STATE DEPARTMENT ADVISORY COMMITTEE ON

TRANSNATIONAL ENTERPRISES

Working Group on Illicit Payments

Minutes of Public Meeting of the
Working Group held on January 5, 1977

---

1. The meeting of the Working Group was held in Room 1205 of the State Department. It commenced at 2:15 p.m.

2. The Working Group members and government agency employees who attended are listed at Tab 1.

3. The meeting was open to the public, as indicated in the announcement of the meeting in the Federal Register (a copy of which is at Tab 2). A copy of the sign-in sheet for members of the public attending the meeting is found at Tab 3.

4. A set of documents was sent to the members of the Committee prior to the meeting and was distributed to all persons who attended the meeting. These documents are included at Tab 4.

5. Following is a complete summary of matters discussed and conclusions reached at the meeting.

The meeting was opened by Deputy Legal Adviser Mark B. Feldman, who acted as chairman of the Working Group in the absence of Professor Isaiah Frank.

Mr. Feldman indicated that the ECOSOC Ad Hoc Intergovernmental Working Group on Corrupt Practices will hold its first substantive meeting January 31 – February 11, 1977. It was thus necessary to convene this working group early in the new year in order to aid the government in preparing for the meeting.

Mr. Feldman reviewed briefly the history of the U.S. effort to obtain an international agreement on illicit payments, which resulted in the formation by ECOSOC of the intergovernmental working group. Its mandate is to study corrupt practices generally and in particular to elaborate the scope and contents of a treaty on illicit payments in such form that ECOSOC can make appropriate recommendations to the UN General Assembly.

This group met first for one week in November 1976. A number of the developed countries (e.g. Canada, U.K., France, FRG and Italy) participated as observers as the western countries had not yet agreed on which of them would fill the seats allocated to them under the ECOSOC system of geographic allocation. Japan is a member, having taken a seat allocated to the Asian nations.

The November meeting was largely procedural. The group adopted an agenda for the two meetings scheduled for 1977 (the second being scheduled for March 28 – April 8). The U.S. also circulated some "preliminary ideas" on an illicit payments treaty and received some informal initial reactions to them. These discussions were hampered by the fact that many countries were represented by members of their U.N. missions rather than delegates from capitals. There was considerable support in principle for a treaty, but many reservations on the specifics of the U.S. ideas. There was no desire expressed by any nation for a uniform criminal law or an international code to supplant domestic laws on bribery.

It must be remembered that the U.S. ideas on the treaty have not been formally presented and are subject to change once the new Administration has had an opportunity to study them.

Mr. Feldman noted that the discussion today was focused on the proposed treaty, but that comments on U.S. domestic legislation could be relevant to this discussion and were welcome. He then opened the meeting to discussion.

A member of the Working Group asked whether the goal is to submit a draft treaty to ECOSOC by its meeting this summer. Mr. Feldman responded that this would be the optimum result of the working group and that there was general accord that a draft treaty is encompassed by the mandate.

Mr. Feldman noted in response to another question that the U.N. Center on Transnational Corporations had done a study of national bribery laws, and that the State Department has also done research on this subject through its embassies.

The group then turned to a discussion of the U.S. ideas for a treaty on illicit payments. Mr. Feldman noted that these incorporate three basic concepts: enforcement of host countries' bribery laws (essentially all countries have such laws); mandatory disclosures by corporations to both their home and host governments of all payments to public officials of foreign governments and to agents in connection with international commercial transactions; and intergovernmental cooperation and assistance in enforcement.

Mr. Feldman raised the issue of the scope of the treaty. He noted the tendency to limit the treaty to payments in "international commercial transactions," as specified in ECOSOC Resolution 2041 which established the Working Group. He noted the sensitivity of many countries, including the U.S., to international regulation of purely domestic activities. At the same time, the US has suggested that the treaty should cover not only international trade, but also payments to influence official actions of benefit to foreign owned corporations (e.g. tax relief relating to a foreign investment).

There was general agreement that it is not possible to attempt international regulation of payments of domestic firms. However, a member of the Working Group noted that such an exclusion would create a significant loophole. For example, the treaty might not reach payments by a joint venture company which is incorporated in the host country but still has a foreign firm as part owner. Another member noted that host countries might require all companies to disclose payments, rather than attempt to distinguish between foreign and domestic ownership. He

thought the treaty could require disclosure of payments in connection with all transactions in which a foreign corporation participated or made an offer. Another possibility would be to require disclosure only to home governments, and not to host governments, although this would lose the advantage of two governments acting as a check on each other.

The question was raised whether the treaty should provide for disclosure of political contributions. It was noted that they would have to be covered in order not to open an inviting loophole. Especially if the SEC requires disclosure, this requirement should be made multilateral. However, it was suggested that many subsidiaries of U.S. firms would probably not be covered by the SEC regulations.

There was general agreement that the treaty should not cover political contributions by domestic corporations. Mr. Feldman agreed, but asked whether a requirement directed exclusively at foreign firms would set a precedent for discriminatory treatment. One member thought that several factors would minimize the precedential value; these included the fact that it would be limited to a simple disclosure requirement; the fact that it would be pursuant to a treaty; and the special need to prevent corporations from secretly influencing the politics and policies of other countries.

There was sentiment that the U.S. should be willing to accept a broad treaty including purely commercial bribery and commercial kickbacks. However, it was recognized that these are a separate problem which would be difficult to deal with effectively. For practical reasons they should be taken up as the subject of a separate treaty.

The question was raised whether the U.S. is suggesting that U.S. citizens should be required to report activities carried out within the U.S. Mr. Feldman indicated that in some cases this would indeed be the case. A payment made in a foreign country might be ordered in the U.S., and such a payment would be subject to the disclosure requirement.

It was suggested that the disclosure provisions for payments to agents should also require the agents to disclose payments received by them. This would provide an effective check on the disclosure of the payments by the payor. This view was supported by several members.

It was further suggested that the treaty provision for disclosure of payments to agents be separated from that for disclosure of payments to public officials. This would avoid tainting payments to agents, which are usually legitimate, by association with payments to public officials, which usually are not. This is simply a question of order and presentation, and there was general support for it.

A suggestion was advanced that, in order to cover all possible forms of bribes, the treaty should cover all payments made “to or for the benefit of” a public official.

The members of the Working Group suggested that a treaty embodying the concept of home country criminalization of foreign bribes should not be attempted at this time. The problems of enforcement and extraterritorial application of national laws were cited as significant disadvantages of such an approach. Although disclosure would involve some

administrative burdens for companies and might require the publication of information of competitive value, this was viewed as the preferable approach.

Several members of the working group felt that public disclosure would be difficult to sell, especially to developed countries. They suggested that a treaty requiring reports to governments, along with mandatory exchange of reports between governments on request, would be a significant step forward and the U.S. should be prepared to accept it even though our government may require public disclosure by U.S. corporations. It was noted that a record-keeping requirement might be a helpful supplement; such a provision could be added to Article V-e of the U.S. outline of a treaty.

A member of the group noted finally that the tax laws of a number of European countries allow foreign bribes to be deducted from taxable income as business expenses. He thought this was deplorable and suggested that an illicit payments treaty should provide for the removal of such benefits. Mr. Feldman indicated that this is being actively considered.

The meeting was adjourned at 5:00 p.m.

_____
Stuart E. Benson
Acting, Executive Secretary

These minutes are certified as correct.

_____
Mark B. Feldman
Chairman

TAB 1

MEMBERS OF THE WORKING GROUP

NAME	ORGANIZATION
Mary Stenberg for Ray Garcia	Emergency Committee for American Trade
Walter Surrey	ICC
Charles Ries for Dr. Stanley	IEPA
R. Fitzgerald for R. Field	Price Waterhouse
John Butler	National Association of Manufacturers
Oakley Johnson for R.M. Brennan	U.S. Chamber
Vernon Markham	IBGC, Inc.
N. L. Anschuetz	Citibank
Arthur Schrofft	State Dept.
Seymour Rubin	State, Consultant
W. R. Gallagher	Textron Inc.
Cecil J. Olmstead	Texaco Inc.
D. M. Norris	National Foreign Trade Council
L. A. Fox	National Association of Manufacturers
Lloyd Cutler	Wilmer, Cutler & Pickering
Richard Bryce	U.S. B.I.A.C

GOVERNMENT EMPLOYEES

NAME	AGENCY
Hugh P. Mabe III	Department of Justice
Richard D. Kauzlarich	Department of State
Detlav F. Vagts	Department of State
Elinor Constable	Department of State
Stephen Bond	Department of State
Stuart Benson	Department of State
Mark Feldman	Department of State
Mr. Clapp	Department of Treasury

STATEMENT OF MARK B. FELDMAN
DEPUTY LEGAL ADVISER
DEPARTMENT OF STATE
AT THE FIRST SESSION OF THE
AD HOC INTERGOVERNMENTAL WORKING GROUP
ON CORRUPT PRACTICES OF THE UNITED NATIONS
ECONOMIC AND SOCIAL COUNCIL
New York – November 15, 1976

I consider it a privilege to join with you in this meeting which initiates the first serious effort of the international community to control corruption that preys upon international commerce. During the past 18 months we have seen disclosures of bribery, extortion and other questionable payments involving approximately 200 business enterprises and public officials in a large number of countries on every continent. While only a small percentage of business enterprises and of public officials may be involved, these disclosures have had very serious consequences in many countries.

In one case a head of government has been removed from office following allegations of bribery. In other cases prominent political leaders and personalities have been indicated or come under censure. A number of corporate executives have lost their positions and criminal investigations are being pressed forward in several countries. Although corruption in one form or another is as old as organized society, the disclosures of recent months have revealed a pattern of corrupt practices that has shocked international public opinion.

There can be no doubt that these corrupt practices -- bribery, extortion and influence peddling -- undermine the integrity and stability of governments and distort international trade and investment. They raise the cost of goods and services in all countries, particularly in the developing countries which can least afford this additional burden on their balance of payments.

Moreover, corrupt practices involving major corporate enterprises and public officials undermine public confidence in the basic institutions of our society.

The United Nations General Assembly recognized the seriousness of this problem when it adopted Resolution 3514 by consensus last January. That resolution condemned all corrupt practices, including bribery by transnational and other corporations, intermediaries and others involved, and called upon both home and host governments to take all necessary and appropriate measures to prevent such practices. In August the Economic and Social Council took the decision to establish this Working Group to examine the problem of corrupt practices, in particular bribery, in international commercial transactions and to elaborate in detail the scope and contents of an international agreement to prevent and eliminate illicit payments, in whatever form, in connection with international commercial transactions as defined by the Working Group.

It is evident that no legal measures can quickly or completely eradicate corrupt practices which are widespread and deep-rooted in human society. On the other hand, it is equally clear that the events of the last year have disclosed a problem that can no longer be ignored. Public opinion demands that our governments act and a process has begun that will compel change. Recognizing that the problem is complex and touches upon delicate questions of social organization and economic interest, the United States delegation believes that if this Working Group focuses its attention on the most urgent problems and addresses them with serious purpose, it can devise legal measures that will eventually gain broad acceptance and produce significant results.

At this stage of our discussion, I should like to review with you the actions the United States Government is taking to control illicit foreign payments by American enterprises and to

consider briefly some aspects of this complex problem. We would welcome similar information and perspectives from other delegations. At a later stage on our agenda, the U.S. delegation will be prepared to indicate some preliminary views on the possible scope and content of an international agreement. We will want to hear the views of other delegations before making any formal proposals to the Working Group.

Over the past year the United States Government has developed a substantial program to deal with questionable foreign payments by U.S. enterprises. That program includes more vigorous enforcement of existing laws, enactment of new legislation, and cooperation with other governments in the investigation of criminal offenses and in other measures to deter illicit payments.

Under U.S. law, the Securities and Exchange Commission, an independent regulatory agency, has responsibility for administering the securities laws which require regulated companies to make public disclosure of information that is relevant and material to investors. When the Commission discovered that companies were not making disclosure of foreign payments, which it deemed material to the financial condition of the enterprise or to the integrity of management, it initiated a program, both by judicial enforcement and voluntary disclosure, that has uncovered questionable foreign payments involving nearly 200 different firms. A number of these firms have publicly declared their intention, or have been ordered by courts, to terminate these practices. The Commission has also issued general guidance on the disclosure it will expect from all regulated companies in the future; these requirements can be expected to act as a significant deterrent as far as U.S. firms are concerned.

The Internal Revenue Service is also concerned with foreign payments as U.S. tax law prohibits the deduction as a business expense of any foreign payment that would have been

illegal if it had been made in the United States. Accordingly, the Service has recently issued a questionnaire to 2,000 large enterprises requiring a full report of foreign and domestic payments. We understand that serious questions have been raised in a number of cases and that indictments can be anticipated. Obviously this action will have a strong influence on U.S. enterprises.

In the field of new legislation, the U.S. Congress included provisions in the Arms Export Control Act of 1976 requiring reports of payments -- including political contributions and agents' fees -- that are made or offered to secure the sale of defense articles or defense services for the armed forces of a foreign country or an international organization. The Department of State has issued detailed regulations implementing this statute.

The Congress has also enacted new tax legislation which provides a further deterrent to illicit foreign payments by U.S. firms. Under the new law, a foreign payment that would have been illegal if made in the United States is treated as taxable income to the U.S. taxpayer.

Last March, President Ford established a cabinet level task force to review U.S. policy concerning questionable foreign payments. That task force has recommended legislation which would require U.S. enterprises to report for public disclosure a broad class of payments made by or on behalf of U.S. enterprises or their foreign affiliates in connection with transactions with foreign government agencies or other official acts of foreign officials for the commercial benefit of these enterprises. The Administration bill would establish criminal penalties for failure to make the required reports or for false reporting. The Congress is also considering several other bills which provide either criminal penalties for the bribery of foreign officials or for disclosure of a class of foreign payments that could be used as a conduit for such bribes. It is likely that the Congress will enact general legislation in 1977 including one or both of these approaches.

While the actions being taken by the United States Government will contribute to a solution of this problem, they cannot be effective unless they are matched by comparable actions of other developed and developing countries. The problems of corrupt practices are not limited to any one country or group of countries or to any one type of enterprise or form of government. All of our countries are affected by this problem, and we must all cooperate to solve it.

Thus, from the outset the United States determined that it must cooperate with other governments who wish to eradicate corrupt practices in their countries. Accordingly, the United States has concluded bilateral agreements for the exchange of information with the law enforcement authorities of 12 countries. In addition, we have cooperated with other governments who have established new requirements for the disclosure or regulation of agents' fees paid in connection with sales to or contracts with government agencies.

Our experience has brought the conviction that the illicit payments problem can only be solved by collective international action based on a multilateral treaty to be implemented by national legislation. We have also come to believe that the traditional criminal laws cannot solve the problem by themselves. A survey of national legislation shows that nearly every country of the world has legislation prohibiting bribery of its officials. However, this legislation can be difficult to enforce and has not proved to be a meaningful deterrent. Thus, a new approach is required.

The basic concept of a new approach, as outlined by the U.S. delegation to the Lima meeting of the United Nations Permanent Commission on Transnational Corporations last March, would be a comprehensive system of disclosure of a defined class of payments to be agreed upon in a treaty and to be enforced by all the Contracting Parties. The theory of disclosure, which has been demonstrated by long experience in the United States, is that public

scrutiny is an effective deterrent of improper activities by private enterprise or by public officials.

Obviously a disclosure approach raises many technical questions of definition as well as potential problems of administration. To be practicable it needs to be carefully focused. Therefore, it is important to recognize that the problem of illicit, or questionable, payments consists of a number of separate but related problems that may require differentiation if we are to take effective action.

- - There are cases of simple bribery in which an individual or an enterprise pays or offers a large sum of money to a public official to obtain a benefit which the official has the discretion to authorize. These bribes might be paid to obtain what the briber cannot win through fair competition, but they might also be made to match the bribes offered by competitors. Sometimes these competitors are of the same nationality as the briber. In other cases the competitors are nationals of the host country or of third countries.

- - There are also cases of extortion in which public officials demand illicit payments from enterprises subject to their jurisdiction. These demands are frequently made in connection with particular contracts or other matters under bid or negotiation, but demands are also made of established investors by officials whose continuing good will is essential. Extortion can take the crude form of demands for personal benefits or the subtler form of solicitation of contributions for political or even charitable purposes.