instituted special procedures which attempt to strengthen the operation of the legal process with respect to corruption. In Ghana, for instance, ad hoc commissions of enquiry are established to investigate allegations of and elucidate the facts about serious corrupt practices. The commissions of enquiry are administrative tribunals and, while operating as quasi-judicial bodies, they are relatively free of some of the rules of evidence binding upon the courts. The findings of the commission of enquiry are only factual in nature and, in the event of a criminal prosecution, constitute prima facie evidence of guilt. The accused may rebut the presumption of guilt, although he may only challenge the findings of fact themselves on limited grounds (for example, failure by the commission to observe due process).

35. Other countries have tackled the problem of proving the offence of corruption in other ways. For instance, in the United Republic of Tanzania amendments were introduced to the Prevention of Corruption Ordinance empowering authorized police superintendents to require any public officer to give a "full and true account" of all, or any specified, property in his possession (including property held by an agent, a spouse or a child). Following such an investigation the public officer may be charged with possessing property "reasonably suspected of having been corruptly received", in which event the onus of disproving guilt before court lies on the accused. 10/ The highest appellate courts have interpreted the law to be in essence that, when a public officer is charged with corruptly accepting a consideration as an inducement or reward for doing something in relation to his principal's affairs, then upon proof of acceptance of a consideration from a person holding or seeking a government contract the accused is presumed to have accepted the consideration corruptly. 11/

2. Other kinds of legislation

36. Some countries have instituted proceedings against corrupt practices under legislation other than the criminal code. For instance, in the United States of

---

10/ Prevention of Corruption Ordinance (Amendment) Act 1970, No. 1.

11/ "The Republic has merely to prove the gift and ... thereupon the burden shifts to the accused to show on the balance of probabilities that it was not corruptly received and that it was not received as an inducement or reward for doing or forebearing to do or having forborne to do some act in relation to his principal's affairs." Haining v. Republic (1970) E.A. 620, at 622.

America, where government agencies have undertaken, or are currently contemplating, criminal and/or civil action against transnational and other corporations, the following laws have been used:

Securities Act and Securities Exchange Act

The failure to report in corporate financial statements filed with the Securities and Exchange Commission bribes and kickbacks to foreign officials or Governments may constitute criminal fraud. However, to come within this category under present law, the errors or omissions must have a material effect on the financial picture of the company as a whole as presented by the report. (15 U.S.C. Sec. 78, 17 CFR 240 etc.)

Internal Revenue Code

The Internal Revenue Code provides that bribery and other payments which would be unlawful if made in the United States may not be deducted from business taxes if made overseas, even if the payments are not unlawful where they are made (26 U.S.C. S162 (c) (1) and (2)). There are no such cases currently pending in the Department of Justice.

Sherman (Antitrust) Act and Federal Trade Commission Act

Conduct by American businesses abroad which has the effect of restraining or monopolizing export or import trade opportunities, thereby denying other American businesses the opportunity to compete in that trade, may constitute a violation of the Sherman Act or the Federal Trade Commission Act.

37. Also, false statements filed with federal agencies may constitute a violation of 18 U.S.C. S1001 or other special false statement statutes. For example, certificates prepared by American firms whose goods are purchased with Export-Import Bank loans must declare any commissions, fees or other costs above and beyond the actual value of the goods sold which constitute any part of the contract price. Several cases of possible fraud have recently been referred to the Criminal Fraud Section of the Department of Justice.

38. In conjunction with violations in the foregoing areas, depending on the facts of a particular case, additional charges may be appropriate for conspiracy (18 U.S.C. S371), mail fraud (18 U.S.C. S1341), or fraud by wire (18 U.S.C. S1343). Furthermore, attempts to circumvent or defeat a regulatory system designed to ensure the integrity of a government programme may constitute a conspiracy to defraud the United States.

39. Proposals have been made in the United States Senate for special legislation barring United States companies from bribing foreign government officials and for legislation requiring companies to disclose any payments exceeding $1,000 they make to employees of foreign Governments or political parties or persons affiliated with either. Proposals have also been made that all registered corporations be required to have audit committees of outside directors and that at least one third of their board seats be held by outside directors.

40. The Securities and Exchange Commission has proposed legislation to amend the Securities Exchange Act of 1934 to prohibit certain issuers of securities from falsifying their books and records. Affiliated corporations would be required to keep books and records that accurately reflect transactions and disposition of assets. The proposed legislation would make it unlawful for "any person, directly or indirectly, to falsify, or cause to be falsified, any book, record, account, or document, made or required to be made for any accounting purpose /with respect to certain issues of securities/ ...". In addition the proposed legislation would make it unlawful for any person to deceive the corporations' auditors. 12/ The rationale behind the legislation is to deter improper payments by making it more difficult for corporations to conceal bribery payments in their accounts.

41. Japanese Government authorities have invoked both tax evasion laws and foreign exchange control laws in bringing criminal action against one alleged recipient of questionable funds. Criminal charges under these laws involve failure to declare income and failure to declare the receipts of foreign exchange.

C. At the private level

42. Various forms of action relating to corrupt practices have been taken at the non-governmental level. A number of private institutions with varying degrees of international concern have devoted time to the issue of corrupt practices, either by way of organizing seminar discussions or sponsoring pertinent research activity. Prominent among these are the Canadian-based International Institute of Administrative Sciences whose Working Group on Ethics in the Public Service has an ongoing programme of occasional seminars and conferences; the United States-based Group on the Establishment of an International Court which has completed the text of a draft treaty for the regulation of the corrupt practices of transnational corporations; and the European Consortium for Political Research of the University of Brussels Centre on the Sociology of Law and Justice which has prepared several studies relating to corruption. Recently, the International Chamber of Commerce established a commission composed of influential public figures drawn from several countries to embark on a study of corruption in business.

12/ See draft legislation proposed by the Securities and Exchange Commission in Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices (at 63-69), submitted to the Senate Banking, Housing and Urban Affairs Committee, 12 May 1976.

II. INVESTIGATIONS AND PROPOSALS MADE BY GOVERNMENTS

A. Investigations

43. In their replies some Governments stated that to their knowledge there had occurred no cases of corrupt practices requiring government action in their countries and, consequently, that they had found no need to carry out any studies or investigations (Sweden, Fiji, Federal Republic of Germany and Singapore). Some Governments stated that they had enacted no special legislation to deal with corrupt practices but that the general law contained measures prohibiting such activities. The Government of the Union of Soviet Socialist Republics stated that the principles of the relations between government agencies and foreign firms as well as the character of the ownership of the means of production laid down in the Constitution of the Soviet Union prevent the appearance of such negative effects of the activities of transnational corporations.

44. Some Governments stated that they had established or were utilizing commissions or committees of enquiry to investigate allegations of corrupt practices in their countries (Colombia, Iran, Japan and the United States of America).

45. The response of the Government of Iran described in some detail the cases of corrupt practices engaged in by transnational corporations which it had investigated. Following the findings of a committee established by the Government to the effect that a consortium of companies had engaged in improper conduct in connexion with a government contract, the Government of Iran had taken three steps. First, it had made it an official requirement for every foreign corporation doing business with Iranian agencies to sign an affidavit stipulating that the contractors - whether the firm, its subsidiaries or affiliates, or any person representing it - has not in any way paid gratuities, fees, bonuses or other payments to middlemen, agents or to any other person in connexion with the business in question, except those specifically mentioned in the contract. (A photocopy of the affidavit form is contained in the reply of the Iranian Government. Secondly, the Government had started to prepare legislation with a view to incorporating into existing law, certain modifications which would render any violation of the provisions of the affidavit a criminal offence. Thirdly, the Government had promptly intitiated legal proceedings against certain corporations with a view to recovering the amounts that had been disbursed illegally.

46. The Government of Japan stated that the case so far known to it is the alleged illicit acts pertaining to the sales activities in Japan of one corporation and its subsidiaries or affiliates. It stated that the case was under investigation. The measures which the Government of Japan had taken consisted of the conclusion of working arrangements with the United States Government relative to procedures for mutual assistance in administration of justice in connexion with the case under investigation.

47. The Government of the United States of America referred to its endeavours to eliminate corrupt practices as evidenced by the investigations that had been and were still being made by the United States Congress and other government agencies.

The Securities and Exchange Commission had carried out a broad programme of inquiry to uncover improper payments by the United States companies, including a voluntary disclosure programme and was complemented by disclosures resulting from law suits instituted by private persons or the Justice Department.

48. The government reply contained the report prepared by the Securities and Exchange Commission to which is annexed an exhibit specifying the corporations that had engaged in corrupt practices. The report describes the work of the Securities and Exchange Commission in the area and analyses the information that has been disclosed as a result of these activities and of responses from the private sector. The report also contains the text and an analysis of a legislative proposal to deal with the issue of questionable and illegal corporate payments and a description of actions taken by the Commission to encourage corporate accountability in this area.

49. The government reply stated that the investigations which had begun would be intensified. Furthermore, it stated that in order to enable the Government to take the most effective possible action on questionable practices, both at home and at the international level, the President had created a Cabinet-level Task Force, under the chairmanship of the Secretary of Commerce, to institute a co-ordinated programme to review ongoing efforts in the area and to explore additional approaches. The Task Force is to report to the President before the end of 1976.

50. The French Government stated in its reply that it had not conducted any investigations. However, it mentioned that it had concluded international agreements with certain States relating to international fiscal administration or to double taxation which enable action to be taken against international fraudulent activities in the fiscal sphere.

B. Proposals

51. The replies of Governments also contained several proposals for dealing with the issue of corrupt practices. These related to the following headings.

1. International codes of conduct

52. Some Governments expressed themselves to be in favour of some form of an international code of conduct. The Federal Republic of Germany suggested that any international rules of conduct designed to prevent corrupt practices should be embodied in the codes of conduct which are being elaborated by the Organisation for Economic Co-operation and Development and the United Nations Commission on Transnational Corporations. The Colombian Government stated that only within the context of a code of conduct, legally binding on transnational corporations, could incidents of corrupt practices involving transnational corporations be regulated. While expressing support for a binding code of conduct, the Government of Mexico stated that the concern about the corrupt practices of transnational corporations should not serve as a distraction from focusing attention on the regular aspects of transnational corporations. In its view, the international

community should concentrate its attention on the elaboration of a code of conduct to deal with these regular aspects of transnational corporations. Only within this context would the measures adopted against corrupt practices be meaningful.

2. Treaty

53. At the second session of the Commission on Transnational Corporations, a paper submitted by the United States of America had proposed the conclusion of an international agreement to deal with corrupt practices. The paper pointed out that the problem of corrupt practices is both a trade and investment problem which, in fact, extended beyond the activities of transnational corporations. Although it stated that it is primarily the responsibility of each State to set forth clear rules relevant to such activities within their territories, it added that the dimensions of the problem are such that unilateral action needs to be supplemented by multilateral co-operation. In the view of the United States Government, co-ordinated action by exporting and importing host and home countries is the only effective way to prevent improper activities of this kind. The proposal listed the following as the principles on which an international agreement should be based:

(a) It would apply to international trade and investment transactions with Governments, i.e., government procurement and other governmental actions affecting international trade and investment as may be agreed;

(b) It would apply equally to those who offer or make improper payments and to those who request or accept them;

(c) Importing Governments would agree to (i) establish clear guidelines concerning the use of agents in connexion with government procurement and other covered transactions and (ii) establish appropriate criminal penalties for defined corrupt practices by enterprises and officials in their territory;

(d) All Governments would co-operate and exchange information to help eradicate corrupt practices;

(e) Uniform provisions would be agreed for disclosure by enterprises, agents and officials of political contributions, gifts and payments made in connexion with covered transactions.

3. Exchange of information

54. The Government of Singapore stated that it had not had any cause to seek information about corrupt practices from other countries. Although the Government of Barbados stated that it had never been necessary for it to seek information in the area of corrupt practices, it usually had been able to obtain general information on foreign companies without any difficulty. Several Governments stated that they kept no information or statistics on incidents or corrupt practices in their countries.

55. In connexion with difficulties faced in obtaining pertinent information available in other countries, the Government of Japan mentioned (1) the difficulty in interviewing persons who are outside Japan and are involved in the case and (2) the need to institutionalize means of mutual assistance both in investigations and legal affairs on a bilateral basis. The Iranian Government reply also mentioned a difficulty it had encountered in obtaining the necessary information concerning alleged corrupt practices. One person who had purported to act as agent and who had improperly collected moneys allegedly to be passed on to Iranian Government officials had left Iran as soon as an investigatory committee was established and had not returned. Consequently, the attempt to obtain direct testimony from him had proven a fruitless endeavour, since he continued to evade Iranian jurisdiction. In addition, the Iranian Government mentioned that

> The difficulties faced in obtaining pertinent information are mainly due to the manner in which some corporations and their intermediaries conduct their transnational activities. The major stumbling block in obtaining relevant data is the proclivity of these corporations to maintain confidentiality of information regarding business operations.

Accordingly, the Government of Iran suggested that home and host Governments should, through bilateral or multilateral arrangements, co-operate with each other and in particular co-ordinate their efforts in collecting and exchanging information on such corrupt practices.

56. The reply of the Government of the Union of Soviet Socialist Republics expressed its agreement that the exchange of information on corrupt practices should be one of the aspects of the activities of the Information and Research Centre on Transnational Corporations of the United Nations Secretariat in the framework of the work programme proposed by the Commission on Transnational Corporations at its second session.

4. Adoption of new measures in national legislation

57. Three Governments mentioned that they were considering the adoption of new measures in the national legislation or the extension of existing measures to deal more effectively with corrupt practices (Iran, Sweden and the United States of America). The Iranian Government proposed a range of legislative measures to prohibit and penalize the illegal acts of transnational and other corporations. These would include

> Concurrent legislation in several countries ... in relatively uniform legal standards. In this connexion, home countries of corporations should assume special responsibility and adopt strict measures, including requirements for disclosure of payments, commission, and agency fees. Disclosure and publicity would constitute an inhibiting factor on the freedom and ability of the offending parties to continue in their devious activities. Legislation designed to establish the criminality of corrupt practices abroad, would

make it impossible for individuals to escape penalities for such corrupt practices undertaken in foreign States, in the name of the corporation.

58. Another proposal, which the Finnish Government put forward, was the creation of a system whereby the establishment of a corporation in a host country would be made dependent on adherence by the corporation to rules of conduct imposed by authorities in the host country. These rules of conduct could include regulation of the relationship of the foreign corporation and its subsidiaries in the host country to the authorities of the host country. Failure to comply with these rules of conduct would entitle the authorities of the host country to use economic sanctions against the corporation and, in extreme cases, to cancel necessary permits and concessions. The Finnish Government pointed out that the effective enforcement of a system of this nature presupposes that the rules of conduct including the provisions for sanctions meet with wide international approval. Also, it proposed the study of possibilities of establishing an international system for the enforcement of decisions on economic sanctions of host country courts in home countries of the offending corporations. In its view this presupposes the effective development of international process law under the auspices of the United Nations.

59. In the view of the Government of Norway, the enforcement of rules against corrupt practices could perhaps be made more effective by enabling such rules also to impose punishment on the company (possibly as well as on those personally responsible). Such a solution would provide an opportunity for meting out penal fines proportionate to the company's economic situation. Moreover, an arrangement of this nature might facilitate the execution of the punishment by the fact that the fine could be collected by distraint upon the company's property.

CONCLUSION

60. The issue of corrupt practices appears to be a complex one. Although its full dimensions are not yet known, it certainly merits serious international concern. Almost all States have some kinds of legislation relating to it, though the nature and scope of these vary considerably. At the international level, measures to combat corrupt practices are currently scanty, but a number of proposals for such measures in the forms of codes of conduct and bilateral or multilateral arrangements have been advanced. The various aspects of the issue of corrupt practices would require more detailed consideration beyond the scope of this report.

UNITED NATIONS

ECONOMIC AND SOCIAL COUNCIL

Distr.
GENERAL

E/5838/Corr.1
26 July 1976

Original: ENGLISH

Sixty-first session
Agenda item 13

Dual Distribution

TRANSNATIONAL CORPORATIONS

Measures against corrupt practices of transnational and other corporations, their intermediaries and others involved

Report of the Secretary-General

Corrigendum

Paragraph 5, line 4

After Dominican Republic, insert Fiji

GE.76-87996

UNITED NATIONS

ECONOMIC
AND
SOCIAL COUNCIL

Distr.
GENERAL

E/5838/Add.1
21 July 1976

Original: ENGLISH

Sixty-first session
Agenda item 13

TRANSNATIONAL CORPORATIONS

Measures against corrupt practices of transnational and other corporations, their intermediaries and others involved

Report of the Secretary-General

Addendum

GE.76-87818

In compliance with General Assembly resolution 3514 (XXX), the Secretary-General prepared a report entitled "Measures against corrupt practices of transnational and other corporations, their intermediaries and others involved"1/ based on Government replies to his note verbale of 2 March 1976. Since completing his report the Secretary-General has received replies from the Governments of the following ten countries with respect to the issue of corrupt practices: Australia, Belgium, Ireland, Jordan, the Netherlands, Senegal, Switzerland, Syrian Arab Republic and the United Kingdom of Great Britain and Northern Ireland. 2/ These replies are summarized below.

I. REGULATIONS CONCERNING CORRUPT PRACTICES

1. The replies of Governments generally draw attention to the types of measures which have been adopted to prevent corrupt practices. The references to national laws and regulations in the replies of other Governments also appear to indicate that such laws and regulations as pertain to transnational corporations are of a general rather than a specific nature and that they deal with the issue of corruption in similarly general terms.

A. Penal legislation

2. The replies of Governments cite their countries' penal legislation designed to prevent corrupt practices. The legislative measures referred to in the replies of Governments appear to fall into various categories. They are contained either in the general criminal codes or in enactments specifically dealing with corruption or in both. The replies of the Governments of Switzerland and of the United Kingdom describe in some detail the scope of the penal legislation relating to corrupt practices and the kinds of sanctions that these provide for.

B. Other kinds of legislation

3. Other types of laws and legislation cited in the replies of Governments as relevant for the prevention of corrupt practices include: the common law, the Representation of the People Act (United Kingdom), the Companies Act (the United Kingdom and New Zealand), the Commerce Act (New Zealand), Exchange Control Regulations (New Zealand), Overseas Investment Act and Regulations (New Zealand), Land Settlement Promotion and Land Acquisition Act (New Zealand), Land and Income Tax Act (New Zealand), the Debtors Ireland Act (Ireland) and the law relating to foreign investment and the registration of foreign companies (Jordan).

C. The issue of jurisdiction

4. The replies of three Governments refer to the issue of jurisdiction to prosecute and punish acts or corrupt practices. This issue raises problems, especially where international elements are present.

5. According to the United Kingdom reply, under that country's existing law no British subject can be tried for an offence committed on land abroad, unless a specific statutory provision so permits. "This is consonant with the cardinal

---

1/ Document E/5838

2/ The full texts of these replies are available in the Secretariat.

principle that the function of the United Kingdom's criminal courts is to maintain the Queen's Peace in her Realm and the courts' criminal jurisdiction is therefore territorial".

6. The Government of New Zealand also states in its reply that the various laws of possible relevance to corrupt practices "would of course only reach New Zealand registered companies". Further, it states that special measures might be necessary if a foreign corporation was involved which does not operate through a New Zealand registered company.

7. Similarly, the Netherlands Government states that the provisions of the country's penal code which relate to corrupt practices are applicable only if the offence was committed in Netherlands territory or in a country which recognizes a provision similar to the relevant provision of the Netherlands penal code and the offender is a Netherlands national.

II. INVESTIGATIONS AND PROPOSALS

A. Information on corrupt practices

8. The following Governments state in their replies that, to their knowledge, corrupt practices of the type referred to in resolution 3514 (XXX) have not occurred in their countries: Australia, Belgium, New Zealand, Senegal.

9. With respect to statistics the Government of the United Kingdom states in its reply that it does not keep separate statistics concerning corrupt practices and bribery as such. However, it states its belief that, although precise figures cannot be given, the number of prosecutions was small.

10. The Netherlands Government reply states that the National Bureau of Statistics has collected data on the different forms of corruption provided for in the relevant articles of the penal code. The reply tabulates the various provisions under which action has been instituted between 1968 and 1975 and the number of convictions and acquittals.

11. The Government of New Zealand states in its reply that it collects certain types of information about affiliates of foreign-based transnational corporations and about the foreign operations of transnational corporations based in New Zealand. The reply mentions that details of the range of information which the New Zealand Government collects on these matters was communicated to the Secretary-General by the Minister of Foreign Affairs of New Zealand in his Note PM 104/14/10 of 11 November 1975.

B. Investigations

12. The Government of the United Kingdom refers to a Committee of Inquiry which it had established in December 1974. The terms of reference of this Committee were "to enquire into the standards of conduct in central and local Government and other public bodies in the United Kingdom in relation to the problem of conflict of interest and the risk of corruption involving favourable treatment of a public body and to make recommendations as to the further safeguards which may be required to ensure the highest standards of probity in public life". The Committee is expected to report in the near future.

13. Furthermore, the reply of the United Kingdom mentions other instruments which are available for the investigation of corruption when a company is involved. It states that these are more frequently used in relation to the ordinary crimes of fraud, though they have occasionally been used for the probing of corruption. The two legal instruments which the reply cited are the Companies Acts of 1967 and 1948. First, section 165 of the 1948 Act enables the Department of Trade to appoint an inspector or inspectors where there are circumstances which suggest that the business of the company has been or is being conducted with intent to defraud creditors or for fraudulent or unlawful purposes or that the company was formed for a fraudulent or unlawful purpose. Secondly, under section 109 of the 1967 Act, the Department of Trade may, if it thinks there is good reason to do so, direct the production of the books and papers of a company, or authorize one of its officers to require such production, and thereafter to obtain explanations of any entry therein from any past or present officers or employees of the company. Under Section III of the same Act the Department of Trade is prohibited from disclosing the results of the investigations to the police, except for the purposes of instituting criminal proceedings.

14. The Government of the Syrian Arab Republic refers to its legislative decree No. 151 of 1952 which governs the activities of transnational and other corporations in the country. Article 37 of this decree establishes the machinery for ensuring compliance with the law and for investigating violations. Responsibility for enforcement of the law is entrusted to officials of the Corporation and Economy Departments in the provinces who are authorized by the Ministry of Economy to verify the enforcement of the provisions of the decree. The reports which these officials prepare remain valid until acted upon. However, the Government's reply states that, since the enactment of the decree, foreign corporations have not committed any serious violation or misconduct requiring investigation or legal action against them.

15. The Government of New Zealand states that its Justice Department carries out routine investigations under the Companies Act and other statutes solely to ensure that the laws are being complied with. These routine investigations contain no record of any instances of corrupt practices by transnational corporations operating in New Zealand. The reply also states that there do not appear to have been any specific studies of the trade policies and practices of transnational corporations.

16. The Netherlands Government states in its reply that it has no information on acts of corrupt practices in violation of the laws of other countries and that the information available to it relates only to corrupt practices violating Netherlands law. It indicates that these latter instances of corrupt practices, namely, where an international element is absent, are not contemplated by General Assembly resolution 3514 (XXX). In five such cases proceedings have been instituted under the Netherlands penal code. Four of these cases resulted in convictions, the fifth in an acquittal.

17. The reply states that the Netherlands Government has not conducted any other studies or investigations of corrupt practices having an international element. The only investigations it has made concerned the domestic scene. Nonetheless, it considers that the information, which has relevance solely to the situation in the Netherlands, could be useful for the purposes of the Secretary-General's note verbale.

18. In 1962 the Netherlands Minister of Justice established a commission whose function was to consider the possibility of prescribing penal sanctions for officials other than agents of the public service who corrupt others or allow themselves to be corrupted, and to make recommendations on the issue.

19. The report of the commission made use of several views which it had gathered from confidential discussions with industrial and commercial leaders. Furthermore, some big enterprises had supplied the commission with confidential written information. On the basis of that material, the commission had concluded that it was necessary to punish corruption, active as well as passive, by non-public officers. The recommendations made by this commission resulted in the insertion of article 328 in the penal code. Before putting forward the text of article 328, the commission had undertaken a comparative study of the relevant provisions of legislation in the Federal Republic of Germany, Austria, Sweden, Switzerland, the United Kingdom, France and the State of New York.

20. The Netherlands Government's reply states that article 328 of its penal code facilitates action against the corruption of non-public officers, even where an international element is present, provided that the criminal act was committed in Netherlands territory, or in a country which has a provision similar to article 328 and the offender is a Netherlands national.

21. The reply of the Belgian Government states that the question whether the penal code of Belgium presents lacunae, especially in the area of corruption and bribery, has been considered in Belgium. A study has been started with a view to amending the law of 6 August 1931 establishing appropriate rules of conduct for ministers.

C. Proposals

22. Two Governments (those of the Netherlands and the Syrian Arab Republic) made the following proposals for combating corrupt practices.

1. International co-operation

23. The Netherlands Government reply refers to the need for international co-operation to deal with corrupt practices. It states that unilateral regulation (in Netherlands penal law) concerning corruption by officials serving in foreign countries cannot be achieved, if only for practical reasons. Only international co-operation, on as wide a scale as possible, would make it possible to take effective action against illicit payments in the framework of international commerce. In the view of the Netherlands Government such international economic co-operation is equally necessary in order to combat acts likely to distort the course of world markets.

24. In its reply the Government of the Syrian Arab Republic also indicates that it is ready to facilitate co-operation, to study any decisions to be taken by the United Nations on the issue of corrupt practices and to consider, in the light of these, the possibility of amending the law governing foreign corporations in a manner not contrary to Syria's interests.

2. International agreements

25. The Netherlands Government states that it would support initiatives with a view to preparing workable international agreements, of universal scope, on the

issue of corrupt practices. In its view, these international agreements will only enter into force or have some effect when the States whose participation in international economic relations is significant regard the norms as binding. Such agreements would have to provide for mutual judicial assistance. In this connexion the Netherlands Government noted with interest the discussions which had taken place at the second session of the Commission on Transnational Corporations. It thought that the proposals put forward by the United States of America deserved serious consideration, preferably by the Sixth Committee of the United Nations General Assembly.

3. The possibility of adopting international norms in national legislation

26. The replies of the Syrian Arab Republic and the Netherlands indicate a willingness to consider adopting, as part of their national legislation, norms which the international community may promulgate. According to the latter, these norms must however be clear, capable of being inserted into national legislation and perhaps backed by sanctions.