



Economic and Social Council

Distr.
GENERAL

E/1979/104
23 May 1979

ORIGINAL: ENGLISH

Second regular session, 1979
Agenda item 9. Transnational Corporations

**REPORT OF THE COMMITTEE ON AN INTERNATIONAL AGREEMENT ON ILLICIT
PAYMENTS ON ITS FIRST AND SECOND SESSIONS**

(29 January-9 February and 7-18 May 1979)

CONTENTS

<u>Chapter</u>	<u>Paragraphs</u>	<u>Page</u>
I. DECISION ADOPTED BY THE COMMITTEE		2
II. PROCEEDINGS	1 - 5	2
III. DRAFT INTERNATIONAL AGREEMENT ON ILLICIT PAYMENTS	6	2
IV. NOTES ON THE DRAFT INTERNATIONAL AGREEMENT ON ILLICIT PAYMENTS	7 - 63	7
V. ORGANIZATION OF MEETINGS	64 - 76	18

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

I. DECISION ADOPTED BY THE COMMITTEE

At its 12th meeting on 18 May 1979, the Committee decided to transmit the draft international agreement on illicit payments contained in chapter III of the present report to the Economic and Social Council at its second regular session, 1979, and to the Commission on Transnational Corporations at its fifth session, drawing their attention to the notes concerning the draft contained in chapter IV of this report.

II. PROCEEDINGS

1. The Committee began its consideration of a draft text of an international agreement on illicit payments at its first session and had before it, as a basic document, 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).
2. The Committee used square brackets in drafting the international agreement on illicit payments 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 might have to be paid at the plenipotentiary conference.
3. The conclusions reached by the Committee during its first session are contained in document E/AC.67/L.1, which includes the text approved at the first session, as well as notes concerning those texts.
4. At its second session, the Committee continued its drafting of an international agreement on illicit payments on the basis of the conclusions reached at its first session (E/AC.67/L.1). The Committee also had before it document E/AC.67/L.2, containing the draft final clause of an international agreement on illicit payments prepared by the Secretariat.
5. At its 12th meeting on 18 May 1979, the Committee decided to transmit the draft international agreement on illicit payments contained in chapter III of the present report to the Economic and Social Council at its second regular session for 1979, and to the Commission on Transnational Corporations at its fifth session, drawing their attention to the notes concerning the draft contained in chapter IV of this report.

111. DRAFT INTERNATIONAL AGREEMENT ON ILLICIT PAYMENTS

6. The draft international agreement on illicit payments which the Committee decided to transmit to the Council at its second regular session for 1979 and to the Commission on Transnational Corporations at its fifth session read as follows:

Article 1

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 advantage by any natural 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 undue consideration for performing or refraining 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 advantage, as undue consideration for performing or refraining from the performance of his duties in connexion with an international commercial transaction.

2. Each Contracting state likewise undertakes to make the acts referred to in paragraph 1 (a) of this article punishable by appropriate criminal penalties under its national law when committed by a juridical person, or, in the case of a State which does not recognize criminal responsibility of juridical persons, to take appropriate measures, according to its national law, with the objective of comparable deterrent effects.

Article 2

For the purpose of this Agreement:

(a) 'Public official' means any person, whether appointed or elected, whether permanently or temporarily who, at the national, regional or local level holds a legislative, administrative, judicial or military office, or who, performing a public function, is an employee of a Government or of a public or governmental authority or agency or who otherwise performs a public function;

(b) 'International commercial transaction' means, inter alia, any sale, contract or any other business transaction, actual or proposed, with a national, regional or local government or any authority or agency referred to in paragraph (a) of this article or any business transaction involving an application for governmental approval of a sale, contract or any other business transaction, actual or proposed, relating to the supply or purchase of goods, services, capital or technology emanating from a State or States other than that in which those goods, services, capital or technology are to be delivered or rendered. It also means any application for or acquisition of proprietary interests or production rights from a Government by a foreign national or enterprise;

(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 any other enterprise or any other person, whether juridical or natural, in connexion with an international commercial transaction.

● Article 3

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

● Article 4

"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, paragraph 1 (a), relating to any payment, gift or other advantage 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.

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

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

"3. Each Contracting State shall also take such measures as may be necessary to establish its jurisdiction over any other offence that may come within the scope of this Agreement when such offence is committed in the territory of that State, by a public official of that State, by a national of that State or by a juridical person established in the territory of that State.1

● Article 5

"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 shall not only apply if the Contracting State extradites the alleged offender.

Article 6

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. That records shall include the amount and date of any such payments and the name and address of the intermediary or intermediaries receiving such payments.

Article 7

1. 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.

2. 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.

3. 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 that if any of the offences that come within the scope of this Agreement is decisive in procuring the consent of a party to an international commercial transaction as defined in article 2, paragraph (b), such international commercial transaction should be voidable and agrees to ensure that its national law provide that such party may at its option institute judicial proceedings in order to have the international commercial transaction declared null and void or to obtain damages or both.]

Article 9

1. Contracting States shall inform each other upon request of measures taken in the implementation of this Agreement.

'2. Each Contracting state shall furnish once every second year, 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 legislative measures 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 Agreement, 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.

1. The Secretary-General shall circulate a summary of the information contained in paragraph 2 of this article to the Contracting States.

'Article 10

1. Contracting States shall afford one another the greatest possible measure of assistance in connexion with criminal investigations and proceedings brought in respect of any of the offences [referred to in article 1/within the scope of this Agreement]. The law of the State requested shall apply in all cases.

'2. Contracting States shall also afford one another the greatest possible measure of assistance in connexion with investigations and proceedings relating to the measures contemplated by article 1, paragraph 2, as far as permitted under their national laws.

'3. Mutual assistance shall include, as far as permitted 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 [and subject to the essential national interests of the requested State];

'(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;

'(c) Production of the records maintained pursuant to article 6.

'4. Contracting States shall upon mutual agreement enter into negotiations towards the conclusion of bilateral agreements with each other to facilitate the provision of mutual assistance in accordance with this article.

"5. Any evidence or information obtained pursuant to the provisions of this article shall be used in the requesting State solely for the purposes for which it has been obtained, for the enforcement of this Agreement, and shall be kept confidential except to the extent that disclosure is required in proceedings for such enforcement. The approval of the requested State shall be obtained prior to any other use, including disclosure of such evidence or information.

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/within the scope of this Agreement] 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 its Agreement 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 jurisdiction in accordance with article 4, paragraph 1."

IV. NOTES ON THE DRAFT INTERNATIONAL AGREEMENT ON ILLICIT PAYMENTS

Preamble

7. The Committee held a preliminary discussion on the preamble and decided that the formulation of the text of the preamble should be left to the conference of

plenipotentiaries envisaged in Economic and Social Council resolution E/1978/71 of 4 August 1978. 1/

Article 1

8. Some delegations were of the view that the word "undue" should not appear in article 1, subparagraph 1 (b); other delegations were of the view that the word "undue" should be placed between the words "any" and "payment".
9. Several delegations observed that paragraph 2 of article 1 could not be interpreted as having the consequence of extending the scope of the penal provisions of the agreement to areas other than criminal matters, at the risk of jeopardizing the compromise already achieved.
10. One delegation stated that the extension of the agreement to companies could most effectively be achieved through the coverage of both natural and juridical persons in article 1, subparagraph 1 (a). It reserved its position on article 1, paragraph (2) for further examination of its adequacy.
11. In relation to that question, one delegation expressed the view that the issue should be resolved when considering article 13, and resolved in such a way that reservations should not affect the very object of the agreement nor create an imbalance between the States parties regarding the obligations they might acquire by the agreement.
12. One delegation stated that the scope of the agreement could not be limited to criminal matters, especially taking into account the case of countries that did not consider the juridical persons as capable of being incriminated under penal law. Also the assistance could not be limited to criminal matters, taking into account what was established in article 8.
13. Another delegation stated that because of the link between article 10 and article 1 its ultimate acceptance of the article 1, paragraph 2, would be dependent on the solution of the problems still remaining in article 10.

1/ In its resolution 1978/71 the Economic and Social Council decided:

'in principle, to convene, if possible in 1980 and subject to a definitive decision by the Council at its second regular session, 1979, a conference of plenipotentiaries to conclude an international agreement on illicit payments, bearing in mind the progress of the work in the Committee'.

Article 2

14. Some delegations objected to the inclusion of persons holding legislative office in article 2, subparagraph (a). Those delegations expressed the view that they would not be able to commit themselves to making express legislative provision in that article and that they accepted the deletion of the square brackets around the word "legislative" only on the condition that those problems could be overcome by reservations by the countries concerned.

15. In relation to that question, one delegation expressed the view that the issue should be resolved when considering article 13, and resolved in such a way that reservations should not affect the very object of the agreement nor create an imbalance between the State parties regarding the obligations they may acquire by this agreement.

16. Several delegations proposed that article 2, subparagraph (a), should cover officials of international intergovernmental organizations and suggested the following wording for subparagraph (a) :

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

"(i) Who, at the national, regional or local level holds a legislative, administrative, judicial or military office or who holds such an office in an international intergovernmental organization; or

"(ii) Who, performing a public function is an employee of an international intergovernmental organization or of a Government or of a public or governmental authority or agency or who otherwise performs a public function:

17. The view was expressed that either the agreement on illicit payments or a protocol thereto should cover officials of international intergovernmental organizations. Some delegates felt that prior consultations were required on that point with the international intergovernmental organizations concerned.

18. One delegation proposed inclusion in the agreement of the following general reservation concerning the privileges and immunities of international civil

"The privileges and immunities as well as agreements relating to them between a Contracting State and international intergovernmental organizations are subject to reservation."

19. One delegation was of the opinion that the definition of public official should be extended to include any official who holds an office either in an international intergovernmental or an international non-governmental organization.

20. Another delegation expressly reserved its position with regard to the inclusion in article 2, subparagraph (b) of ● application for governmental approval.

21. The Committee noted the view expressed by the senior Adviser on Legal Matters of the Centre on Transnational Corporations, who explained that in his opinion the second sentence of article 2, ● subparagraph (b), would cover the various arrangements, both proprietary and contractual, relating to the exploration or exploitation of natural resources by foreign nationals and enterprises - such as concessions, production sharing contracts, service contracts, "risk contracts", operation and work contracts.

22. It was noted that the scope of the agreement could be widened if in subparagraph (b), in the definition of 'international commercial transaction', the words 'wholly or substantially' were added immediately after the word ● emanating.

23. One delegation was of the view that in subparagraph (b) the words 'or originating' should be added after the word 'emanating' in the definition of the term 'international commercial transaction'.

24. Another delegation reserved its position concerning the second sentence in article 2, subparagraph (b).

Article 3

25. Several delegations had reservations regarding the deletion from the text of article 3 of the words 'endeavour to' before the word 'take.. It was noted that the word "practicable" is subject to differing interpretation and might be viewed as meaning that federal States shall carry out their obligations under article 3 in accordance with their respective constitutional systems.

26. At least one delegation was of the opinion that it should be possible to extend the scope of article 3 to other offences that came or might come within the scope of this agreement but which were not stated or described in article 1.

Article 4

27. As a result of the addition of paragraph 2 to article 1, some delegations considered that new language should be added to article 4, subparagraph 1 (c) that would require a State to extend its jurisdiction over acts committed by or on behalf of juridical persons (in addition to natural persons) which are nationals of that State.

28. One delegation stressed that the adoption of article 4, subparagraph 1 (c), would represent a substantial departure from its country's fundamental rules on jurisdiction and that in its country there could be difficulties in enforcing a law

based on such a jurisdiction. It therefore reserved its position on that paragraph and proposed an alternative solution. 2/ Another delegation expressed a similar reservation.

29. In relation to that question, one delegation expressed the view that the issue should be resolved when considering article 13 and that such a way that reservations should not affect the very object of the agreement nor create an imbalance between the States parties regarding the obligations they may acquire by the agreement.

30. Delegations favouring retention of the words placed within square brackets in article 4, subparagraph 1 (c), stated that those words were necessary in order to comply with their national legal rules on jurisdiction. Those delegations noted that their national legal systems did not accept the theory of jurisdiction based solely on nationality.

31. Delegations favouring deletion of the words placed within square brackets in article 4, subparagraph 1 (c), were of the view that retention of the words would unduly narrow the scope of application of the agreement as the agreement would then be focused only on competition among large enterprises.

32. Several delegations expressed the view that while they preferred to retain the words placed within square brackets, as they formed part of a compromise arrived at an earlier stage of the Committee's work on the contents of article 4, subparagraph 1 (c), they could also accept the deletion of the bracketed words.

33. Some delegations stated that they would not be able to accept the proposal for adding the new paragraph 3 to article 4.

Article 5

One delegation expressed the view that paragraph 1 of article 5 should refer to paragraph 3 of article 4, as well as to paragraph 1 of article 4.

Article 6

35. The delegation of a federal State noted that his Government would not itself be able to implement fully the provisions of article 6, since under its constitutional system the subject matter was subject to shared jurisdiction

2/ At the session of the Committee on Illicit Payments held in January 1979, the United Kingdom delegation proposed, in a conference room paper, an alternative version of article 4 as a basis for discussion. The United Kingdom delegation considers that it would be helpful to place on record that part of its proposal replacing article 4, paragraph 1 (c):

"In the case of a State which exercises a prohibition on the extradition of its nationals, over the offence referred to in article 1 (a) when committed by a national of that state."

between the federal **Government** and the provinces. **For** this reason his **Government** would **need** an appropriate federal **State** clause or the possibility of **making** a reservation concerning **article 6**; otherwise his **Government** would **NOT** be able to **ratify** the **agreement** until all its **provincia** had enacted implementing legislation.

36. In relation to that question, one delegation **• ◊□□ℳ◊◊ℳ◊** the **viw** ~~that~~ the issue should be resolved **when** considering **article 13** and **in** such a way that reservations should **not** affect the very object of the agreement **nor** create an imbalance **between** the **States parties** regarding the obligations they might acquire by the agreement.

37. One delegation **proposed** that the following words should be added at the end of **article 6**: **"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..

Article 7

38. The **Committee** held some **discussions** on **article 7** at its first session and agreed to retain the article in brackets in the draft agreement for further consideration by the conference of plenipotentiaries **envisaged** in **Economic and Social Council resolution 1978/71** of 4 August 1978.

Article 8

39. **Several** delegations noted that **article 3** would pose serious **constitutional, legislative** or **juridical** **problem**5 for them, especially since the article would **affect** the **area** of **private law** which was **not** otherwise within the scope of the agreement. **Several** other delegations expressed the **view** that the provisions contained in **article 8** should pose no insurmountable problems, that the article provided a strong additional deterrent **against** corrupt practices, and that it should therefore be retained7 those delegations **were** also of the opinion that the article should **form** an essential part of the **agreement**.

Article 9

40. **Sass** delegations **noted** that the provisions in **paragraphs 2 and 3** of **article 9** **were** not indispensable as regards an instrument obligatory in nature.

41. **One** delegation **noted** that the article should be looked at in conjunction with the provisions on review conferences that may be included in the final clauses of the agreement..

Article 10

42. With regard to **paragraph 2** of **article 10**, one delegation indicated that it **would** prefer that it **not** be retained, since **that form** of **utual assistance** fell within the **scope** of **paragraph 4** of **article 10**.

43. One delegation stated that, in conformity with the trench language text of article 10, paragraph 2, • 8 set forth in document E/AC.67/L.1, that paragraph only referred to "mutual judicial assistance". In the light of the discrepancy on that point among the language versions of article 10, paragraph 2, in document E/AC.67/L.1, the delegation reserved its position on the issue.

44. Son delegations felt that in their countries article 10, paragraph 5, would be considered to apply only to judicial proceedings. Other delegations were of the view that the scope of that paragraph should also encompass other proceedings, such as • Qlini8ttative ones.

45. One delegation could **NOT** envisage the extension of the scope of article 10, paragraph 5, to non-judicial proceedings.

46. Another delegation expressed the view that the question should be resolved when considering article 13 and in such a way that reservations should not affect the very object of the agreement nor create an imbalance between the States parties regarding the obligations they might acquire by the agreement.

47. One delegation pointed out that wing to the broadening of the scope of the applicability of, the $\Delta\Box\text{X}\diamond$ • gremnt, introduced by new paragraph 2 of article 1, the mutual assistance Contracting States should lend to one another was to refer not only to criminal proceedings and investigations that would be launched against the alleged offender, but should also cover proceedings and investigations of an • tiinistrative or civil nature and, since a number of delegation8 were unable to agree to that interpretation, that &legation reserved its position with respect to the ultimate acceptance of article 10. The same delegation also pointed out that the absolute requirement of confidentiality to which article 10, paragraph 3, referred also was unacceptable as running counter to the reference of the same issue in paragraph 5 of article 10.

Article 11

48. Several delegations were opposed to the incorporation of the phrase "within the scope of this Agreement" in the text of article 11, paragraph 1. Those delegation8 noted that the above wording would extend to offences arising under article 6 concerning the requirement to maintain a record of payments involving intermediaries. Other delegations were of the opinion that other offences than those mentioned in articles 1 and 5 should be added and therefore reference to "within the scope of this Agreement" would be useful in article 11, paragraph 1.

49. Several delegation8 stated that in article 11, paragraph 3, retaining the bracketed text "may at its option" made little sense, since the provisions of paragraph 3 referred to obligation8 that were fundamentally different from those covered by article 11, paragraph 2.

50. One delegation noted that if the bracketed text "may at its option" were retained in article 11, paragraph 3, then for balance the same option would have to be introduced in article 11, paragraph 1, at some later stage.

51. One delegation expressed the view that paragraphs 2 and 3 of article 11 were closely linked and that an imbalance would be created if paragraph 2 'shall' • My at its Option' while paragraph 3 said "shall".

52. Several States that do NOT make extradition conditional on the existence of a treaty once again insisted on the need to retain the word • shall' in article 11, paragraph 2, in order to ensure that States that could extradite without a treaty and those that could not extradite without a treaty made an equal commitment.

53. Another delegation noted the diversity of systems of extradition applied by different States, ranging from the willingness of some States to extradite their own nationals to the total prohibition exercised by others. The delegation considered it necessary to retain the possibility of using the agreement as an optional legal basis for extradition in line with the precedents in numerous other agreements.

Final clauses

54. The Committee held preliminary discussions on the final clauses but was of the view that their substance should be left for decision at the conference of plenipotentiaries envisaged in Economic and Social Council resolution 1978/71 of 4 August 1978. 1/ It was noted that the contents of the final clauses depended upon the final texts of the substantive provisions of the agreement as adopted by that conference.

Article 12

55. The Committee noted that the subject of settlement of disputes, covered by article 12, formed part of the final clauses of an international agreement and agreed that the subject should be considered in conjunction with the other final clauses of the agreement. The Committee proposed the following two alternatives concerning the settlement of disputes for consideration by the conference of plenipotentiaries:

Alternative 1

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.

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.

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

Alternative 2, proposed by the delegation of France

'1. 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.

'2. 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.

'3. The arbitrators shall adopt their decision by a majority vote.

'4. 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:

Article 13

56. Several proposals were made concerning the provisions on entry into force of the agreement. The Committee decided that the following proposals should be submitted to the conference of plenipotentiaries for its consideration:

(a) This agreement shall enter into force [30 days] after the date of deposit of the xth instrument of ratification, acceptance, approval or accession;

(b) Some delegations proposed 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:

3/ This is the text of article 13 in the 1978 New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (see A/AC.188/L.2)

(i) Alternative 1: world trade)

(ii) Alternative 2; production of basic commodities used in world trade;

Several delegations were opposed to those proposals;

(c) Some delegations proposed that entry into force should depend on ratification or acceptance by a minimum number of States from different geographical regions) several delegations were opposed to the proposal;

(d) One delegation suggested that the entry into force of the agreement should generally follow article 25, paragraph 1, of the Constitution of the United Nations Industrial Development Organization, adopted on 8 April 1979, which read as follows:

"This Constitution shall enter into force when at least eighty States that had deposited instruments of ratification, acceptance or approval notify the Depository that they have agreed, after consultations among themselves, that this Constitution shall enter into force." 4/

57. One delegation speaking on behalf of the Group of 77 stated that, regardless of the basic provision on entry into force, the agreement should not enter into force until the code of conduct on transnational corporations, which was being negotiated by the Intergovernmental Working Group established by the Economic and Social Council, had come into force.

Other final clauses

58. The Committee took note of the following draft final clauses prepared by the Secretariat, set forth in document E/AC.67/L.2, and referred them for consideration to the conference of plenipotentiaries:

Article A: Depository

Article B: Signature, ratification, acceptance, approval, accession

Article C: Reservations

Article D: Revision or amendment

Article F: Review conference

4/ The quotation only serves as an example for possible language and is NOT meant to indicate the number of ratifying States needed for the Agreement to enter into force.

Attic10 G: Denunciation

Article H: Federal State clause.

General **statement on the draft agreement as a whole**

59. In **connexion** with the above-mentioned **article C**, on **reservations**, the delegation proposed that the provisions sh~~ld~~ be based on the following text:

'1. The **Secretary-General** of the United Nations shall receive and circulate to all States **which** are or **may become** Parties to this Convention reservations lade by States at the **time** of ratification or accession. Any State which **objects** to the reservation shall, within a period of ninety days **from** the date of the **said communication**, notify the Secretary-General **that it does not accept** it.

'2. A **reservation incompatible** with the object and purpose of this Convention shall **not** be permitted. A reservation shrll be considered incompatible or inhibitive if at least two-thirds of the States Parties to this Convention object to **it**.

'3. **Reservations may** be withdrawn at any time by notification to this **effect** addressed to the **Secretary-General**. Such notification shall **take** effect on the date on which **it** is received: 5/

General statement on the draft agreement as a whole

60. **One** delegation stated that it ha3 followed with interest the debates of the Cmittee over the past 10 days. It noted vith some concern the lack of adequate representation from all interested regional areas, which prevented the holding of formal **meetings**. The work **was** done most of the time in informal sessions because a quorum could not be found **under** the special conditions set by the Economic and Social Council that the **Committee** should only **meet** if at least four States from each interested geographical group were represented. That delegation **wished** to have **it on** record that **under** those circumstances it could hot participate in the **consensus for** the text of the international agreement **as** found in the present report.

61. **One** delegation reserved its position in order to **make** further comments and **declarations** on the draft agreement at a later stage.

62. **One** delegation noted that it had participated in the work of the **Committee** as well **as** in the work of its predecessor group, the Ad Hoc Intergovernmental Working Group on the Problem of Corrupt Practices. However, in **view** of the great changes that **were** currently taking place in that country as a result of **the** revolution,

5/ See article 20 of the International Convention on the Elimination of All **Forms** of Racial **Discrimination**, opened for **signature** at New **York** on 7 March 1966.

which were bound to affect the entire social, political, legal and economic system of the country, the participation of that country's delegation should not be construed as an approval of the text of the draft agreement contained in the present report.

63. At the request of one delegation, the proposal it had made earlier for a convention on the elimination of bribery in international commercial transactions, is annexed to the present report.

V. ORGANIZATION OF MEETINGS

A. Introduction

64. The Committee on an International Agreement on Illicit Payments was established by Economic and Social Council resolution 1978/71 of 4 August 1978.

65. The Committee held its first session at Headquarters from 29 January to 9 February 1979. During that session it held 8 formal meetings and 10 informal meetings.

66. The second session of the Committee was held at Headquarters from 7 to 18 May 1979. During that session the Committee held 4 formal meetings and 15 informal meetings.

67. The first session was opened by the Executive Director of the Centre on Transnational Corporations, who made an introductory statement. The second session of the Committee was opened by the Chairman, Professor M. R. MOR (Netherlands).

B. Membership and attendance

68. In accordance with Economic and Social Council resolution 1978/71, the Committee, which was to meet only if a quorum of four States from each interested geographical group was represented, was open to all interested States. At both sessions, the Committee conducted its work mainly in informal meetings in order to overcome the problem of the quorum requirement. The arrangement also allowed a more frank and informal exchange of views among delegations.

69. **The following States were represented at the first and/or second sessions:**

Argentina	Mali
Australia	Mexico
Benin	Netherlands
Belgium	Nigeria
Brar il	Panama
Canada	Somalia
Central African Empire	Sudan
Colombia	Sweden
Denmark	Switzerland
Dominican Republic	Syrian Arab Republic
Egypt	Thailand
Ethiopia	Trinidad and Tobago
Prance	Tunisia
Gabon	Turkey
Germany, Federal Republic of	Uganda
Greece	United King&m of Great
Holy See	Britain and Northern
India	Ireland
I ran	United Republic of Cameroon
Italy	United States of America
Ivory Coast	vcuguay
Jamaica	Venezuela
Japan	Zaire
Kenya	Zambia
Madagascar	

70. **The following United Nations organization was represented:**

United Nations Industrial Development Organization.

71. **The following specialized agency was represented:**

United Nations Educational, Scientific and Cultural Organization.

72. **The following non-governmental organization was represented:**

International Chamber of Commerce.

C. Officers of the Committee

73. **The following officers of the Committee were elected by acclamation at the first session;**

Chairman: Hr. M. R. MOK (Netherlands)

Vice-Chairman: Miss Ana RICHTER (Argentina)

Rapporteur: Mr. Harold ACEMAH (Uganda)

D. Adoption of the agenda

74. At its 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.

75. At its 9th meeting, on 7 May 1979, the Committee adopted the following agenda for its second session (E/AC.67/2):

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.

E. Documentation

76. The Committee had before it the following documents:

<u>Title</u>	<u>Session</u>	<u>Symbol</u>
Provisional agenda	First	E/AC.67/1
Report of the <u>Ad Hoc</u> Intergovernmental Working Group on the Problem of Corrupt Practices on its fourth, fifth and resumed fifth sessions		
Provisional agenda	Second	E/AC. 67/2

<u>Title</u>	<u>Session</u>	<u>Symbol</u>
Conclusions reached by the Committee on on International Agreement on Illicit Payments during its first session held at Headquarters from 29 January to 9 February 1979	Second	E/AC.67/L.1
International Agreement on Illicit Payments: draft final clauses prepared by the Secretariat		E/AC. 67/L. 2
Draft report on the first and second sessions		E/AC. 67/L. 3 and Add.

F. Adoption of the report

77. The Committee, **at** its 12th meeting, on 18 May 1979, adopted the draft report on **its** first and second sessions.

Annex

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 purpose 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 **per sons** 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 **saw manner as in the case of any ordinary offence** under the **law** of that State.

Article 6

1. The **offences** referred to in article A 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 **conditioc.6** 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 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**.