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CORRUPT PRACTICES, PARTICULARLY ILLICIT PAYMENTS IN INTERNATIONAL COMMERCIAL TRANSACTIONS: CONCEPTS AND ISSUES RELATED TO THE FORMULATION OF AN INTERNATIONAL AGREEMENT

Report of the Secretariat

SUMMARY

This report examines the concepts and issues related to the formulation of an international agreement on corrupt practices, particularly illicit payments in international commercial transactions. The report describes briefly the background of prior United Nations work on the issue and examines the nature of the problem posed by corrupt practices. Chapter I attempts to elaborate on the major concepts involved, such as "corrupt practices", "bribery", "illicit payments" and "international commercial transactions", and to identify the various possible classifications of such corrupt practices, as well as the parties involved. Chapter II underscores the need for international action and discusses the types of actions, both national and international, that might be embodied in a relevant international agreement. It also discusses the types of machinery that could be created in the agreement in order to enforce its provisions and to ensure the settlement of any disputes relating to its interpretation or application.

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INTRODUCTION

A. Background

1. The General Assembly on 15 December 1975 adopted by consensus 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 host countries. The resolution 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 corporations and other involved in such corrupt practices. The General Assembly 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 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. Lastly, the General Assembly in the resolution requested the Secretary-General to report to it at its thirty-first session, through the Economic and Social Council, on the implementation of the resolution.

2. In pursuance of that request the Secretary-General submitted to the Economic and Social Council at the sixty-first session the document entitled "Transnational corporations: measures against corrupt practices of transnational corporations, their intermediaries and others involved" (E/5838 and Add.1), which was based on responses of Governments to the Secretary-General's note verbale of 2 March 1976.

3. That report covered the measures and regulations that the responding Governments stated they had taken at the national and international levels in order to deal with the issue of corrupt practices. It contained a brief survey of the penal legislation of selected countries regarding the concept of corruption, persons capable of committing it, elements of offence and sanctions. It also described certain investigations of corrupt practices that had been conducted by Governments, and summarized the proposals for further dealing with the issue. In conclusion, the report stated that the issue of corrupt practices is a complex one that merited serious international concern and pointed out that "the various aspects of the issue of corrupt practices would require more detailed consideration" than was possible within its scope.

4. Pursuant to General Assembly resolution 3514 (XXX) the Commission on Transnational Corporations discussed the subject at its second session, held at Lima from 1-12 March 1976. The Commission took note of the proposal submitted by the Government of the United States of America for an international agreement and a plan of action and decided to forward it for further discussion to the Economic and Social Council. It also recommended that the Council consider the matter of corrupt practices on a priority basis and take appropriate action at its sixty-first session. 1/

5. At its sixty-first session the Economic and Social Council considered that issue and adopted resolution 2041 (LXI) of 5 August 1976 in which it decided "to establish an Ad Hoc Intergovernmental Working Group to conduct an examination of the problem of corrupt practices, in particular bribery, in international commercial transactions by transnational and other corporations, their intermediaries and others involved, to elaborate in detail the scope and contents of an international agreement to prevent and eliminate illicit payments, in whatever form, in connexion with international commercial transactions as defined by the Working Group".

6. The Ad hoc Intergovernmental Working Group held its first session from 15 to 19 November 1976. The first session was devoted to the organization of its substantive work and to a general exchange of views by delegations on the various aspects related to its mandate. The Working Group requested the Centre on Transnational Corporations to prepare for its second session a working document on corrupt practices which would identify the issues involved in an analysis of the question of corrupt practices and indicate the options available to the Working Group. The present document is in response to that request.

B. The nature of the problem

7. The problem of corrupt practices is a universal phenomenon with deep roots and a long history. It poses serious political, economic, social, legal and moral challenges. Recently, instances of corruption particularly illicit payments involving transnational corporations and others, have surfaced in a dramatic manner, causing serious embarrassment and attracting widespread concern.

8. The effects of corrupt practices are deleterious when such practices take place within a national context, but they are strongly exacerbated and their ramifications even more dangerous when these practices occur in the context of international commercial transactions. They can distort the process of economic development, undermine sovereignty and thwart normal international relations.

9. Corrupt practices in international commercial transactions involving foreign commercial enterprises may subvert the governmental decision-making process. This subversion can have somewhat different effects depending on the economic and political system, but whatever the system, the impact can be serious. It may negate the benefits of competition and undermine national development goals.

1/ See Official Records of the Economic and Social Council, Sixty-first Session, Supplement No. 5 (E/5782), para. 37.

10. Corrupt practices can distort the process of development by inducing countries to make inappropriate expenditures and to waste needed resources. Whenever a business transaction results from corrupt practices, resources and wealth have been misallocated. Under such conditions an inefficient firm could sell relatively low-quality and high-priced products at the expense of a more efficient enterprise. A buyer may have placed his limited resources in an inferior and perhaps unnecessary product. In a world of scarce resources and great developmental needs such activities cannot be tolerated. They can be avoided if both the decision on resource allocation and the decision on the particular product are made in an atmosphere free from impropriety.

11. Corrupt practices could also undermine the political base of a Government. If it is commonplace that a government service can be purchased or that the tax collector can be bribed, respect for government is seriously eroded. Revelations of such practices can have serious destabilizing effects on Governments. In some countries sudden changes of government have been connected with charges - whether true or not - of corrupt practices by the previous régime.

12. Corrupt practices also pose possible threats to national security. On the one hand, armed forces may be persuaded to buy inferior or unnecessary military equipment. On the other, high government officials who are involved as recipients of payments or other gratuities are open to blackmail.

13. Furthermore, corrupt practices can have an adverse impact on international relations. In some cases corrupt practices by a corporation could reflect badly on its home country, at least as far as the authorities or public opinion of the host country affected are concerned. Bilateral relations between home, host or third countries can be strained if revelation of corrupt practices creates political upheavals, particularly when prosecution of the parties involved differs widely among countries, or if domestic legal restraints hinder intergovernmental co-operation.

C. Scope of the report

14. This report attempts, first, a preliminary examination of concepts related to corrupt practices, particularly illicit payments, of types of illicit payments and of possible parties involved. Secondly, it discusses the need for international action and focuses on the possible scope and machinery of an international agreement in this area. Such an agreement, it is suggested, could involve required actions at both national and international levels. In conclusion, the report focuses briefly on possible machinery for implementation and settlement of disputes.

15. At the appropriate time a more thorough analysis of legal issues involved might be needed.

I. MAJOR CONCEPTS

16. The description of the key concepts contained in this chapter is intended to clarify some of the terms used in paragraph 1 of Economic and Social Council resolution 2041 (LXI). No attempt is made to formulate precise legal definitions.

A. Corrupt practices

17. The term "corrupt practices" can cover a broad range of activities which are morally and sometimes legally improper. The scope of those practices that are considered to be corrupt varies from one country to another and from one society to another.

18. In international commercial transactions, there is a wide range of improper activities. These may be viewed so broadly as to include unfair competition and restrictive business practices such as market distortion, price fixing, price discrimination, allocation of markets, rigging of bids and so on. It is also possible to include taxes and royalties made to an illegal régime. The range may also extend to various forms of political interference or intervention in the domestic affairs of a Government.

19. However, although every corrupt practice is an improper activity, not all improper activities are necessarily regarded as corrupt. It is important to recognize this basic distinction and to decide whether one proposes to deal with corrupt practices in the specific sense of bribery or illicit payments or in the broader sense of all improper activities in international commerce.

20. There are arguments in support of dealing with corrupt practices either in the broad meaning indicated in paragraph 18 or in the narrower sense of illicit payments. However, it should be noted that the basic considerations are different when dealing with unfair or restrictive business practices or political intervention than with illicit payments. The former are issues whose importance might merit special consideration. Furthermore, it should be noted that some of these issues are currently being dealt with by some agencies within the United Nations system (for example, the issue of restrictive business practices and of transfer of technology in the United Nations Conference on Trade and Development, including the Commission on Transnational Corporations itself, particularly in its work on a code of conduct.

B. Illicit payments and bribery

21. The term "illicit payment" is the generic term for all payments that are made with the intention to improperly influence a decision. These payments may be directed to officials in public service as well as to officials of private institutions. Illicit payments, which shall be interpreted broadly enough to cover financial and non-financial payments, may include the payment of a bribe or illegal political contributions, gifts and favours (sometimes sexual) to officials; excessive or unduly lavish entertainment; payments to close relatives

or friends of officials: granting employment to close relatives or friends of officials; arranging for transactions that enable officials to violate local currency laws; payments made clandestinely to political figures and journalists to influence the climate of opinion; and so on. In a case in which the illicit payment purports to influence a decision regarding a sale, the payment is usually by a prospective seller to the official in charge of making purchases. It is not inconceivable, however, for the official to make the payment to the seller, for example, to obtain scarce or even prohibited merchandise. Thus an illicit payment may be made by any party to a commercial transaction, whether buyer or seller.

22. It is often difficult to determine whether a non-financial payment is illicit. Although such payments may be customary and part of business life in some quarters, at some point the size and value of the gift relative to the transaction make the gift suspect.

1. Bribery and extortion

23. The term "bribery" is used in most penal legislations to describe the payment of anything of value made to a decision maker (or his agent) in order to influence his official decision-making. 2/ In a narrow criminal law sense, bribery takes place only if the intent of the party making the payment is corrupt, the decision maker who is paid has the authority to influence the event for which the payment is given and the intent in making the payment to him is to influence his decision. Although the law on this point can differ, bribery statutes often cover both the giver and taker of the bribe.

24. The recipient of the bribe can be a public official or a private person. In many countries only public officials, as defined in relevant national legislations, can be "bribed" or "corrupted". In other countries, the recipient need not be a public official. In some cases the act that the bribe is intended to influence must be unlawful; in other cases that is not necessary.

25. An illustration of a description of elements of bribery of civil servants is found in article 147 of the penal code of Iran:

> "If, in order to achieve the goals mentioned in Articles 139, 140, 141 and 144, any possession was transferred, directly or indirectly, to the civil servants both in the judiciary and the administrative order, either freely or at a price obviously lower than the regular price, or at a price apparently regular but actually much lower or else if, in order to attain the same goals, any possession was bought from them at a price obviously higher than the regular price, or at a price apparently regular but actually much higher, the said civil servants are guilty of corruption, and the party with which they deal will be considered as corrupting.

2/ See E/5782, paras. 16-19.

26. The term "extortion" is used to refer to the situation in which the illicit payment is made as a result of threats or other methods of coercion employed by an official. This is sometimes referred to as "active bribery", as opposed to "passive bribery" in which the official has not initiated the payment. Invariably when bribery is disclosed, each party - the payer and the recipient - accuses the other of having originated the transaction and determination of the truth of the matter is difficult.

2. Types of illicit payment

27. Illicit payments may be classified, for the purpose of this report, into three major types: expediting, altering decision-making and maintaining a favourable climate. Political contributions, which may be made for all of the above purposes, are often connected with securing a favourable climate.

Expediting payments

28. Expediting payments are those made to speed up the decision-making process. They become most common where a civil service is under-manned and thus limited in its capacity to handle the demand for the service it performs. Expediting payments are used to buy preferential access to the head of the line. A typical example is a payment to a harbour master to avoid waiting to off-load a ship.

29. Sometimes the expediting payment is the result of extortion by the official who controls the service or function. He lets it be known that preferential treatment can be purchased and suggests that if payment is not forthcoming problems will ensue.

30. These types of payment are by no means harmless because they result in unfair competition. Their repercussions can be even more serious when made by corporations with ample financial resources. Such corporations may, for instance, push the bidding in expediting payments far above local competitors. The ability to pay, to pay in more sophisticated ways, and to offer a better prospect for concealing the payment could give the corporation an unfair competitive advantage.

Decision-altering payments

31. Decision-altering payments are payments made to induce an official to buy a product that he would not normally have bought, or to act in a way in which he would not otherwise have done. Instances that have come to light are payments to airline and government officials to favour one manufacturer's aeroplane even without regard to whether the plane may be inferior or inappropriate; payments to military officials to persuade them to purchase more aircraft than they need; payments by company executives to officials in charge of resources for a concession on favourable terms; and payments to change official rulings on taxation, licensing or permits. In a number of countries, cases of regular payments to tax auditors, building inspectors and licensing officials have come to light.

32. The impact of decision-altering payments is more deleterious than that of

expediting payments. More than the order in which people are served is affected: the use and distribution of resources is changed. This qualitative aspect makes the decision-altering payment a matter for particular concern. When the payments come from foreign sources the distortions they create may be viewed as external interference with internal decision-making processes.

Political contributions

33. Political contributions are illicit payments when made in violation of the laws of the country in which they occur. They may be made either to a party in power that is seeking to maintain its status or to opposition parties that are seeking to accede to power. In many cases the objective behind the payment is to maintain or to secure a government policy favourable to the payer. It is invariably difficult to determine whether such payments are in fact political contributions or simply bribes.

34. A more complex type of a "political contribution" is a payment that is made with the intent to alter the system. Such payments can be directed towards any level of a government, institution or company. For example, by securing the removal of, or conversely the appointment or election of particular officials, the way in which decisions are generally made and the general orientation of the decision makers may change - although no payment is made on any specific decision.

C. International commercial transactions

35. The term "international commercial transaction" may be used to refer to commercial transactions occurring across national boundaries between any of the following: private persons, companies and Governments or governmental agencies. For the purpose of an international convention, it may be necessary to focus on international commercial transactions in which a company or individual (a) sells directly to a foreign Government; (b) makes a sale requiring government approval; (c) makes a direct investment requiring government approval; (d) seeks any government licence or permit relating to its business operation; (e) seeks national legislation favourable to its commercial interests; or (f) seeks international action favourable to its interests.

36. It should be decided whether and to what extent an international convention should focus on commercial transactions between a corporation and its home Government. Such transactions can have an international character, for instance, where goods sold by a corporation to its own Government are located in another country and are to be delivered to a third country and the contract of sale is governed by the law of a State other than that of the home Government.

D. Parties to illicit payments

37. Corrupt practices, especially illicit payments, involve two or more parties. For the purpose of the present discussion the definition of the commercial participant can be broad enough to cover all forms of enterprises, including

domestic enterprises, exporting products or services abroad. The recipients may be government or other public officials, private persons and agents. Other actors facilitating the payments are intermediaries.

1. Transnational and other corporations

38. This heading might include all possible corporations, national as well as transnational. It might include manufacturers, traders, service industries dealers in licences and patents, and corporations involved in any other commercial transaction. Concerning the ownership of these corporations, the approach of the Group of Eminent Persons might be followed: "Such enterprises are not always incorporated or private: they can also be co-operative or State-owned entities." 3/

2. Intermediaries

39. An intermediary is the person or organization that serves as the vehicle through which an improper payment is made. Usually the purpose of the use of an intermediary is to conceal the fact or the nature of the payment. The desire to conceal the payment is frequently the reason for the location of the intermediary in a third country that has stringent bank secrecy laws or is a tax haven. Some intermediaries have been fictitious sales corporations, foundations, trusts, lawyers and law firms, public relations firms and advertising agencies which collect so-called fees which they then pass to the recipient. Occasionally, illicit payments are made into quasi-official funds.

40. The most common possibility for an illicit situation arises when a corporation retains an in-country sales agent, the agent is paid on a straight commission basis and the corporation makes a point of avoiding asking the agent whether he is splitting his commission or paying a bribe. Although technically the corporation has not made an illicit payment, the agent who subsequently pays an official has clearly moved the transaction into the illicit category.

41. The use of the relatives of a government official or of another influential private citizen as a commission agent can, in some cases, be considered illicit.

42. Purchasing the services of a lobbyist may also cross into impropriety, especially if the relationship is concealed and the amounts are large. If the recipient is clearly not in the sales business, is unfamiliar with the company's product and offers no visible support services, it may even be assumed that his activities are questionable.

3/ The Impact of Multinational Corporations on Development and on International Relations, (United Nations publication, Sales No. E.74.II.A.5).

3. Others involved

Government officials

43. A government official is anyone employed directly or indirectly by a Government in the administration, civilian or military. For the purpose of this discussion this definition should also include consultants and advisers who hold a quasi-governmental position through part-time involvement on governmental boards and commissions or through a contractual relationship with a Government. It could also, in a broad sense, include members of royal families and leading figures of political parties.

Private officials

44. The official involved in an illicit payment may be a person who can influence decisions in his private role. In that case, he might be an official of a company or of a non-governmental institution. Such a person might offer or receive an illicit payment for the purpose of making a decision on grounds other than those it merits.

Agents

45. Commercial agents typically represent manufacturers in their overseas sales efforts. In the context of the present discussion the concern is with agents who go beyond the traditional role of salesmanship and engage in making illicit payments to push sales or other commercial transactions. Companies that engage in corrupt practices might use agents as a screen for their activities by carefully avoiding a discussion of illicit payments with the agent so that the corporation can deny its involvement.

46. Sometimes agents are used to facilitate extortion, for instance, when a government official suggests to a firm that in order to facilitate the commercial transaction it should use a particular agent. Then the agent delivers all or part of the commission back to the government official.

II. INTERNATIONAL ACTION

A. The need for international action

47. Although national laws exist in most countries with respect to corrupt practices, they are not always effective against illicit payments in international commercial transactions because of the transnational ("across-the-frontier") element in the offence and its international implications.

48. The impediments to effective national action are many and varied. Effective enforcement at the national level may be impeded by conflicts of jurisdiction, the inadequacy of information available in any one State and conflicting governmental policies towards enterprises and their activities.

49. Illicit payments in international commercial transactions involve activities in several States, including the home country of the person or corporation making the payment, the country in which the decision-making process is intended to be influenced and possibly third countries through which the payments pass to avoid discovery. Effective control would involve concurrent action in home, third and host or purchaser countries.

50. It is possible that in some States existing laws are not comprehensive enough to reach the various types of corrupt practices. The development of such laws by means of a model text or through an international agreement could help to bring about the required harmonization.

51. Because illicit payments are used as competitive tools, some countries may perceive that unilateral action to change national law to prohibit such payments by their nationals would place their firms at a serious competitive disadvantage internationally. International action to harmonize domestic law will therefore be required with respect to prohibitions. Thus, although the most important remedies necessarily comprise national action, international agreement on simultaneous national action is also essential.

52. Effective national action will depend on international co-operation for enforcement related to such issues as information exchange, judicial assistance and extradition. Although international agreements exist on these subjects, many of them were concluded before the explosion of international commercial activities and the sophisticated movements of funds and records. The usefulness o those agreements in the current context is therefore doubtful. Moreover, existing agreements also tend to be limited in scope to well-defined crimes about which the is little disagreement. Thus, where illicit payments have taken place, international co-operation has been difficult because the national laws, which hav been violated, are not fully covered by existing mutual judicial assistance agreements.

53. Action at the international level would seem especially necessary in order to achieve a uniform understanding on issues such as: (a) the concepts and terms used to describe or proscribe certain activities; (b) criteria and

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procedures for the recognition and enforcement of judgements or findings of national tribunals or authorities; (c) arrangements for obtaining evidence abroad; (d) procedures for subpoena of records available in another country; (e) extradition in cases of individuals seeking to escape responsibility; and (f) appropriate punishment.

54. The need to establish uniform disclosure procedures could also be met through international action. This would not only help to achieve uniformity in the reporting procedures, which all corporations should then be required to follow, but would also help to establish co-operative procedures for the exchange of information. Such international action could encourage those countries whose tax and bank secrecy laws favour their use as third countries to co-operate in eliminating or limiting illicit payments. Under the present situation, if one third country were to agree to shut off illicit payments without another haven country taking similar steps, the activities could simply be transferred to the latter.

B. The scope of an international agreement

55. The measures necessary for dealing comprehensively with all aspects of the issue of corrupt practices cannot adequately be met by national action.

56. Some issues could be effectively regulated by an international agreement that would prescribe specific principles with regard to the conduct of firms. On other issues its provisions could serve as guidelines for conduct, leaving their detailed day-to-day implementation to national authorities. An agreement of this type could also harmonize the variety of existing provisions on the issue.

57. An international agreement could take the form of a multilateral convention with a detailed spelling out of rules, principles and procedures for its enforcement, together with agreed procedures for implementation. It could also be a general convention containing agreed principles for observance by the contracting parties, without mandatory procedures for implementation. In either event the convention could recommend some, if not all, of its provisions for adoption into the national laws of the States parties to the agreement. A third alternative would be to envisage the convention as a model law for contracting parties to adopt into their national legislation. Such a model text could supplement the efforts made at the national level to deal with the issue of corrupt practices in international commercial transactions.

1. Action at the national level

58. An international agreement relating to illicit payments, whatever its nature and scope, could be addressed to the types of action that could be taken by home, host and third countries.

Home countries

59. Home country Governments have a broad range of options to control illicit payments made by their national firms. These include criminalization, disclosure, taxation and certification requirements.

60. Criminalization. Home country Governments can make it a criminal act to offer or attempt to offer an illicit payment in connexion with any international commercial transaction. They could be required to prosecute and to punish all offenders within their jurisdiction, since they are in the best position to obtain jurisdiction over the persons who authorized the payments, as well as over the evidence relating to payments in appropriate files.

61. A difficulty in this approach is that in some cases a home country court could be sitting in judgement over nationals and officials of another country. Although these persons might not be parties to the case itself, the conviction of the giver of a bribe could raise political problems for the officials implicated.

62. Disclosure. A strict home country disclosure requirement would seem possible for several reasons. Because disclosure of innocent commercial arrangements or payments would not be harmful politically to the individuals involved, the definition of which payments should be included in the disclosure requirement is less difficult. For example, while it would be impractical to make the payment of all agents fees criminal, it would seem to be possible to require that the names of all agents involved in transactions of more than a certain amount be reported.

63. By limiting disclosure to sizable payments, objections relating to the burden of disclosure would be minimized.

64. Home country disclosure requirements might be backed by criminal sanctions, which would serve as an additional deterrent to illicit payments.

65. Detailed public disclosure of all questionable payments by corporations in their home countries would make it unlikely that a public official would demand such a payment or that he would accept one if offered.

66. Corporations might be required to disclose questionable payments to their home Governments, which would then undertake to inform the appropriate officials of the country in which the payment was made. This approach would allow governmental decisions at each step of the process. However, it advances the possibility of political intervention in the criminal justice process in both home and host countries and of blackmail of the host country government official involved.

67. Another alternative would be to have immediate disclosure of payments to home Governments, coupled with the requirement that a report be made available by the home Government to the national authorities of the purchaser. At the

end of a one-year period, for instance, corporations could be required to make the report public. This approach would give the purchaser Government the opportunity to investigate the transaction and decide whether law enforcement action was warranted. The fact that later public disclosure by the home Government would be required would act as a deterrent to the payments and would put pressure on all parties to prosecute corporations for any illicit payments that had taken place.

68. A time-lag feature in a disclosure requirement would meet the possible objection that disclosure of a perfectly innocent transaction might put the disclosing firm at a serious competitive disadvantage, since the terms of the underlying business deals would be made public, as would the identity of the sales agent. Without a time-lag, a competitor could learn the bid price or try to hire away an effective agent by offering him a higher salary or commission. However, if disclosure were delayed for a year or more, the information would lose its competitive importance and the objectives of enforcement would be met.

69. Political contributions, however, should be revealed immediately if disclosure is to be effective.

70. Taxation. The tax laws of home countries allow business expenses as deductions. Under these provisions it is sometimes possible to conceal the fact that an illicit payment has been made and to obtain a deduction for it. However, when an illicit payment is clearly identified and made non-deductible, its true cost increases, and the temptation to make such payments would probably decrease.

71. A further tax penalty could include a special tax on profits from a deal involving a bribe.

72. Certification. Some international commercial transactions require home Government involvement. Arms sales, for example, are subject to export permits. Governments often promote exports with loans from government-operated export banks. Exchange-control approval may also be required for some transactions, or critical technology sales made subject to export licences. Corporations might be required to report all fees, commissions, political payments and other payments as a condition of getting such approval for the transaction. A prospective purchaser may insist on receiving a copy of the report. Home country Governments could enforce this requirement by making it part of their criminal laws and by subjecting the firm to audit and appropriate penalties.

73. In many countries certifications are already required or can be required through administrative rather than legislative change.

74. Civil remedies. Under most legal systems it is not possible to enforce a contract that is tainted with corruption or that offends public morals. This principle could be of possible relevance as a deterrent to making illicit payments.

75. Home countries might also offer a remedy to firms that have lost a sale to a competitor that made an illicit payment. This could be done through existing laws on trade restraints, by allowing injured firms (competing companies are often likely to know whether there has been a questionable payment) to bring private damage actions for a multiple of the amount of the lost profit and reasonable attornies fees. To be most effective, home country law should be written in a way that specifically gives the right of this kind of action to firms from other countries.

76. The right of corporations to sue might also be complemented by giving shareholders a right to sue corporate officers personally to recover improper payments from them. To impose such a personal responsibility on managers and directors of corporations might even be one of the most important deterrents to illicit payments.

77. Finally, home country civil law should require a firm to keep accurate books and records of all transactions. Thus, payments that are concealed through off-the-books accounts and falsified invoices would lead to prosecution for the act of concealment. The more difficult it becomes to conceal an illicit payment, the less likely it is that a corporation will make one. The law could require that books of operations carried out in secrecy or of haven countries be kept in duplicate, with one set in the home country, as a condition for the firm to operate in the country.

Host countries

78. Criminalization. Bribery of officials is already a crime throughout the world. This could be supplemented by making it a crime to conspire to bribe, even if all of the activity were to take place in another country. The use of the criminal process is complicated by the immunity granted to high elected officials and parliamentarians in some countries.

79. Host country laws on extortion could also be revised to allow for more certain penalties. For example, it should be possible for a corporation to obtain the prosecution of a public official who approaches it with a demand for illicit payment in exchange for an official act or omission. Business officials who have been approached by bribe seekers might be more willing to complain if there were special prosecutors.

80. The conversion of a political contribution to personal use could expressly be made a criminal offence. Any prohibition of political contributions, to be fully effective, should extend to foreign individuals as well.

81. Many questionable transactions have involved former government officials offering their services to companies who deal with the branch of government they once worked for. Occasionally, the retired officials use established connexions; sometimes the employment contract may have been negotiated while that person was still a public official. Consequently, it would be necessary to prescribe rules prohibiting former government employees from dealing with the agency that they have left for a certain period of time and prohibiting job negotiations with firms having business with that agency.

82. Disclosure. Host countries can require the disclosure of all agents fees and commissions as a condition for doing business. (For example, Iran has adopted a policy of obliging companies to disclose agents fees as a condition of bidding on a contract). To effect this disclosure each firm could be required to allow an audit of its books by an external auditor to determine whether questionable payments were made in connexion with a particular transaction.

83. Once agents fees and other additional payments are disclosed, the purchaser country can investigate further to determine the legitimacy of the payments. If the home country requires similar disclosure, the two reports can be compared.

84. Other remedies. In addition, host countries could also require any company that has made an illicit payment to pay a fine of several times the amount of the payment before being allowed to operate in the country. Conversely, the public official who has taken an illicit payment could also be subjected to severe sanctions, including removal from public office in appropriate cases.

Third countries

85. Many illicit payments are passed through a third country (a tax haven or secrecy country) in order to hide the transaction. In some cases the agent is in the third country and in others the fictional corporation or foundation which receives the money either in cash or as an agent's fee is in a third country. Information about such agents and recipients would thus be central to any plan to combat illicit payments.

86. In the first instance, third countries could adopt rules that increase the risk and the difficulty of such illicit transactions. Agents working for foreign firms might also be required to disclose their activities.

87. Third countries might further be required to assist Governments affected by an illicit payment to fully investigate a suspicious transaction that has been passed through the third country. Currently, the laws of some countries do not allow officials of a foreign Government to even question its own nationals located in the third country in order to ascertain whether an illicit payment has occurred. In some cases the laws relating to industrial espionage prohibit disclosure by a corporation or by an individual of information that is potentially damaging to a third party. Thus, if a subpoena is issued in the home country, the corporation could refuse to comply on the grounds that injury to a third party might result and hence render the local representative of the corporation subject to arrest and prosecution.

88. Finally, third countries could be required to reveal bank records if both the home country and the purchaser country show probable cause that the payment they are tracing is an illicit one. The third country could create machinery to decide when and what degree of co-operation is appropriate. Local law enforcement officers could be empowered to determine when a transaction is tainted and hence should be deprived of protection under bank secrecy laws.

2. Action at the intergovernmental level

89. In addition to the actions that Governments might be required to take within their own territories, an international agreement could contain provisions regarding intergovernmental co-operation and harmonization of national laws. In fact, a considerable number of issues dealt with in an agreement would require the co-operation of home, host and third countries. Such co-operation could range from exchange of information, assistance in investigation, mutual judicial assistance and disclosure at the international level.

Exchange of information

90. Since the fundamental characteristic of any illicit payment is secrecy, co-operation in making public information on such payments would have an important deterrent function. Indeed, an agreement on the exchange of information would seem complementary to an agreement on international standards and criteria for disclosure. There is a mutuality of interest between the host and home Governments for exchanging relevant information bearing on the activities of corporations with which they are concerned.

91. At the international level, there are many examples of multilateral conventions that have established information-exchange procedures. However, with respect to the exchange of information on illicit payments, difficult and embarrassing questions might arise when State-owned corporations are involved or when corporate secrecy and competitiveness is given away by exchanging further, more harmless, information. Appropriate provisions in an international convention could minimize these and other related problems.

Mutual judicial assistance

92. An international agreement could also include provisions concerning the power of law enforcement officers to summon witnesses, to subpoena relevant records and to extradite, for purposes of judicial investigation, any persons involved in illicit payments. Such provisions would ensure the effectiveness of the obligations undertaken by the parties to the agreement. It would be necessary in the international agreement to specify the procedures to be followed.

93. The provisions of an international agreement ought to be broad enough to facilitate investigations and prosecutions of illicit payments. It might therefore be necessary to state clearly in the agreement that illicit payments constitute extraditable offences for the purposes of all extradition treaties.

94. In addition, provision could be made for investigations by parliamentary bodies and other agencies. Sometimes, because of the political position of the persons under investigation, ordinary criminal processes may not be adequate or even possible; in such cases, until a parliamentary committee has produced its findings, no criminal investigations are likely to ensue. Therefore, when the questionable activities involve high officials, the more diverse the number of agencies with the power to investigate, the higher the chances that there will be prosecutions.

95. Judicial assistance agreements could also be extended to the investigative stage so that co-operation may begin before formal criminal proceedings are initiated. Investigators could also be permitted to exchange on a confidential basis papers filed with different Governments, to question foreign nationals and to request information regarding illicit payments.

C. Implementation and settlement of disputes

1. Machinery for implementation

96. The effectiveness of an international agreement on illicit payments would depend on a number of factors, beyond its formal acceptance and enactment.

97. The agreement would have to be ratified by all three categories of States (home, host and third countries). A variety of procedures may have to be considered in such an agreement in overcoming the difficulties in securing a sufficient number of ratifications. There are many examples in international practice of agreements establishing procedures for obtaining a wide spectrum of adherence. For example, article 19 of the constitution of the International Labour Organisation establishes a system for facilitating ratification of labour conventions concluded under its auspices. A Committee of Experts on the Application of Conventions and Ratifications is created to examine whether contracting parties have enacted legislation or taken appropriate action within the time prescribed (18 months usually) to ratify an international agreement. Furthermore, States are required to inform the Director-General of ILO of the measures they have taken to give effect to the convention in question.

98. In the case of States that have not ratified a convention, the above-mentioned article 19 further requires them to report on the laws and practices concerning the matters dealt with by the convention and to state the difficulties that prevent or delay ratification. On the basis of the information obtained, the ILO Committee of Experts on the Application of Conventions and Ratifications prepares a general survey of the status of the convention for consideration by the General Conference of the Organisation.

99. International procedures might be devised to assist the parties to an agreement in securing its effective implementation. The mechanism for implementation of an international agreement may range from the establishment of permanent institutions or agencies to ad hoc consultations and exchange of information. An international institution might be created or an existing one used to exercise a variety of functions. Such an institution or agency could assist States in overcoming administrative problems and co-ordinate actions taken by the parties to the agreement. It could be entrusted with such functions as servicing, revieving and appraising the implementation of the agreement, mechanisms for exchanging information among Governments, and consultations or fact-finding and reporting. It could also be entrusted with submitting proposals for possible revisions of the agreement.

2. Settlement of disputes

100. The provisions of an agreement may give rise to disputes concerning their interpretation or application. It would thus be essential for an agreement to establish procedures and mechanisms for settling disputes. These procedures and mechanisms could include negotiation, mediation or conciliation and, where these were insufficient, arbitration and judicial settlement.

Negotiation

101. Although negotiation by itself may not be sufficient for the settlement of disputes that may arise out of a convention, it can be stipulated as a prerequisite to more formalized settlement processes. An agreement might provide that the parties to a dispute consult with some third party and make every effort to reach a settlement through it. The third party negotiator could be authorized either to recommend appropriate terms of settlement or to suggest a reference to either conciliation, arbitration or judicial settlement.

Mediation or conciliation

102. A mediation or conciliation procedure for resolving disputes relating to an agreement could consist of a board to be appointed by the parties. Such a board would recommend appropriate action in accordance with the provisions agreed upon.

Arbitration

103. The parties to a dispute relating to the interpretation or application of a convention may choose to resort to arbitration in order to settle the dispute. They may do so either on an ad hoc basis or in a more institutionalized manner. In an ad hoc arbitration, each party would appoint one arbitrator, and both parties together would appoint the third or provide for some other manner of appointment. In an institutionalized arbitration procedure the parties resort to an existing arbitral body.

Judicial settlement

104. Depending on the nature of the dispute, it may be possible to resort to national judicial tribunals for settlement. On the international level, the dispute may be submitted to the International Court of Justice, provided that the parties are States that have accepted the Court's jurisdiction.
