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AD HOC INTERGOVERNMENTAL WORKING GROUP
ON THE PROBLEM OF CORRUPT PRACTICES
Third session
28 March-8 April 1977

MAJOR ISSUES TO BE CONSIDERED IN THE EXAMINATION OF THE PROBLEM OF CORRUPT PRACTICES, IN PARTICULAR BRIBERY, IN INTERNATIONAL COMMERCIAL TRANSACTIONS BY TRANSNATIONAL AND OTHER CORPORATIONS, THEIR INTERMEDIARIES AND OTHERS INVOLVED

Annotated outline

Report of the Secretariat

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INTRODUCTION

1. The Economic and Social Council at its sixty-first session 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, and 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. 1/

2. 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. 2/

3. At its second session held from 31 January to 11 February the Ad Hoc Intergovernmental Working Group adopted a list of major issues to be considered in the examination of the problem of corrupt practices, in particular bribery, in international commercial transactions by transnational and other corporations, their intermediaries and others involved, as a basis for its future work. 3/

4. The Ad Hoc Intergovernmental Working Group also requested the Centre on Transnational Corporations to prepare for its third session (to be held on 28 March-8 April 1977) an annotated outline following the approved outline. The present document is in response to that request. It is based on the discussions and the views expressed during the first and second sessions of the Working Group, and draws upon any other material which could be of relevance to the work of the Working Group.

5. On 2 March 1976 the Secretary-General of the United Nations had transmitted a note verbale to all States requesting information on, inter alia, the existing laws on the subject of corrupt practices and the range of sanctions. In their replies some States identified all such relevant provisions in their domestic laws. A listing of these provisions is contained in the accompanying annex.

1/ See also General Assembly resolution 3514 (XXX) of 15 December 1975 entitled "Measures against corrupt practices of transnational and other corporations, their intermediaries and others involved", and United Nations document E/5938 and Add.1 containing a survey of aspects of national legislation on corrupt practices and an analysis of governments' views and proposals to further deal with the problem of corrupt practices.

2/ United Nations document E/AC.64/3, entitled "Corrupt Practices, Particularly Illicit Payments in International Commercial Transactions: Concepts and Issues Related to the Formulation of an International Agreement".

3/ United Nations document E/AC.64/4.

A. Issues to be considered in the elaboration of an international agreement to prevent and eliminate illicit payments, in whatever form, in connexion with international commercial transactions

I. PREAMBLE

6. The preamble to an international agreement on bribery, illicit payments and other corrupt practices in international commercial transactions could recall the previous resolutions of the United Nations relevant to the issue of corrupt practices as well as the purposes and orientations of those resolutions. For instance:

(1) General Assembly resolution 3201 (S-VI) of 1 May 1974 on the Declaration on the Establishment of a New International Economic Order;

(2) General Assembly resolution 3202 (S-VI) of 1 May 1974 on the Programme of Action on the Establishment of a New International Economic Order;

(3) General Assembly resolution 3281 (XXIX) of 12 December 1974 on the Charter of Economic Rights and Duties of States;

(4) General Assembly resolution 3514 (XXX) of 15 December 1975 on Measures against Corrupt Practices of Transnational and Other Corporations, their Intermediaries and Others Involved;

(5) Economic and Social Council resolution 2041 (LXI) of 11 August 1976 on Corrupt Practices, Particularly Illicit Payments, in International Commercial Transactions; and

(6) Others.

6a. In addition the preamble could also identify the main problems posed by corrupt practices and spell out the objectives to be achieved through the formulation, adoption and implementation of an international agreement on corrupt practices, particularly illicit payments in international commercial transactions. For example, the Working Group might recognise that corrupt practices in international commercial transactions could adversely affect, inter alia:

(1) Sovereignty of States

(2) International relations

(3) International commercial relations

(4) Economic development

(5) Decolonization and self-determination of peoples

(6) National security

(7) Governmental decision-making process.

7. With respect to purposes of the international agreement the preamble could further recognize:

(1) The need to strengthen national measures against corrupt practices and to develop further methods for their prevention and punishment;

(2) The need to harmonize national action and to achieve uniform understanding of the basic concepts involved; and

(3) The need for international co-operation to assist national law enforcement.

II. DEFINITIONS

8. In attempting to define the terms listed under this title two approaches are possible: one is to elaborate definitions of the various terms at the international level; the other is to leave the major concepts of the international agreement to be determined in accordance with various national legislation. If the latter approach were adopted, the international agreement would specify rules for determining which national legislation would be applicable in a particular case. It might also indicate in general basic elements of definitions or rather the descriptions of the acts to be covered by the concepts.

9. In the elaboration of the international agreement, the Working Group may conclude that the international agreement need not contain definitions of all the terms listed in paragraph 10 and that a single definition may suffice for the "acts" and the "actors" to be covered by the agreement or that one or more of the concepts may be subsumed under one definition.

10. It should be noted that the items listed for definition fall into three main groups. The first three ("bribery", "illicit payments" and "other corrupt practices") refer to the scope and subject-matter of a possible international agreement. The second group ("transnational and other corporations", "intermediaries and others involved", "government and public officials" and "private officials") identifies the actors whose activities are to be regulated by the agreement. The third group ("international commercial transactions") refers to the sphere of application of the agreement and thus defines the limits of the agreement. 4/

Group 1: Acts covered by the agreement

11. There are three distinct categories of acts which the agreement could deal with: bribery, illicit payments and other corrupt practices. Whilst the term "bribery" is known to and dealt with in virtually all national legal systems, the concepts of "illicit payments" and "other corrupt practices" are not easily identifiable in legal texts and could give rise to different interpretations. The two latter concepts however are evolving and may be crystallized through the current work of the Working Group.

1. Bribery

12. The question of bribery is dealt with in the penal laws of most countries, in various legal contexts. In addition to being criminally sanctioned in the penal codes, bribery is also often penalized in laws relating to elections, dealings with public officials, international commercial transactions, imports and exports, concessions, and so on.

4/ Item 9 of document E/AC.64/4 on "other terms to be defined" can only be dealt with at a later stage in the work towards elaborating the text of a possible agreement.

13. The basic elements in the definition of bribery which appear in these laws are as follows: (1) one party gives, offers, attempts to give or offer, promises, (2) another party who may be a public official, a decision-maker in some other capacity or who is in a position to influence such public official or decision-maker, (3) or that the public official or the intermediary of such officer solicits, demands or accepts, (4) any reward, advantage, or benefit of any kind, (5) in order to improperly influence the making or not making or implementation of a decision or act by the official concerned.

13a. However, the specific elements covered in the definitions and the scope of the concepts used in legal provisions on bribery vary from one country to another. For instance, in some countries only public officials can be bribed whilst in others any person in a decision-making position may be bribed. Furthermore, in some countries the term "public official" includes elected officials, persons in the armed and police forces, members of the judiciary and so on whilst in others it appears to be limited to certain categories of appointed employees.

14. In dealing with bribery the Working Group could focus on the acts which should be covered, the types of payments which amount to bribery, and the persons whose activities are to be regulated.

15. The acts to be covered might include on the one hand, the giving, offer, promise and attempt to give or offer, and on the other hand, the demand, soliciting or acceptance of a bribe (extortion or passive bribery).

16. With respect to the payments, the agreement might include all such things as loans, gifts, favours and promises. Furthermore, it should make it clear that the nature of the payment is irrelevant as long as it consists of "anything of value" to the recipient and the accompanying intention is to improperly influence his decisions or actions. However, the Working Group might wish to consider whether amounts of payments, however small, should be dealt with or whether the agreement should cover only payments of a certain size.

17. Similarly, the agreement might state that the decision-maker involved need not be specifically a public official, but could be any person in a decision-making capacity or in a position to influence a decision-maker. This would encompass not only the broadest possible definition of a public official but also his near relations, associates or agents

2. Illicit payments

18. The term "illicit payments" is not as such a technical legal term. They are used in a non-technical sense to refer to any payments which are contrary to or prohibited by some law.

19. The clearest example of an illicit payment is bribery, which is criminally prohibited in national penal laws. However, there are some forms of illicit payment, apart from bribery. Three notable examples of these are illegal political

contributions, payments of royalties and taxes to illegal régimes in contravention of United Nations resolutions and payments in violation of currency exchange regulations.

Political contributions

20. In some countries, political contributions are not illegal per se; they become illegal when their size or manner of payment is bigger or other than legally stipulated. Thus the Working Group might limit its consideration to illegal political contributions.

21. In the context of the present work, it will often be difficult to determine whether or when the illegal political contributions are intended to influence decision-making in international commercial transactions. In other words, there is no automatic direct connexion between the making of such payments and international commercial transactions. When such a connexion exists, the transaction could be dealt with under bribery.

22. Illegal political contributions have been condemned in some legal instruments. For example, paragraph 8 of the OECD Guidelines states:

> "Enterprises should, unless permissible, not make contributions to candidates for public office or to political parties or other political organizations."

23. Some Latin American countries also referred to this subject in the areas of concern, which they proposed as a basis for the preliminary work on the code of conduct. They stated that transnational corporations are sometimes able to influence foreign and domestic policy by recourse to their great financial power and to their relations, which are frequently close, with high officials of governments. 5/

24. The Intergovernmental Working Group on a Code of Conduct has identified, as one of the issues that the code should cover, the item "Non-interference in internal political affairs". It should be noted that one form of interference in internal political affairs is illegal political contributions.

Illicit payment of royalties and taxes

25. A payment which is otherwise licit may become illicit by virtue of the character of the recipient. The payment of royalties or taxes to the illegal régimes in contravention of United Nations resolutions is an example.

26. For instance, in its Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (i.e. South West Africa) notwithstanding Security Council resolution 276 (1970), the International Court of Justice noted the illegality of the South African régime in Namibia and stated that all "Member States (of the United Nations) are under obligation to abstain

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5/ See annex IV to E/C.10/16.

from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia" and that the illegality of the South African presence in Namibia also "impose(d) upon Member States the obligation to abstain from entering into economic and other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the Territory". 6/

27. Similarly in resolution 301 (1971), the Security Council, after adopting and endorsing the above opinion of the Court, continued to state, inter alia:

> "11 (f). To abstain from entering into economic and other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the Territory;
>
> 12. Declares that franchises, rights, titles or contracts relating to Namibia granted to individuals or companies by South Africa after the adoption of General Assembly resolution 2145 (XXI) are not subject to protection or espousal by their States against claims of a future lawful Government of Namibia;".

28. In resolution 2871 (XXVI) the General Assembly requested Member States whose nationals are subject to taxes in Namibia to assist the Council of Namibia in the collection of such taxes and to deny exemptions or deductions to their nationals for taxes paid to the South African Government on any taxable Namibian activities.

29. With respect to Southern Rhodesia, the Security Council in resolution 232 (1966) determined that the unilateral declaration of independence by the minority régime was illegal and constituted a threat to international peace and security and decided that all States Members and non-members of the United Nations must abstain from any act amounting to a recognition of the legitimacy of that régime. The resolution called for a prevention of certain types of business dealings with Southern Rhodesia "nothwithstanding any contracts entered into or licences granted before the date of the resolution". Also resolution 253 (1968) of the Security Council called upon States to prohibit their corporations and nationals from entering into any business or commercial relations with Southern Rhodesia and from transferring any fund for that purpose.

29a. The opinion of the World Court and the language of the above and other resolutions make it clear that any royalties and taxes paid to the illegal régime in either Namibia or Southern Rhodesia are illegal.

Payments in violation of exchange control regulations

30. Another example of payments which could be regarded as illicit are payments made in violation of the exchange control regulations of a State. Article VIII (2) (b) of the International Monetary Fund agreement deals with contracts involving or requiring such payments as follows:

6/ 1971 I.C.J. Report 16, p. 76.

"Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member. In addition, members may by mutual accord, co-operate in measures for the purpose of making the exchange control regulations of either member more effective, provided that such measures and regulations are consistent with this agreement."

An international agreement on bribery, illicit payments and other corrupt practices, in addition to making such payments unenforceable, could also penalize them.

3. Other corrupt practices

31. There is no generally accepted definition of "corrupt practices". Furthermore, it is not possible to have an exhaustive enumeration of activities which may be considered to be corrupt practices.

32. Examples of activities which might be included in the scope are such improper activities in international commercial activities as restrictive business practices, unfair competition, double accounting, fraudulent transfer pricing and tax evasion. It may be useful to refer to the way in which some of these activities have been dealt with in national legislation.

33. Some types of restrictive practices which are dealt with in national legislation relate to the manufacture, distribution and sale of products and to a lesser extent to the provision of services when the aim of such practices is the obtaining or maintaining and exploiting of market power, usually to the detriment of other firms and of the national interest in general. They may derive from: agreements and/or understandings, formal or otherwise, between firms; or from the existence of dominant market power, both monopolistic and oligopolistic, on an invididual basis.

34. The activities which restrictive business practice legislation generally seeks to control include: the fixing of volumes of production, for example, by means of quotas and the allocation of production areas on an exclusive or non-exclusive basis; the fixing of volumes or prices of sales, including discounts and rebates; the allocation of sales territory on an exclusive or non-exclusive basis, both domestic and foreign, and mergers, takeovers or partial acquisitions and common directorships. These types of activities can also involve the use of other practices, such as boycott arrangements (refusals to supply or sell), tied purchasing arrangements in respect of materials, intermediate products and finished products, and tied selling arrangements.

35. It should be noted that the definition of restrictive practices in exsiting legislation tends to be in either general or specific terms. Where the definition is in general terms, there is often heavy reliance on the courts to determine and interpret the scope of the law.

36. In conclusion, 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 is covered by the United Nations Conference on Trade and Development. The Commission on Transnational Corporations itself, particularly in its work on a code of conduct, also covers most of the above-mentioned practices.

Group 2: Actors involved

37. The persons (natural or legal) whose activities are to be covered by the agreement are "transnational corporations and other corporations", "intermediaries and others involved", "government and public officials" and "private officials". The Working Group may wish to define the actors to be included or excluded under a single definition, such as "all legal and natural persons both public and private who engaged in any of the acts covered by this agreement".

4. Transnational and other corporations

38. It should be noted that the mandate of the Working Group does not require a distinction between "transnational" and other types of corporations.

39. During the discussions in the second session of the Working Group, the view was expressed that it is not necessary to define the term "transnational corporations".

40. If it should be necessary to have some general working definition of a transnational corporation, the Working Group might consider the definition upon which the Group of Eminent Persons has proceeded, namely, "enterprises which own or control production or service facilities outside the country in which they are based. Such enterprises are not always incorporated or private; they can also be co-operative or State-owned entities." 1/

41. The term "corporation" itself could include, for the purposes of the present exercise, all types of corporations (public and private), ordinary stock and limited liability companies. It could also include other business enterprises such as co-operatives, sole proprietorships, partnerships and all forms of business associations.

5. Intermediaries and others involved

42. There is no generally accepted definition of an intermediary. In the context of bribery, illicit payments, and other corrupt practices an intermediary may be regarded as the person or organization that serves as the vehicle of an improper payment.

43. The term could cover all persons who, under whatever title, fulfil a role as middlemen, whether or not for a fee between donor and recipient. It could also be

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1/ The Impact of Multinational Corporations on World Development and on International Relations, op. cit., p. 25.

made to include close relations, friends and advisors of both donor and recipient. Some intermediaries have been agents, fictitious sales corporations, foundations, trusts, lawyers and law firms, public relations firms and advertising agencies. Usually the function of the intermediary in a bribery or illicit payment transaction is either to channel the payment expressly or to receive so-called fees which are then passed on to the intended recipient.

6. Government and public officials

44. The recipients and donors of a bribe, or an illicit payment, can be a government or public official. The scope of these concepts appears to vary from one country to another. In some countries it covers only civil servants; in others it includes elected officials, the military, police and judicial personnel; in yet others it includes ecclesiastics and party officials.

45. The Working Group might consider whether it is necessary to define this term. In this connexion, it should be noted that the definition of a government or public official would be useful if it could serve to exclude other persons who are not government or public officials. However, if an agreement were also to include "private officials" among the possible actors, the need for a specific definition of "government and public officials" might be lessened. In any case, the definition of a government or public official should be made broad enough to encompass all persons in decision-making or implementing roles as well as all persons who are in a position to influence decision-making. A person who misrepresents himself as having decision-making or influencing capacities, should also be covered by the international agreement.

7. Private officials

46. There is no generally accepted definition of the term "private official". A "private official" may refer to an official of a private institution such as a corporation, university or other non-governmental institution. If the Working Group adopted the broad definition of a government or public official discussed in the preceding paragraph, that would adequately subsume all private officials and consequently it might be unnecessary to define the term "private official".

Group 3: The sphere of application of the agreement

8. International commercial transactions

47. It is important for the Working Group to deal explicitly with the term "international commercial transactions". This term delimits the context in which the agreement is to operate; it makes it clear that the agreement is concerned with bribery, illicit payments and corrupt practices only when these occur in international commercial transactions.

48. The Working Group might define the term "international commercial transactions" to refer to commercial transactions occuring across national boundaries between private persons, companies, Governments or governmental agencies. The agreement might furthermore focus on only 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 an 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.

III. ACTION AT THE NATIONAL LEVEL: MEASURES BY HOME, HOST AND THIRD COUNTRIES

1. Criminalization of bribery, illicit payments and other corrupt practices

49. The Working Group might consider whether to criminalize each of the three categories under this heading, namely bribery, illicit payments and other corrupt practices, or whether to penalize only bribery and possibly illicit payments and to make other recommendations on "corrupt practices" (see para. 36).

50. The following are the major elements which a provision to criminalize bribery, illicit payments and corrupt practices could encompass: (1) the actual payment of a bribe, (2) attempts or conspiracy to commit the act, (3) the giving, demanding or receiving of a bribe or an illicit payment, and (4) the wilful participation in the transfer of funds to be used for the purpose of bribery, illicit payments corrupt practices.

51. The Working Group might consider whether the criminalization should be prescribed in the international agreement or in the various national laws.

52. The agreement could require each State party to extend their criminal laws prohibiting bribery to cover the acts of its nationals whether or not committed within its territory and regardless of where the effect of the offence is manifested. (This kind of provision in the agreement would have to be complemented with a clear allocation among the States concerned of the jurisdiction to prosecute a particular offence.) In addition, the agreement would have to provide for a clear undertaking by all States to prosecute all persons (donors as well as recipients) in bribery, illicit payments and corrupt practices.

53. It should be noted that, apart from bribery, other kinds of illicit payments have not traditionally been regulated in penal codes. These kinds of payments are so variant in nature that the Working Group might consider whether it is possible or desirable to evolve general criteria for penalizing them.

54. As in the case of bribery, the Working Group may either state the standards for the criminalization of illicit payments in the agreement itself or urge their adoption into the various national penal statutes.

55. With respect to other corrupt practices, the Working Group may decide to criminalize certain specific activities such as unfair competition, artificial transfer pricing, and tax evasion, and to define the relevant standards. In addition to or apart from criminalization, other measures of regulation by the international agreement or by regulations of other fora (see para. 36) may be adopted to prevent or eliminate "other corrupt practices".

2. Jurisdiction

56. The Working Group could agree on certain criteria as bases for allocating jurisdiction over the offence where two or more States are involved.

57. One option is for the agreement to confer concurrent jurisdiction on the home State of the corporation, the State in which the offence occurs and the State of nationality of the parties to the offence. This concurrent jurisdiction would run until one of the competent States takes appropriate action.

58. Another option would be for the agreement to confer "primary" jurisdiction on the one or other State, and "secondary" jurisdiction on some other States. This would involve identifying certain situations as falling under the primary jurisdiction of the State in which the act was committed, provision for the home State having secondary jurisdiction to take action if the former fails to do so within a reasonable period of time. As a further example, the home State of a corporation could be given primary jurisdiction over a corporation or its agent's officers, directors and employees who have committed acts of bribery, illicit payments and other corrupt practices.

59. In the case of an intermediary, the State of nationality of an intermediary would have secondary jurisdiction and the State in which the offence was committed primary jurisdiction.

60. Public or government officials could be subject to either the exclusive or primary jurisdiction of their home State.

61. The Working Group could provide for a procedure for consultation between all the States having jurisdiction, whether concurrent, primary or secondary. The former might be required to notify and to keep each other informed of any steps to prosecute and of the status of the criminal proceedings which are initiated in accordance with the provisions of the agreement.

62. The agreement could further stipulate a time period within which other States having jurisdiction might take action if the State with primary jurisdiction fails to take effective action.

63. The agreement might contain an express provision against the possibility of prosecution in more than one country for the same offence.

3. Disclosure (of political contributions, gifts and loans to public officers, fees and commissions, etc.)

64. The questions to be considered under this heading are: who should disclose, what, to whom, when and how.

65. The agreement could prescribe certain uniform requirements for the types of transactions in which disclosure should be made: for example, international commercial transactions involving payments of a defined monetary value.

66. With respect to political contributions, the contracting States could agree to require by law the disclosure of all contributions, direct or indirect, made to candidates, political parties and political committees in foreign countries a defined time-period after they are made. Such reports would include the identity of the contributor, the amount involved and the name of the recipient. The wilful

failure to report and false reporting would be made a criminal offence. Another possibility is, as in the case of the United States, to forbid corporations from contributing to political parties.

67. States could also adopt laws requiring their government or public officials to make public declarations of their net worth at the beginning and at the end of holding office.

68. Each contracting State could agree to require its nationals to report certain types of transactions within a defined time-period to an appropriate government agency or instrumentality. The reports would include the names of the parties to the transaction, the goods or services involved, the name of the agent, the ultimate recipient of the payment, and the amount paid.

69. These reports would be transmitted only to Governments involved. In addition or alternatively provision might be made for their disclosure to the public.

70. The provisions on disclosure should make exceptions for payments made for any professional and legitimate services, provided the payments are supported by detailed invoices showing the services rendered, the fee charged and the identity of the firm or individual who did the work.

4. Regulations concerning intermediaries and others involved

71. The agreement could provide for contracting States to require agents and intermediaries involved in international commercial transactions to register with their Government when their services are engaged. The report which they would be required to file would contain the identity of the principal, the amount of the fee or commission and the nature of the services rendered. The Government receiving the report would communicate its contents to other Governments involved.

72. Intermediaries would be subject to criminal prosecution whenever their activities involve bribery, illicit payments or other corrupt practices.

5. Taxation to discourage bribery, illicit payments and other corrupt practices

73. The agreement could contain provisions designed to ensure that bribes and illicit payments are separated and treated differently from legitimate business expenses which in many countries are tax deductible.

6. Measures against the payment of royalties and taxes in contravention of United Nations resolutions

74. Several types of measures may be taken to prevent the payment of royalties and taxes in contravention of United Nations resolutions.

75. Among the measures that might be considered against the payment of any taxes or royalties in contravention of United Nations resolutions, the agreement might require that home countries demand annual disclosure of any such payments by

their corporations and deny exemptions or deductions to their nationals for taxes paid on any taxable income derived from commercial or business activities in the countries in question.

76. Furthermore, in the case of contraventions of Security Council resolutions, the agreement could require home States to adopt specific laws and regulations to prohibit their corporations from any business dealings and other forms of collaboration with the illegal régimes. For instance, in the case of Namibia several Security Council resolutions have dealt with the measures which are required to bring about a termination of the illegality. For example, in resolution 283 (1970), the Security Council calls upon all States:

> to ensure that companies and other commercial and industrial enterprises owned by or under direct control of the State cease all dealings with respect to commercial or industrial enterprises or concessions in Namibia;
>
> to withhold from their nationals or companies of their nationality not under direct governmental control, government loans, credit guarantees and other forms of financial support that would be used to facilitate trade or commerce in Namibia;
>
> to ensure that companies and other commercial enterprises owned by, or under direct control of, the State cease all further investment activities, including concessions in Namibia.

77. With respect to Southern Rhodesia, the Security Council has on several occasions called for the implementation of its decisions imposing sanctions against the territory. In resolutions 314 (1972), for instance, the Security Council, inter alia:

> "1. Reaffirms its decision that the present sanctions against Southern Rhodesia shall remain fully in force until the aims and objectives set out in resolution 253 (1968) are completely achieved;
>
> 2. Urges all States to implement fully all Security Council resolutions establishing sanction against Southern Rhodesia, in accordance with their obligations under Article 25, and Article 2, para. 6, of the Charter of the United Nations and deplores the attitude of those States which have persisted in giving moral, political and economic assistance to the illegal régime ...".

7. Civil remedies and actions

78. The agreement could specify measures of redress to parties who have suffered actual injury as the consequence of the payment of a bribe or illicit payment or of the commission of a corrupt practice. These injured parties may be shareholders of the corporation which has committed the bribery, illicit payment or other corrupt practice and other corporations which may have suffered injury as a result of being placed at a competitive disadvantage. The agreement could expressly

recognize a similar right on the part of consumers to bring civil action for injuries suffered from the sale of goods or services which are of inferior quality or for which higher purchase prices have been paid as a consequence of the bribe, illicit payment or other corrupt practice.

8. Other measures

79. There are other measures which could be considered within the scope of an international agreement to prevent and eliminate bribery, illicit payments and other corrupt practices. The following are four of the possibilities.

80. First, the Working Group could consider the issue of the impact of a corrupt practice on the validity of an international commercial transaction. In many legal systems, a contract which is proven to be tainted with corruption is regarded as contrary to public policy and hence unenforceable. The same is true in the Law of Treaties: i.e. article 50 of the Law of Treaties, entitled "Corruption of a representative of a State". If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty. By analogy, this can be extended to governmental consent to a contract or concession, achieved by bribery, illicit payment or other corrupt practice. The Working Group could consider including a provision along similar lines in the agreement. Such a provision would have to be two-sided and apply equally to both parties to the transaction.

81. Secondly, the agreement could prescribe that home countries impose relatively high tax surcharges on the profits made from transactions tainted with bribery, illicit payments or other corrupt practice.

82. Thirdly, the agreement might require all countries for a certain number of years to exclude a foreign corporation engaged in bribery, illicit payments or other corrupt practice from doing business in the country or with the Government.

83. Fourthly, national legislation could require public officials to declare their net worth or net assets upon the assumption and at the end of office (see para. 67 above). This could be coupled with a requirement to account for any undue increases and anomalies which might appear.

IV. ACTION AT THE INTERGOVERNMENTAL LEVEL

1. Exchange of information

84. Co-operation between home, host and third countries in making public information on bribery, illicit payments and other corrupt practices, would have an important deterrent function on the commission of these acts.

84a. The exchange of information can be effected on various levels, depending on the type of information and the nature of the parties involved.

Reports

85. The Government to which a report or disclosure is made could be required to pass that report to other Governments directly involved. The exchange of information along these lines would allow a comparison of all reports made on the same subject to various Governments and thus greatly increase the risk of detection of false reporting.

Investigative material

86. The agreement could require any contracting State which receives information on bribery, illicit payments and other corrupt practices to inform other interested contracting States and to make arrangements at the latter's request, for the transfer of the information to them. To this end, some international machinery for information exchange may be provided for in the agreement. However, it should be borne in mind that preliminary investigative material is frequently composed of informers' allegations, circumstantial evidence and inconclusive documents. Premature disclosure of this sort of material could hamper further investigation of a case and may be highly damaging to innocent people; consequently, it might have to provide for the confidential treatment of such investigative material until there is consent on the part of the party supplying the information to make it public.

87. If the State receiving investigative material from another State uses it to begin its own parallel investigation, the two Governments should be required to consult on their findings and on the status of any criminal or civil proceedings.

88. An alternative approach would be to leave information exchange to bilateral agreement on a case-by-case basis among the involved countries. Although this would allow each agreement to be tailored to the particular facts and problems under discussion and to the constitutional systems of the countries, the negotiation of agreements while an investigation is under way could slow the investigative process and inject extraneous political factors in the discussion.

Parliamentary bodies and investigative commissions

89. The laws of a number of countries grant immunity to members of Parliament and cabinet ministers from criminal prosecution. In the absence of a formal

parliamentary waiver of the immunity in certain cases, appropriate investigative material should be transferred when required by legislative bodies and other duly constituted boards of inquiry. The machinery should permit co-operation in information exchange based on the request of a duly constituted parliamentary committee or investigative commission.

90. Even where law enforcement authorities have decided that investigative information does not warrant prosectuion, upon request the investigative information could nevertheless be made available to parliamentary bodies and boards of inquiry in the affected States. Such information could be useful for legislative reform or for political action with respect to the participants in a transaction.

2. Mutual judicial assistance (facilitating all aspects of investigations and prosecutions connected with bribery, illicit payments and other corrupt practices)

91. Mutual judicial assistance between home, host and third countries in the investigation and prosecution of all the offenders is an essential element in the control of bribery, illicit payments and corrupt practices at the international level.

92. The elements which could be covered in a judicial assistance agreement are: (1) co-operation with investigations including allowing the questioning of witnesses outside the jurisdiction of the requesting State, the examination of documents relating to the transaction, including bank records and government papers, and the use of local procedures to obtain access to information, including forms of compulsory process; and (2) co-operation with prosecutors in a criminal trial, including compelling the testimony of witnesses either personally or in writing, conveying evidence to the requesting jurisdiction in a form which will be admissible and making available as witnesses government officials with personal knowledge of the transactions or of all pertinent documents.

3. Extradition

93. The agreement could require all States (home, host and third) to treat acts of bribery, illicit payments and other corrupt practices as extraditable offences in their extradition laws, as well as in their existing extradition agreements.

93a. Among countries which have extradition treaties in force it is essential that the offence for which extradition is requested is a crime in the requested and requesting countries. For example, the European Convention on Extradition defines as extraditable offences, those offences which are punishable under the laws of the requesting and requested States by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty (article 2:1). 8/ Also, national law must not forbid extradition for the particular crime. Again as an example, the European Convention allows individual countries

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8/ Done at Paris, 13 December 1957, European Treaty Series, No. 24.

to exclude certain offences from the impact of the convention by amendment to national law (article 2:3).

94. Thus the applicability of existing extradition treaties to bribery, illicit payments and other corrupt practices cases will require international agreement to that effect.

95. Existing extradition treaties as a general rule exclude political and related offences. Inasmuch as many cases of bribery and illicit payments may involve political figures and may have extensive political ramifications, agreement should be reached on the extent to which the usual exclusion of political offences from extradition treaties shall be allowed to stand.

96. States , wish to exclude all of their own officials from extradition to other countries for bribery and related offences on political grounds. Similarly, States may wish to exclude their own nationals from foreign extradition requests if there are political aspects to the pending case.

97. Where no extradition treaty is in force, agreement will be necessary on other issues usually covered in extradition agreements. These might include: agreement that if a person has been tried or convicted for an offence in one country he cannot be extradited and tried again; that when a person is extradited for an offence covered in the agreement he can be tried only for that and related offences and cannot be re-extradited to third States for any purpose; and that if there is substantial reason to believe that the request for extradition is really to prosecute or punish a person because of race, religion, nationality or political opinion the requested State may refuse it.

4. Other actions: co-operation on tax matters

98. Cases involving bribery and illicit payments usually also involve tax law violations. In some countries tax law violations are not criminal (or are only criminal under rare circumstances) and are not subject to the usual mechanisms of co-operation in criminal matters including judicial assistance and extradition treaties. Agreement among the contracting States to treat tax law violations involving bribery, illicit payments and other corrupt practices as criminal for purposes of mutual judicial assistance and extradition would greatly enhance the prospect for controlling improper behaviour.

V. SETTLEMENT OF DISPUTES

99. The Working Group might consider the following types of dispute settlement mechanisms for the settlement of disputes that may arise between the contracting parties concerning the interpretation or application of the agreement: negotiation, mediation or conciliation, arbitration or judicial settlement. These mechanisms are not mutually exclusive; one or more of them can be provided for in the agreement.

100. In any case it would be necessary to decide whether special ad hoc or permanent dispute settlement institutions should be created or whether it is sufficient simply to provide for the process of settlement and to leave actual disputes to be settled on a case-by-case basis.

VI. ENTRY INTO FORCE

101. The agreement would have to specify the manner of its entry into force, namely whether by signature, ratification, acceptance, approval or accession. If the Working Group decides that the agreement should enter into force, for example, by ratification or accession, it would be further necessary to fix the number of ratifications or accessions required to bring the agreement into effect.

102. The Working Group may also wish to consider whether the agreement should permit reservations to the agreement and if so to provide for the effect of such reservations with respect to States which accept and States which reject the reservations.

103. In addition, the Working Group might wish to consider elaborating provisions relating to withdrawal from or termination of the agreement.

104. The Working Group should also decide in what manner and when such a withdrawal from or termination of the agreement should take place.

105. The Secretary-General of the United Nations may be entrusted with the task of receiving and notifying all States of any ratification, reservations and notices of withdrawal.

B. Proposals and options other than an international agreement

106. There are various proposals and options other than an international agreement which the Working Group may consider for dealing with the problem of bribery, illicit payments and corrupt practices. These include:

(1) Model law;

(2) Guidelines;

(3) Codes of conduct;

(4) Unilateral national action;

(5) Other forms of international action.

107. These proposals are not mutually exclusive. One or more of these might be adopted in conjunction with, in addition to, or other than an international agreement.

1. Model law

108. The Working Group may wish to draft a model national law relating to bribery, illicit payments and other corrupt practices which States may incorporate in their national legislation. The model law may prescribe either criminal or civil remedies or both. Such a model law, if enacted by many countries, would provide certainty as to the kinds of behaviour which are proscribed so that different standards in different countries would not have to be coped with. It would make possible harmonization of the national laws on the subject and thus greatly facilitate co-operation under judicial assistance treaties and extradition treaties. Extradition treaties and treaties covering judicial assistance in criminal matters depend on the act being treated as criminal in the States involved.

2. Guidelines

109. Some corporations have adopted internal guidelines of behaviour for their corporate employees. These instruments often include condemnations of bribery, illicit payments and other corrupt practices, and urge corporate employees to abstain from committing such acts. Examples of such internal guidelines are The International Responsibilities of a Multinational Corporation of Union Carbide Corporation, A Code of Worldwide Business Conduct by Caterpillar Tractor Company and John Deere Corporation's Guide in the Everyday Conduct of Our Business for Employees at all Levels in the Company. The Working Group could recommend the widespread adoption and use of such internal guidelines by corporations engaged in international commercial transactions.

110. The Working Group could urge trade and other professional associations to incorporate measures to prevent and eliminate bribery, illicit payments and other corrupt practices in any standards, agreements and guidelines which they evolve. A possible measure is disciplinary action against executives or corporations involved in such practices to be taken by their professional organization which they draft or recommend for use.

111. The Working Group could also urge the adoption of measures against bribery, illicit payments and other corrupt practices into guidelines formulated at the intergovernmental level. In the OECD Guidelines for Multinational Enterprises e.g., it is stated that:

> "Enterprises should ... (7) 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;".

3. Codes of conduct

112. Currently, the Commission on Transnational Corporations is in the process of preparing a code of conduct relating to transnational corporation activities. The problem of bribery, illicit payments and other corrupt practices has also been discussed in the context of that work.

113. Proposals to deal with the issue of bribery, illicit payments and other corrupt practices in the context of the code of conduct have already been made by some Governments. In response to a note verbale of the Secretary-General on measures to combat corrupt practices, the Government of the Federal Republic of Germany had 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 had also 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. Similarly, the Government of Mexico had stated that only within the framework of a binding code of conduct could the regular as well as the irregular aspects of transnational corporate activities such as corrupt practices be effectively regulated. 9/

4. Unilateral national action

114. In considering the types of unilateral action which States may adopt, the Working Group might draw the attention of States to the underlying social, political and economic causes behind bribery, illicit payments and other corrupt practices.

115. Each nation, whether it is the home country, the host country or the country of the intermediary, can take effective unilateral action to limit bribery, illicit payments and corrupt practices. For instance, General Assembly resolution 3514 (XXX), inter alia, had 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 corrupt practices. In addition, home Governments were called upon to prosecute, within their national jurisdictions, those who engage in such acts.

116. In its reply to the Secretary-General's note verbale of 2 March 1976 the Government of Iran had proposed the following types of action by countries:

> "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.

9/ These proposals were summarized in document E/5838, para. 52.

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 penalties for such corrupt practices undertaken in foreign States, in the name of the corporation."

117. Home country Governments can ensure that their laws extend to bribery, illicit payments and other corrupt practices. They can also require full disclosure of all sitable payments to agents and intermediaries in connexion with international commercial transactions. To be effective, the disclosure requirements should be backed by criminal sanctions.

118. Home countries can amend their tax laws to make the payment of a bribe non-deductible as a business expense and to place a special tax on profits made from transactions which have been tainted by illicit payments. Similarly, States could also adopt appropriate measures against bribery, illicit payments and other corrupt practices by public or private officials in their countries.

Certification

119. A certification by corporations and intermediaries that no improper payments have been made can be required by Governments as a condition for granting the necessary government approvals for a transaction. Most large transactions require some government participation either through the granting of licences or the approval of credit. Conditioning licences and credit on a certification that no improper payments have been made and then checking on the accuracy of the certification through independent outside auditors would be an effective control. For instance in Iran any foreign corporation conducting business with Iranian agencies has to sign an affidavit. This sworn statement must stipulate 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 referred to in the contract. In addition, the Government of Iran is in the process of preparing legislation with a view to rendering any inaccuracy in the contents of the affidavit a criminal offence.

120. States can also enact civil remedies granting all injured customers and competitors the right to sue any corporation which engages in bribery, illicit payments and other corrupt practices. This requirement could be coupled with a requirement that all corporations which do business, be subject to independent audit to determine whether they have engaged in bribery, illicit payment or other corrupt practice.

121. Finally all States could review the regulations regarding the behaviour of their public officials. This can include stating specifically what gifts and favours can be accepted and which are unacceptable. Some attempt could also be made to control the relationship of government employees to the companies they regulate after they leave government service.

5. Other forms of international action

122. The relevant intergovernmental bodies could from time to time adopt resolutions or declarations on bribery, illicit payments and corrupt practices expressing their condemnation and setting out guidelines and international standards of behaviour.

123. Another form of international action would be the conclusion of bilateral or regional agreements on specific aspects of the problem of bribery, illicit payments and corrupt practices such as on the collection and exchange of information and extradition.

ANNEX

References to provisions in national legislation on corrupt practices as contained in the replies of States to the note verbale of the Secretary-General dated 2 March 1976. 10/

A. Argentina

Penal Law No. 16.648, article 256-259.

B. Australia

1. Recommendation on Mutual Administrative Assistance (1953).

2. Recommendation on the Pooling of Information concerning Custom Fraud (1967 and 1975).

C. Barbados

1. The Election Offences and Controversies Act, Cap. 3, articles 6, 7, 8, 23, 24 cover the offences. Articles 27 (1), 28, 29, 30, 32 cover the sanctions. Part V deals with the consequences of a finding of corrupt or illegal practice.

2. The Prevention of Corruption Act, Cap. 144.

3. The Representation of the People Act, Cap. 12, section 47.

4. Common Act.

D. Belgium

Penal Law, articles 246-262.

E. Canada

1. Criminal Code, sections 110, 350, 358, 376, 383.

2. Senate and House of Commons Act, section 23.

3. Public Servants Conflict of Interest Guidelines, section 6.

10/ The texts of the provisions in the national legislations are available for consultation at the Centre on Transnational Corporations.

4. Elections Act, subsection 13, 78.

5. Elections Expenses Act, section 9.

6. Business Corporations Act, part XIX.

F. Dominican Republic

Penal Law, articles 177 and 258.

G. Fiji

Penal Law, Cap. 11, articles 410-413.

H. Finland

1. Penal Law, chapter 15, paragraph 3; chapter 16, paragraph 13; chapter 31, paragraph 4; chapter 40, paragraph 1.

2. Act on Prevention of Unfair Competition, paragraph 13.

3. Act on Employment Contracts, paragraph 15.

I. France

1. Penal Law, articles 174-183.

2. General Tax Law, articles 57, 155-1.

3. Finance Law, article 18 of 1973, article 14 of 1974.

J. Germany, Federal Republic of (reference not available)

1. Criminal Laws.

2. Law Prohibiting Unfair Competition

3. Law Prohibiting Restraints of Competition

K. Iran

1. Criminal Law concerning bribery involving government employees or agents and consulting agencies and municipalities.

2. Penal Code, articles 141, 142, 143, 146, 147, 152, 153, 157.

3. Law concerning the punishment of persons misappropriating government properties.

4. Law concerning collusion in government transactions.

5. Law concerning undue influence.

6. Affidavit to be made by every foreign corporation conducting business with Iranian agencies.

L. Ireland

1. Act for the Better Prevention of Corruption, 1906, chapters 34, 35.

2. Larceny Act, 1916, section 32.

3. The Criminal Justice Act, 1951, section 10.

M. Italy (reference not available)

1. Penal Code, articles 317-322.

2. Constitutional Law No. 1 and Law No. 20 on Investigation by Parliamentary Commission on members of present and past governments.

N. Japan

1. Penal Law, chapter 25, crimes of official corruption.

2. Law for the Regulation of Political Contribution and Expenditures.

O. The Netherlands

1. Penal Code, articles 84, 177, 178, 328, 362, 363, 364.

P. Norway (text not available)

1. Penal Law, paragraphs 12, 112, 128, 275, 373 (1).

2. Marketing Control Act (Act No. 46 of 1972), paragraphs 6, 17 (5).

Q. Singapore (text not available)

Prevention of Corruption Act, Cap. 104.

R. Surinam

Criminal Law, paragraphs 229, 230, 427, 428.

S. Sweden (reference not available)

1. Penal Law.

2. Law against unfair competition (1931).

T. Switzerland

Penal Law, paragraphs 288, 314, 315, 316, 317.

U. Syria (reference not available)

Decree Law No. 151 of 1952.

V. Trinidad and Tobago (reference not available)

1. Aliens (landholding) Ordinance.

2. Exchange Control Act.

W. United Kingdom of Great Britain and Northern Ireland

1. Common Law.

2. Public Bodies Corrupt Practices Act, 1889, sections 1 and 2.

3. Prevention of Corruption Act, 1906 and 1916.

4. The Representation of the People Act, 1949, section 99.

5. Companies Act, 1967, sections 109 , 111.

6. Companies Act, 1948, section 165.

Hong Kong

7. Prevention of Bribery Ordinance, chapter 201.

8. Independence Commission against Corruption Ordinance, chapter 204.

X. United States of America

1. Exim Bank of USA requires disclosure.

2. Agency for International Development (AID), under the Foreign Assistance Act (22. U.S.C. para. 2399) requires disclosure.

3. Foreign Aid Authority Bill S.2662 requires disclosure.

4. Securities and Exchange Commission requires disclosure.

5. The Internal Revenue Code (26 U.S.C. para. 162 (c) (1) and (2)).

6. 18 U.S.C. paragraph 371 (conspiracy), paragraph 1341 (mail fraud), paragraph 1343 (fraud by wire).

7. Sherman Act.

8. Senate Bill 3379 (Church bill), ninety-fourth Congress, second session (received later).

9. Senate Bill 305 (Proxmire bill), ninety-fifth Congress, first session (received later).

Y. Venezuela

Penal Law, chapter 3, title 3, articles 198-203.

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AD HOC INTERGOVERNMENTAL WORKING GROUP
ON THE PROBLEM OF CORRUPT PRACTICES
Third session
28 March-8 April 1977

MAJOR ISSUES TO BE CONSIDERED IN THE EXAMINATION OF THE PROBLEM OF CORRUPT PRACTICES, IN PARTICULAR BRIBERY, IN INTERNATIONAL COMMERCIAL TRANSACTIONS BY TRANSNATIONAL AND OTHER CORPORATIONS, THEIR INTERMEDIARIES AND OTHERS INVOLVED

Annotated outline

Report of the Secretariat

Corrigendum

1. Paragraph 28, line 1

For In resolution 2871 (XXVI) the General Assembly requested read

In its sixth report the United Nations Council for Namibia decided that it would request

2. Paragraph 28, last line

After Namibian activities, add 7/

7/ See Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 24 (A/8424), para. 196 (g).

and renumber remaining foot-notes accordingly.

3. Paragraph 80, line 5

For article 50 of the Law of Treaties read article 50 of the Vienna Convention on the Law of Treaties, which is

4. Paragraph 110, line 4

For executives or read executives of

5. Paragraph 110, line 6

Delete which they draft or recommend for use