

UNITED NATIONS
ECONOMIC
AND
SOCIAL COUNCIL



Distr.
LIMITED
E/1978/115
7 July 1978
Original: ENGLISH

Second regular session, 1978
Agenda item 18. Transnational corporations

REPORT OF THE AD HOC INTERGOVERNMENTAL WORKING GROUP ON THE PROBLEM
OF CORRUPT PRACTICES ON ITS FOURTH, FIFTH AND RESUMED FIFTH SESSIONS

I. RECOMMENDATION TO THE ECONOMIC AND SOCIAL COUNCIL

1. The Ad Hoc Intergovernmental Working Group on the Problem of Corrupt Practices, recognizing the need for the early adoption of an international agreement on illicit payments in connexion with international commercial transactions, recommends to the Economic and Social Council that it re-examine the question of convening a conference of plenipotentiaries open to all interested States to conclude an international agreement, with a view to setting an early date for the conference and establishing a committee, open to all interested States, to make preparations for the conference and to take such further actions as may be deemed necessary.

II. PROCEEDINGS

A. Drafting of an international agreement to prevent
and eliminate illicit payments in connexion with
international commercial transactions

2. The deliberations of the Working Group on this item of its agenda were based on Part A ("Provisions relevant to the elaboration of an international agreement to eliminate and prevent illicit payments, in whatever form, in connexion with international commercial transactions by transnational and other corporations, their intermediaries and others involved") of the report of the Ad Hoc Intergovernmental Working Group on the Problem of Corrupt Practices on its first, second, third and resumed third sessions (E/6006) and on the draft report on its fourth session (E/AC.64/L.5 and Corr.1), to which were annexed the proposals made by the delegation of France for a convention on the elimination of bribery in international commercial transactions, a proposal by the United States of America for additional preventive measures to the one contained in Part A and an alternative draft of articles 1, 2 and 4 in the French proposal prepared by the Secretariat. For its resumed fifth session the Working Group also had before it a report on its fifth session (E/1978/39).

3. At the 44th meeting, on 13 April 1978, the representative of Zambia speaking on behalf of the African members of the Working Group, stated that he regretted that it had not been possible to have a thorough and meaningful discussion of Chapter III.5, "Measures against the payments of royalties and taxes to illegal minority régimes in

southern Africa in contravention of United Nations resolutions", contained in part A of document E/6006. He said that the African delegations attached the highest priority to that chapter, as well as to other sections of the draft agreement and expected reciprocal support from other delegations for chapter III.5. He expressed the hope that, at a later stage, it would be possible to hold a substantive discussion on the chapter.

4. One representative, speaking at the same meeting, stated that he understood the implications of the position of the African delegations and expressed the hope that it would be possible to reach agreement on the matter at a future stage.

5. A number of representatives of States with a federal system of Government indicated that they would accept the references to the words "regional or local" appearing in several articles, on the understanding that those States would rely in that respect, on the law of the competent regional or local authorities.

6. During the fifth session reservations were made by the representatives of the Federal Republic of Germany with regard to the "other business transactions", in the definition of "international commercial transactions" and by Japan with regard to article 4, paragraph 1 (a). With regard to article 4, paragraph 1 (c), it was agreed that at a later stage the Working Group would decide whether the term "national" in that paragraph included juridical persons as well as natural persons and, if it did, what criteria were to be used to determine their nationality.

7. Another reservation was made by the representatives of the Federal Republic of Germany and the United Kingdom with regard to the deletion of the words "of a Contracting State" in the definition of the term "public official" contained in article 2.

8. At the resumed fifth session of the Working Group the following comments, set forth below in paragraphs 7 - 19, were made by various delegations during the deliberations at that session concerning the text of the draft international agreement contained in paragraph 20 of this report.

9. With regard to article 1 (a), the words "or to another person" after "directly or indirectly" were deleted. Several delegations pointed out that this deletion meant that the agreement would not reach payments, gifts or other benefits directed to persons or institutions acquainted or associated with the public official without the latter's knowledge, with the intention that they in turn influence such official, and this deletion would make it more difficult to furnish evidence of an indirect payment. Several delegations were also concerned that the words "directly or indirectly" might not be adequate to cover the case where payments, gifts or other benefits were directed, at the request or with the concurrence of a public official, to another person such as a member of the official's family.

10. Also with regard to article 1 (a), the Working Group agreed that it should also cover ex post facto payments, gifts and other benefits as rewards for past favours. Several delegations pointed out that the precise language should be formulated at a later stage. Some delegations expressed the view that the

present language of article 1 (a) already covered such ex post facto payments. In addition, several delegations considered it desirable that the term "person" in article 1 (a) be defined so as to include juridical as well as natural persons. (See also paragraph 13 dealing with article 4.1(c)).

11. The Working Group considered the question of expressly stipulating the element of impropriety in article 1 (b). In this connexion the words "as an inducement or reward", which could be considered in connexion with the words "as consideration for", were suggested, but the decision on its inclusion was left until the decision on the question of ex post facto payments in article 1 (a) is considered. One delegation was of the view that the concept of voluntary acceptance be included in article 1 (b).

12. With regard to article 2(1) several delegations pointed out that the objective of the draft text was to include the cases discussed by the senior legal adviser of the Centre on Transnational Corporations in Annex A of his memorandum dated 22 June 1978 as presented to the Working Group.

13. With regard to article 4.1 (a), one delegation pointed out the difficulty his country would have in undertaking the prosecution of offences committed by foreigners on its territory and stated that his government would like to examine this point further.

14. With regard to article 4.1 (b) many delegations felt strongly that the formulation did not adequately adhere to the principle of parity of treatment for all parties to the offence and that further consideration should be given to this provision.

15. Several delegations pointed out that the words "a national" in article 4.1(c) could be read in three ways:

- (a) "a national" includes a juridical as well as a natural person. In this case the Contracting States which do not recognize the concept of criminal responsibility of juridical persons ought to consider introducing this concept in their national legal systems for the purpose of the offence under consideration;
- (b) "a national" excludes juridical persons. In this case according to some delegations the addition of the words "or on behalf of" after "the offence is committed by" would go a long way towards meeting the concern expressed, so that the officer of the juridical person involved in the offence, whatever his/her nationality, should be prosecuted;
- (c) "a national" excludes juridical persons, as well as natural persons of other States. In this case, the agreement leaves a large loophole by allowing a corporation to use a foreigner to do all its bribing.

16. With regard to article 4.1(c), some delegations considered that the particular formulation of the territorial link needed further consideration. One delegation considered that examination should also be made of the question whether the obligation should apply to acts committed in a non-Contracting State where such acts are not unlawful in that State.

17. Many delegations felt that while there was no doubt that under the draft agreement the Contracting States would undertake to prohibit the bribing of public officials of other Contracting States as well as their own public officials, further consideration should be given to the advisability of making this point explicit under article 1.2 or 4.

18. With regard to article 7 the representative of Uganda, speaking on behalf of the African members of the Working Group, stated that he regretted that the Group had been unable to accord consideration to this article on payments to the illegal minority régimes in southern Africa, contrary to their anticipation at the last session. He stated that this article is of crucial importance to many delegations and that it would endow this draft agreement with greater meaning, relevance and significance. It was his firm understanding that this exercise was but one dimension of the current world pre-occupation with the fulfilment or realization of certain fundamental rights of humankind, in particular as it related to the grave situation in southern Africa. He emphasized that the attitude of the African group to this whole exercise would, to a large extent, be determined by reciprocal attention and positive attitude to Article 7.

19. With regard to article 9 one delegation drew attention to the need for considering further the mechanism for ensuring balanced operation of the agreement as between Contracting States.

20. With regard to article 13, some delegations suggested that the provisions on entry into force of the agreement should refer not only to ratification or accession by a specified number of States, but also to ratification or accession by States accounting for a specified percentage of world trade.

21. Several delegations stated that, in their view, the draft agreement focused more on the improper activities of public officials than on the improper activities of transnational and other corporations. They stated further that the scope of the agreement should not be limited to bribery, but should also extend to other illicit payments.

22. In accordance with the mandate given to it by the Economic and Social Council in resolution 2122 (LXIII) to draft an international agreement on illicit payments, the Working Group prepared ad referendum the following draft text for consideration by the Economic and Social Council:

DRAFT INTERNATIONAL AGREEMENT TO PREVENT AND ELIMINATE
ILLICIT PAYMENTS IN INTERNATIONAL COMMERCIAL
TRANSACTIONS

PREAMBLE

[For the text, see annex III below.]

Article 1

"Each Contracting State undertakes to make the following acts punishable by appropriate criminal penalties under its national law:

- "(a) The offering, promising or giving of any payment, gift or other benefit by any person, on his own behalf or on behalf of any other natural or juridical person, to a public official, either directly or indirectly with the intention of inducing such official to perform or refrain from the performance of his duties in connexion with an international commercial transaction."
- "(b) The soliciting, demanding, accepting or receiving, directly or indirectly, by a public official of any payment, gift or other benefit, as consideration for performing or refraining from the performance of his duties in connexion with an international commercial transaction."

Article 2

- "(a) 'Public official' means any person whether appointed or elected who, at the national, regional or local level holds a [legislative,] administrative, judicial or military office or who is an employe of a government or of a public or governmental authority or agency or an employe of an entity which provides a public service and which is owned [or controlled] by such a body, and any other person when performing a public function.
- (b) 'International commercial transactions' includes any sale, contract or other business transaction with a national, regional or local Government or any authority or entity referred to in paragraph (a) of this article [and any application for governmental approval of a sale, contract or business transaction], which under the laws of that State is open to foreign persons or enterprises [or to suppliers of imported goods, services, capital or technology].
- "(c) 'Intermediary' means any natural or juridical person who negotiates with or otherwise deals directly or indirectly with a public official on behalf of another natural or juridical person. However, the term does not include any employe of the person on whose behalf the intermediary is acting."

Article 3

- "[(a) Each Contracting State shall ensure that contracts which are entered into by agencies or instrumentalities of its Government for international commercial transactions include a provision that no payment, gift or other benefit which would constitute an offence under article 1 has been or will be offered, promised or given in connexion with the transaction.]
- "(b) Each Contracting State shall, in accordance with national and international law, [endeavour to] take all practicable measures [, and particularly administer its national laws and regulations,] for the purpose of preventing the offences referred to in article 1 [involving its own public officials or public officials of another State.]"

Article 4

"(1) Each Contracting State shall take such measures as may be necessary to establish its jurisdiction:

- (a) over the offences referred to in Article 1 when they are committed in the territory of that State,
- (b) over the offence referred to in Article 1(b) when it is committed by a public official of that State,
- (c) over the offence referred to in Article 1(a) relating to any payment, gift or other benefit in connexion with the negotiation, conclusion, retention, revision or termination of an international commercial transaction when the offence is committed by a national of that State, provided that any element of that offence, or any act aiding or abetting that offence, is connected with the territory of that State.

"(2) This Agreement does not exclude any criminal jurisdiction exercised in accordance with the national law of a Contracting State."

Article 5

"(1) A Contracting State in whose territory the alleged offender is found, shall, if it has jurisdiction under article 4, paragraph 1, be obliged without exception whatsoever to submit the case to its competent authorities for the purpose of prosecution, [through proceedings in accordance with the laws of that State.] [Those authorities shall take their decision in the same manner as in the case of any ordinary offence under the law of that State.]

"(2) The obligation provided for in paragraph 1 of this article does not apply if the Contracting State has extradited the alleged offender, or if the Contracting State knows that a prosecution has been undertaken in another State, for the same offence and with respect to the same person."

Article 6

"(1) (a) Each Contracting State shall ensure, under penalty of law, that [persons resident or] entities established in its territory maintain accurate records of payments made by them to an intermediary, or received by them as an intermediary, [for the purpose of securing] [in connexion with] an international commercial transaction.

(b) These records shall include, inter alia, the amount and date of any such payment or payments [exceeding 350,000] which are made to an intermediary in a calendar year or which are attributable to a particular international commercial transaction; the name, address, and nationality of the intermediary or intermediaries receiving such payments; [and, to the extent ascertainable by the party concerned, the name and address of any public official who is employed or retained by or has a financial interest in the intermediary.]

"(2) The records maintained pursuant to paragraph 1 of this Article shall be made available for the purpose of criminal investigations and proceedings to the competent law enforcement authorities of another Contracting State in accordance with the provisions for mutual judicial assistance in Article 10."

"[Article 7

"(a) Each Contracting State shall prohibit its persons and enterprises of its nationality from making any royalty or tax payments to, or from knowingly transferring any assets or other financial resources in contravention of United Nations resolutions to facilitate trade with or investment in a territory occupied by, an illegal minority régime in southern Africa.

"(b) Each Contracting State shall require by law or regulation its persons and enterprises of its nationality to report to the competent authority of that State any royalties or taxes paid to an illegal minority régime in southern Africa in contravention of United Nations resolutions.

"(c) Each Contracting State shall submit annually, to the Secretary-General of the United Nations, reports on the activities of transnational corporations of its nationality which collaborate directly or indirectly with illegal minority régimes in southern Africa in contravention of United Nations resolutions.]

"Article 8 ^{1/}

- (a) Each Contracting State recognizes [agrees to ensure that its national law provide] that if bribery or illicit payment are decisive in procuring the consent of a party to a contract relating to an international commercial transaction such party may at its option institute judicial proceedings in order to have the contract declared null and void.]

"Article 9

- "(a) The Contracting States shall inform each other upon request of measures taken in the implementation of this Agreement.
- "(b) Each Contracting State shall biannually furnish, in accordance with its national laws, to the Secretary-General of the United Nations, information concerning its implementation of this agreement. Such information shall include legislation and administrative regulations, as well as general information on judicial proceedings and other measures taken pursuant to such laws and regulations. Where final convictions have been obtained under laws within the scope of this Convention, information shall also be furnished concerning the case, the decision and sanctions imposed in so far as it is not confidential under the national law of the State which provides the information.
- "(c) The Secretary-General shall circulate a summary of the information referred to in paragraph (ii) of this article to the Contracting State.

"Article 10

"1. Contracting States shall afford one another the greatest measure of assistance in connexion with criminal investigations and proceedings brought in respect of the offences [referred to in article 1] [within the scope of this Convention whether committed by natural or juridical persons]. The law of the State requested shall apply in all cases.

"2. Mutual assistance shall, inter alia, include, as far as permissible under the law of the State requested [and taking into account the need for preserving the confidential nature of documents and other information transmitted to appropriate law enforcement authorities]:

- "(a) Production of documents or other information, taking of evidence and service of documents, relevant to investigations or court proceedings;

^{1/} Several representatives pointed out that this article had not been discussed at the fourth, fifth and resumed fifth sessions.

"(b) Notice of the initiation and outcome of [any public] criminal proceedings concerning an offence referred to in article 1, to other Contracting States which may have jurisdiction over the same offence according to article 1.

"3. Contracting States shall upon request enter into negotiations towards the conclusion of bilateral agreements with each other to facilitate the provision of judicial assistance in accordance with this article. [Such agreements shall, inter alia, make provision for the taking of evidence and conduct of interviews under the law of the Contracting States.]

"4. The provisions of this article shall not affect obligations under any other treaty, bilateral or multilateral, which governs or will govern in whole or in part mutual assistance in criminal matters.

"Article 11

"1. The offences referred to in article 1 shall be deemed to be included as extraditable offences in any extradition treaty existing between Contracting States. Contracting States undertake to include the said offences as extraditable offences in every extradition treaty to be concluded between them.

"2. If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it [may at its option] [shall] consider this Convention as the legal basis for extradition in respect of the offence. Extradition shall be subject to the other conditions provided by the law of the requested State.

"3. Contracting States which do not make extradition conditional on the existence of a treaty [shall] [may at their option] recognize the offence as an extraditable offence between themselves subject to the conditions provided by the law of the requested State.

"4. The offence shall be treated, for the purpose of extradition between Contracting States, as if it had been committed not only in the place in which it occurred but also in the territories of the States required to establish the jurisdiction in accordance with article 4, paragraph 1.

"Article 12 1/

"(a) Any dispute between Contracting States concerning the interpretation or application of this Agreement shall be settled by bilateral consultations unless it is freely and mutually agreed by all States concerned that other peaceful measures be sought on the basis of sovereign equality of States.

"[(b) Any dispute between Contracting States concerning the interpretation or application of this Agreement which cannot be settled through bilateral consultations, shall, at the request of either Contracting State be submitted to an ad hoc arbitral tribunal for settlement in accordance with the applicable principles and rules of public international law.]

"Article 13 1/

"Alternative 1

"(a) This Agreement shall enter into force [30 days] after the receipt by the depository of the Xth instrument of ratification, [acceptance or approval] or accession.

"Alternative 2

"In respect of articles 'a' to 'n', this Agreement shall enter into force [30 days] after the receipt by the depository of the Xth instrument of ratification, [acceptance or approval] or accession. In respect of articles 'o' to 'z', this Agreement shall enter into force [30 days] after the receipt by the depository of the 'X + Yth' instrument of ratification, [acceptance or approval] or accession.

"(b) The depository for this Agreement shall be the Secretary-General of the United Nations.

"Article 14 1/

"(a) Any Contracting State may at the time of its signature, ratification, [acceptance or approval] or accession, enter [a] reservation[s] with respect to the following articles:

"(b) ...

"(c) ...

"(d) No reservation shall be permitted in respect of any provisions of this Agreement other than those referred to in paragraph 1 of this article.

"(e) Any reservation entered at the time of signature shall be subject to confirmation at the time of ratification, [acceptance or approval] or accession.

"(f) The entry and confirmation of any reservation in accordance with paragraphs (a) and (e) respectively of this article shall be communicated in writing to the depository.

"(g) A reservation shall take effect from the time of the entry into force of the present Agreement with respect to the reserving State."

B. Consideration of proposals and options other than an international agreement to combat corrupt practices

23. This agenda item was discussed by the Working Group at one informal meeting and at the 38th meeting, on 10 March 1978.

24. At the 38th meeting, the representative of Colombia, speaking on behalf of the Group of 77, stated that the Group attached equal importance to parts A and B of document E/6006 and that both parts deserved equal treatment. Recalling paragraph 3 of Economic and Social Council resolution 2041 (LXI), the representative of Colombia reaffirmed the position of the Group of 77 that the formulation of a code of conduct by the Commission on Transnational Corporations should be accorded the highest priority.

25. The Working Group discussed the item further at its 46th meeting, on 17 April 1978, using as a basis part B of document E/6006, entitled "Other relevant proposals and options", 2/ which it agreed should be included in the body of the present report as follows:

"PART B

"OTHER RELEVANT PROPOSALS AND OPTIONS

"1. In paragraph 1 of resolution 2041 (LXI) the Economic and Social Council invited the International Working Group to include in its report 'such other relevant proposals and options as the Working Group may decide to submit'.

"2. In the course of the sessions of the Working Group, many delegations stressed the importance of devoting equal emphasis to the two aspects of its mandate contained in paragraph 1 of the Economic and Social Council resolution 2041 (LXI). The Working Group accordingly decided to consider simultaneously the scope and content of a possible international agreement to prevent and eliminate illicit payments, in whatever form, in connexion with international commercial transactions as well as other relevant proposals and options.

2/ Several representatives pointed out that this question had not been discussed at the fourth, fifth and resumed fifth sessions.

"3. During its third session the Working Group also discussed the relevant proposals and options contained in paragraphs 106-123 entitled "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" (E/AC.64/7). They included the drafting of a model national law; the adoption of voluntary guidelines by enterprises and professional associations or other international organizations; the adoption of codes of conduct by intergovernmental organizations; unilateral national action and other forms of international action.

"4. In the course of its consideration of the scope and content of an international agreement, the Working Group also decided that some of the items contained in part A of document E/6006 should be transferred to part B for further consideration. The items in question related to:

- "(a) The elimination of tax shelters;
- "(b) Disclosure by public officials of their net worth;
- "(c) Other corrupt practices.

The Working Group considered that these items could be dealt with through both national and international action.

"National action

"5. The Working Group considered various forms of measures which could be adopted in national law to eliminate tax shelters in respect of bribery and illicit payments. Among the specific proposals considered were: that home countries impose relatively high tax surcharges on the profits made from transactions tainted with bribery; and that all countries adopt measures to ensure that tax law violations involving bribery and illicit payments were treated as criminal offences per se.

"6. The Working Group also considered a proposal in connexion with the item on disclosure, namely, that public officials be required by national law to disclose their net worth upon assumption of office, at prescribed intervals and at the end of their term of office.

"7. Lastly, the Working Group considered a certification procedure in national law, which was described in paragraph 119 of document E/AC.64/7, by which the officials of all enterprises dealing with any government agency would be required to sign a statement stipulating that no payments, fees or gratuities in whatever form were made in connexion with the transaction, other than those specifically referred to in the contract.

"8. Some delegations expressed the view that it would be useful for the Working Group to continue to examine the feasibility of elaborating the text of a model national law to deal with the above and other related issues.

"International action

"9. The Working Group emphasized that the work on a code of conduct which the Commission on transnational corporations was in the process of preparing should be accorded the highest priority. The Working Group took note of document E/C.10/31 on work related to the formulation of a code of conduct, which contained a specific item on corrupt practices and also noted that some of the other items raised issues which were interrelated with the existing item on 'Other corrupt practices'.

"10. The need for all States to enter into appropriate bilateral and multilateral arrangements to prevent and eliminate other corrupt practices was recognized."

III. ORGANIZATION OF WORK

26. The Ad Hoc Intergovernmental Working Group on the Problem of Corrupt Practices, established by Economic and Social Council resolution 2041 (LXI) and expanded to include all interested States by Council resolution 2122 (LXIII), held its fourth, fifth and resumed fifth sessions at United Nations Headquarters from 6 to 10 March, from 5 to 14 April and from 26 to 30 June 1978, respectively.

27. The following States were represented at both sessions: Argentina, Australia, Belgium, Canada, Colombia, Denmark, France, Germany, Federal Republic of, Ghana, Greece, India, Iran, Iraq, Italy, Japan, Mexico, Netherlands, Nigeria, Norway, Pakistan, Philippines, Spain, Sweden, Switzerland, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, United Republic of Cameroon, United States of America, Venezuela and Zaire. Cuba participated as an observer at both sessions.

28. Algeria, the Holy Sec, Ireland, Israel, Kenya, the Libyan Arab Jamahiriya, Mali, the Niger, the Republic of Korea, Rwanda, the Sudan and Turkey were represented at the fourth session; and Barbados, Brazil, the Dominican Republic, Ecuador, Surinam and Zambia were represented at the fifth session only. Bolivia, Guatemala and Trinidad and Tobago were represented at the resumed fifth session only.

29. In the course of the two sessions the Working Group held 19 formal meetings (36th-54th) and 19 informal meetings.

30. The Working Group had before it the report of the Ad Hoc Intergovernmental Working Group on its first, second, third and resumed third sessions (E/6006), which it was agreed would continue to be the basic working document of the Group, a draft report on its fourth session (E/AC.64/L.5 and Corr.1), and the report on its fourth and fifth sessions (E/1978/39), prepared by the Rapporteur at the request of the Working Group.

A. Election of officers

31. At the 36th meeting, on 6 March 1978, the Working Group re-elected the following officers by acclamation:

Chairman: Mr. Farrokh Parsi (Iran)
Vice-Chairman: Mr. J.F. Botero (Colombia)
Rapporteur: Mr. Harold E.L. Acenah (Uganda)

The Working Group also elected by acclamation Professor M.R. Bok (Netherlands) to replace Mr. Junichi Nakamura (Japan) as Vice-Chairman, following the latter's resignation.

B. Adoption of the agenda and organization of work:

32. At the same meeting the Working Group adopted the following agenda for its fourth session (E/AC.64/9):

1. Opening of the session
2. Election of officers
3. Adoption of the agenda and organization of work
4. Consideration of proposals and options other than an international agreement to combat corrupt practices
5. Drafting of an international agreement to prevent and eliminate illicit payments in connexion with international commercial transactions
6. Draft provisional agenda for the fifth session of the Working Group
7. Adoption of the report of the Working Group to the Economic and Social Council.

33. At the 39th meeting, on 3 April 1978, the Working Group adopted the following agenda for its fifth session (E/AC.64/10):

1. Opening of the session
2. Election of officers
3. Adoption of the agenda and organization of work
4. Drafting of an international agreement to prevent and eliminate illicit payments in connexion with international commercial transactions
5. Consideration of proposals and options other than an international agreement to combat corrupt practices
6. Adoption of the report.

IV. ADOPTION OF THE REPORT

34. At its 46th meeting, on 14 April 1973, the Working Group considered the draft report contained in documents A/AC.64/L.6 and Add.1 and 2 and adopted it as orally amended and revised. At its 54th meeting on 30 June 1978 the Working Group adopted the report on its fourth, fifth and resumed fifth sessions.

Annex I

PROPOSAL BY DENMARK FOR AN ARTICLE ON RECORD KEEPING

Each Contracting State will ensure, under penalty of law, that the records of account kept by persons or companies resident or established in their territory give the precise identification of their operations, and particularly any payment to an intermediary, relating to an international commercial transaction in which they take part.

Information about such operations shall be obtained by the judicial authorities from another Contracting State in accordance with the provisions for mutual judicial assistance in article 7.

Annex II

PROPOSAL BY JAPAN ON RECORD KEEPING

1. Each Contracting State shall ensure by appropriate measures that reasonably accurate records of payments including those relating to international commercial transactions be maintained by all persons and enterprises of its nationality engaged in such transactions.
2. The record maintained pursuant to paragraph 1 of this article shall be made available for the purpose of criminal investigation by its competent authorities relating to the offences provided for in article 4, paragraph 1.

Annex III

DRAFT PREAMBLE PREPARED BY THE SECRETARIAT AT THE REQUEST
OF THE WORKING GROUP AT ITS FIFTH SESSION a/

The State Parties to this Convention,

Recalling the provisions of paragraph A (g) of General Assembly resolution 3201 (S-VI) of 1 May 1974, containing the Declaration of the Establishment of a New International Economic Order, which provide for the regulation and supervision of the activities of transnational corporations,

Recalling also the provisions of section V of General Assembly resolution 3202 (S-VI) of 1 May 1974, containing the Programme of Action on the Establishment of a New International Economic Order, which emphasize, inter alia, the need to formulate, adopt and implement an international code of conduct for the operation of transnational corporations designed to promote their contribution to national development goals and world economic growth, while controlling and eliminating their negative effects,

Recalling further the provisions of General Assembly resolution 3281 (XXIX) of 12 December 1974, containing the Charter of Economic Rights and Duties of States, in which the Assembly calls upon transnational corporations to desist from operating in a manner that violates the laws and regulations of the host States,

Convinced that corrupt practices, including bribery, by transnational and other corporations, their intermediaries and others involved, in violation of the laws and regulations of host countries, are detrimental to a viable international economic order as well as the national interests of host States,

Mindful of the provisions of General Assembly resolution 3514 (XXX) of 15 December 1975, on measures against such corrupt practices,

Determined to eliminate and control the incidence of such practices in international commercial transactions by appropriate national and international measures,

Convinced of the need to establish an international machinery to supplement the individual efforts of the Contracting States in preventing and combating such practices,

Recognizing the need for all States to enter into appropriate bilateral and multilateral arrangements to prevent and eliminate other corrupt practices,

Have agreed as follows:

a/ The Draft Preamble was not discussed at the fifth session of the Working Group.

Annex IV

PROPOSALS BY FRANCE FOR A CONVENTION ON THE ELIMINATION
OF BRIBERY IN INTERNATIONAL COMMERCIAL TRANSACTIONS

Article 1

1. Any public official and any person holding elective office who solicits or accepts offers or promises or who solicits or receives gifts or other considerations in return for performing or refraining from the performance of an act falling within his functions or his employment, regular or otherwise, in connexion with an international commercial transaction shall be deemed to have committed a criminal offence.

2. Any person who, in order to induce someone to perform or refrain from the performance of an act as provided in paragraph 1, resorts to promises, offers, gifts or other considerations shall also be deemed to have committed a criminal offence.

Article 2

Each Contracting State undertakes to make the offences referred to in article 1 punishable by severe penalties.

Article 3

For the purposes of this Convention:

1. The term "public official" shall refer to any administrative, judicial, military or equivalent civil servant, whether principal or agent, of a public agency or of an agency subject to the jurisdiction of the public authorities, and to any citizen performing public functions.

2. The term "international commercial transaction" shall refer to any sale, contract or other business transaction with a central or local service or agency which under the laws of the State concerned is open for competition to foreign persons or enterprises.

Article 4

1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 1 when they are committed in its territory or by one of its nationals.

2. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

Article 5

A Contracting State shall, if it has jurisdiction under article 4 but does not extradite the alleged offender, be obliged, without exception whatsoever, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence under the law of that State.

Article 6

1. The offences referred to in article 1 shall be deemed to be included as extraditable offences in any extradition treaty existing between Contracting States. Contracting States undertake to include the said offences as extraditable offences in every extradition treaty to be concluded between them.

2. If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it shall consider this Convention as the legal basis for extradition in respect of the offence. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. Contracting States which do not make extradition conditional on the existence of a treaty shall recognize the offence as an extraditable offence between themselves subject to the conditions provided by the law of the requested State.

4. The offence shall be treated, for the purpose of extradition between Contracting States, as if it had been committed not only in the place in which it occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 4, paragraph 1.

Article 7

1. Contracting States shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of the offences referred to in article 1. The law of the State requested shall apply in all cases.

2. The provisions of paragraph 1 of this article shall not affect obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual assistance in criminal matters.
