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COMMITTEE ON AN INTERNATIONAL AGREEMENT
ON ILLICIT PAYMENTS
Second session.
7-18 May 1979

CONCLUSIONS REACHED BY THE COMMITTEE ON AN INTERNATIONAL AGREEMENT
ON ILLICIT PAYMENTS DURING ITS FIRST SESSION HELD AT HEADQUARTERS
FROM 29 JANUARY TO 9 FEBRUARY 1979

Rapporteur: Mr. Harold D. L. ACEAH (Uganda)

I. GENERAL REMARKS CONCERNING THE FIRST SESSION OF THE COMMITTEE

1. The report of the Ad Hoc Intergovernmental Working Group on the Problem of Corrupt Practices (E/1978/115) was the basic document before the first session of the Committee on an International Agreement on Illicit Payments. Document E/1978/115 will be among the working documents for the second session of the Committee.
2. Several delegations whose working language is not English expressed concern and regret at the lack of texts in all the working languages of the Committee. However, as an exceptional measure in recognition of prevailing technical and other difficulties, they did not insist on documentation being issued in all working languages. The Committee expressed the hope that the Secretariat will endeavour to provide all necessary facilities and services to enable it to complete its work at its second session.
3. The Committee utilized square brackets within the approved texts of articles not only to indicate lack of agreement in the Committee but also to reflect problems arising from differences in national legal systems to which particular attention may have to be paid at the plenipotentiary conference.

II. TEXTS APPROVED AT THE FIRST SESSION OF THE COMMITTEE
ON AN INTERNATIONAL AGREEMENT ON ILLICIT PAYMENTS

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 enterprise or any other person, whether juridical or natural, 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

"For the purpose of this Agreement:

"(a) 'Public official' means any person, whether appointed or elected, whether permanently or temporarily,

- (i) who, at the international, national, regional or local level holds a legislative, administrative, judicial or military office or
- (ii) who is performing a public function is an employee of a Government or of a public or governmental authority or agency or an employee of an entity which provides a service which is considered as public in the State concerned and which is owned or controlled by such a body ."

No text was approved for article 2, paragraph (b); however, the Committee decided to consider at its next session the following two alternatives for the definition of "international commercial transactions":

Alternative 1 (as in E/1978/115)

"(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.

Alternative 2, proposed by the delegations of the Netherlands and the United Kingdom of Great Britain and Northern Ireland

"(b) 'International commercial transaction' means any sale or other transaction, actual or proposed, with a national, regional, or local government or any authority or entity referred to in paragraph (a) of this article, and relating to the supply or purchase of goods, services, capital or technology emanating wholly or substantially from a State other than that in which those goods, services, capital or technology are to be delivered or rendered.

"(c) 'Intermediary' means any enterprise or any other person, whether juridical or natural, who negotiates with or otherwise deals with a public official on behalf of another juridical or natural person. However, the term does not include any employee of the person on whose behalf the intermediary is acting."

Article 3

"Each Contracting State shall endeavour to take all practicable measures for the purpose of preventing the offences mentioned in article 1."

Article 4 1/

"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."

"2. The obligation provided for in paragraph 1 of this article does not apply if the Contracting State extradites the alleged offender."

1/ Consideration of the proposal by Argentina to add the following new subpara. (d) to art. 4, para. 1, was deferred until the second session of the Committee:

"(d) Over the offences referred to in article 1 when they have results within the territory of that State."

Article 6

"1. (a) Each Contracting State shall ensure that enterprises or other juridical persons established in its territory maintain, under penalty of law, accurate records of payments made by them to an intermediary, or received by them as an intermediary, 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 \$50,000 which are made to an intermediary in an accounting year or which are attributable to a particular international commercial transaction; the name and address of the intermediary or intermediaries receiving such payments; and, to the extent known by the party concerned, the name and address of any public official who is retained by or has a financial interest in the intermediary."

The Committee reached no final decision regarding the text of article 6, paragraph 2. 2/

Article 7

"(a) Each Contracting State shall prohibit its nationals 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 nationals 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

"Each Contracting State recognizes agrees to ensure that its national law provide that if bribery or illicit payment is 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."

2/ The text of art. 6, para. 2 in document E/1978/115 reads as follows:

"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 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 they are 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 (b) of this article to the Contracting State."

Article 10

No text was approved for article 10; however, the Committee decided to consider at its next session the following two alternatives for article 10:

Alternative 1 (as in E/1978/115)

"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;

"(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 4.

"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."

Alternative 2, proposed by the delegation of the United States of America

"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 whether committed by natural or juridical persons. The law of the State requested shall apply in all cases except to the extent otherwise provided in this article. The fact that formal criminal charges have not yet been filed shall not be grounds to refuse assistance under this Treaty."

"2. Mutual assistance under this article shall, inter alia, include, as far as permissible under the law of the State requested:

"(a) General liaison, including informal exchange of evidence and information."

"(b) Compulsory production of documents or other information, and the taking of testimony or statements for use in an investigation or court proceedings, and the service of judicial documents.

"(c) Preservation and/or authentication of judicial and other documents, records or articles of evidence."

"(d) Notice of the formal initiation and outcome of any 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 4.

"3. Designated officials of any Contracting State which may have jurisdiction pursuant to article 4, and who are investigating an offence referred to in article 1, with permission of the appropriate authorities of the requested State may communicate directly with persons within its territory in order to obtain any testimony, statements, documents or other things which such persons may voluntarily agree to produce."

"4. Any evidence or information obtained pursuant to the provisions of this article shall be used solely for law enforcement purposes in the requesting State. All evidence or information made available by a Contracting State pursuant to this article shall be kept confidential except to the extent that disclosure is required in judicial or administrative proceedings. Prior to the disclosure of such information, the parties shall give notice and afford an opportunity for consultation. Such evidence or information shall not be disclosed by the requesting State to third parties or to government agencies not having law enforcement responsibility without the prior approval of the requested State."

"5. 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.

"6. 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

No text was approved for article 12; however the Committee decided to consider at its next session the following two alternatives for the text of article 12:

Alternative 1 3/

"1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

3/ This is the text of art. 13 in the 1973 New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (see A/AC.188/L.2).

"2. Each State Party may at the time of signature or ratification of this Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by paragraph 1 of this article with respect to any State Party which has made such a reservation.

"3. Any State Party which has made a reservation in accordance with paragraph 2 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations."

Alternative 2, proposed by the delegation of France

"Any dispute concerning the interpretation or application of this Convention shall, at the request of either party to the dispute, be submitted to an arbitral tribunal.

"The party which acts first shall give notice of the name of an arbitrator to the other party, which shall, within a period of two months after such notice, give notice of the name of a second arbitrator. The two arbitrators so named shall, within a period of 60 days after the naming of the second arbitrator, appoint the third arbitrator, who shall not be a representative of either party and shall not be of the same nationality as either of the first two arbitrators. The third arbitrator shall serve as chairman of the tribunal. If the second arbitrator is not named within the prescribed period, or if the two arbitrators fail to agree within the prescribed period on the appointment of the third arbitrator, the arbitrator remaining to be named or appointed shall, at the request of either party, be appointed by the Secretary-General of the United Nations. Each Contracting Party undertakes to accept the decision of the arbitrators as final and binding.

"The arbitrators shall adopt their decision by a majority vote.

"The parties shall contribute in equal proportions to the payment of the emoluments of the third arbitrator and the costs of the arbitral tribunal. The tribunal shall establish its other rules of procedure."

Final clauses of the Agreement

The Committee took no decisions regarding the final clauses of the Agreement (arts. 13 and 14 in document E/1978/115). The Secretariat was requested to prepare draft final clauses for consideration at the second session of the Committee.

Article 13

The Committee decided to delete alternative 2 of article 13 which had appeared in document E/1978/115. The remaining text of article 13, together with the following proposals, was referred for consideration at the second session of the Committee:

"(a) That despite the basic provision on entry into force, this Convention shall not enter into force until the Code of Conduct for Transnational Corporations, which is being negotiated by the Intergovernmental Working Group established by the Economic and Social Council of the United Nations, has come into force (Mexico).

(b) That entry into force should depend both on the number of ratifying or acceding States and on ratification or acceptance by States representing a certain percentage of world trade (proposed by the Netherlands) production of certain raw materials used in world trade (proposed by Argentina).

(c) That entry into force should depend on ratification or acceptance by a minimum number of States from different geographical regions (United Kingdom)."

III. NOTES CONCERNING THE TEXTS APPROVED AT THE
FIRST SESSION OF THE COMMITTEE

Article 1

1. One delegation proposed the following alternative text for article 1 (a), so as to cover ex post facto payments explicitly:

"(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 enterprise or juridical person, with the intention of

- (i) inducing a public official to perform or refrain from the performance of his duties or
- (ii) rewarding such official for performing or refraining from the performance of his duties, in connexion with an international commercial transaction."

2. Several delegations proposed the following new text for article 1 (a):

"(a) The offering, promising or giving of any payment, gift or other advantage by any person, on his own behalf or on behalf of any enterprise or any other person whether juridical or natural, to or for the benefit of a public official as improper consideration for performing or refraining from the performance of his duties in connexion with an international commercial transaction."

Article 2

1. One delegation made a general reservation on article 2 (a) since it affected the recipients covered by the Agreement.

2. One delegation reserved its position on article 2 (a) since it wished to see its scope limited to public officials of the Contracting States.

3. One delegation made a reservation on the formulation of article 2 (a), subparagraph (ii), which it considered to be unclear and repetitive.

4. One delegation made a reservation regarding the definition of "international commercial transactions" in article 2 (b), in so far as it related to the transfer of technology by foreign enterprises within the territory of a Contracting State.

5. The last sentence in article 2 (c) was placed within square brackets because of its link with the figure "\$50,000" that appears within square brackets in article 6, paragraph 1, subparagraph (b).

Article 3

One delegation expressed preference for the retention of the words "in accordance with international and national law" in article 3.

Article 4

1. One delegation reserved its position on article 4, paragraph 1, subparagraph (c) because of an imbalance between that provision and article 4, paragraph 1, subparagraph (b).
2. One delegation stressed that the adoption of article 4, paragraph 1, subparagraph (c) would represent a substantial departure from its country's fundamental rules on jurisdiction and that there could be difficulties in practice in the enforcement in its country of a law based on such a jurisdiction. It therefore reserved its position on this paragraph and proposed an alternative solution.

Article 5

1. In article 5, paragraph 1, the reference to paragraph 1 of article 4 was placed within square brackets until a final decision is reached on the contents of article 4, paragraph 1.
2. It was noted that article 5, paragraph 2 applied only to extradition of an offender for the same offence.
3. One delegation made a general reservation regarding article 5, paragraph 2.

Article 6

1. The Committee deferred until its second session consideration of the possible inclusion in article 6 of a time-limit for the required keeping of records. Some delegations were of the view that such time-limits should be the same as the time-limits under national law for ordinary business records.
2. Several delegations made strong and substantial reservations regarding article 6 as a whole.
3. Several delegations expressed reservations with regard to the usefulness of setting a limit and the actual figure of \$50,000 in square brackets in article 6, paragraph 1, subparagraph (b). The following alternatives were proposed: (a) no limit; (b) a limit of \$50,000; (c) a limit of less than \$50,000; (d) a limit not expressed in terms of figures.
4. The Committee took no final decision concerning article 6, paragraph 2 due to its close link to article 10. Some delegations expressed the view that article 6, paragraph 2 should not be mandatory.

Article 8

1. Some delegations were in favour of retaining article 8; many delegations expressed the view that article 8 should be deleted.
2. Some delegations noted that article 8 posed constitutional difficulties to federated States and its retention might necessitate inclusion in the Agreement of an appropriate federal-state clause.

Article 9

1. Without opposing the substance of article 9, one delegation noted that it was not a useful provision in the context of a legally binding international agreement.
2. One delegation was of the view that article 9 was useful and should be strengthened.
3. One delegation noted that its ultimate approval of article 9 depended on the final form of the definition of "international commercial transactions" in article 2 (b).

Article 12

1. Concerning alternative 2 to article 12, several delegations expressed the view that the final appointing authority specified therein should be the President of the International Court of Justice rather than the Secretary-General of the United Nations.
2. It was noted that article 12 should only apply to the resolution of those disputes between two or more Contracting States which cannot be settled by negotiation.

Final clauses of the Agreement

1. It was noted that articles 13 and 14 in document E/1978/115 were not a complete set of final clauses.
2. It was suggested that the final clauses of the Agreement should also contain provisions dealing with, inter alia, the signing of the Agreement, accession to the Agreement, a procedure for revising or amending the Agreement and an article calling for periodic review of the effectiveness of the Agreement.

Preamble

The Committee held a preliminary discussion on the preamble and decided to defer further consideration until its second session.

IV. ORGANIZATION OF WORK

1. The Committee on an International Agreement on Illicit Payments was established by Economic and Social Council resolution 1978/71, adopted at the second regular session for 1978. It held its first session at United Nations Headquarters from 29 to 9 February 1979.
2. The following States were represented at the session: Argentina, Australia, Belgium, Brazil, Canada, Central African Empire, Denmark, Dominican Republic, Egypt, Ethiopia, France, Germany, Federal Republic of, Greece, Italy, Jamaica, Japan, Kenya, Madagascar, Mali, Mexico, Netherlands, Nigeria, Panama, Somalia, Sudan, Sweden, Switzerland, Syrian Arab Republic, Trinidad and Tobago, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, United Republic of Cameroon, United States of America and Venezuela.
3. The United Nations Educational, Scientific and Cultural Organization as well as the International Chamber of Commerce participated as observers.
4. In the course of the session the Committee held 3 formal and 10 informal meetings.
5. The Committee had before it the "Report of the Ad Hoc Intergovernmental Working Group on the Problem of Corrupt Practices" on its fourth, fifth and resumed fifth sessions (E/1978/115).

A. Election of officers

6. The Committee elected the following members of the bureau by acclamation:
Chairman: Professor M. R. MOK (Netherlands)
Vice-Chairman: Miss Ana RICHTER (Argentina)
Rapporteur: Mr. Harold E. L. ACEMAH (Uganda)

B. Adoption of the agenda and organization of work

7. At the 2nd meeting on 30 January 1979 the Committee adopted the following agenda for its first session (E/AC.67/1):
 1. Opening of the session
 2. Election of officers
 3. Adoption of the agenda and organization of work
 4. Advancing the work on an International Agreement on Illicit Payments, particularly in respect of the articles not yet discussed

5. Draft provisional agenda for the second session of the Committee on an International Agreement on Illicit Payments.

8. At the 7th meeting on 9 February 1979 the Committee adopted the following agenda for its second session:

1. Opening of the session
2. Election of officers
3. Adoption of the agenda and organization of work
4. Approval of the results of the first session
5. Advancing the work on an International Agreement on Illicit Payments, particularly in respect of the articles not yet discussed.
6. Adoption of the report of the Committee
